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NOTE OF THE UNIDROIT SECRETARIAT ^ξ
ON
THE UNIDROIT PRINCIPLES
OF INTERNATIONAL COMMERCIAL CONTRACTS
AND
THE COVID-19 HEALTH CRISIS *

^ξ The present Note is not meant to express an official position of UNIDROIT on the use or interpretation of the UNIDROIT Principles in International Commercial Contracts. It constitutes merely a document for public discussion.

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- I -
INTRODUCTION

1. **The outbreak of a health and economic crisis.** The appearance of a number of patients with symptoms compatible with previous episodes of coronavirus-related illnesses in the Chinese city of Wuhan evolved, first, into a local epidemic, and soon after, burst into the outbreak of a global pandemic caused by an unknown type of virus labelled COVID-19. Its high potential risk to the health, especially -but not only- of certain parts of society, alongside its quick contagion rate forced Governments (in different moments, and with disparate levels of intensity) to adopt economic and legal measures that gave rise to a multitude of legal problems in virtually all fields of the law. Large portions of the economic activity were either substantially reduced or brought to a complete stop. This had an immediate effect on market transactions as well as on on-going contractual relationships. Problems concerning performance of contractual obligations became one of the most salient and widespread consequences of both the pandemic and the measures adopted as a consequence thereof.

2. **The effects of the situation on contractual relationships.** The impact of the pandemic on the performance of contractual obligations affects contracts both domestically (i.e., contracts between parties in the same jurisdiction, subject to national law fully or in part) and internationally (i.e., contracts between parties in different jurisdictions or with a cross-border component). Domestically, jurisdictions have dealt with the situation either by applying their general national contract law, by passing emergency legislation, or by a combination of both. The complexity and severity of the factual situation resulting from the pandemic is stress-testing many general, traditional domestic contract law frameworks that were already struggling to adapt to the needs of modern market reality. Moreover, for contracts with an international component, unless there is an adequate private international law system in place, frictions between the different legal systems involved might constitute an additional risk, since often there exists a lack of consistency and coordination between the solutions envisaged across different countries. This situation is bound to hamper economic recovery as the pandemic loses strength. Relief for this situation might be found in modern transnational law instruments, which offer state-of-the-art, flexible, solutions that can be adapted to the varied circumstances of each jurisdiction.

3. **The UNIDROIT Principles of International Commercial Contracts as a suitable Transnational Law instrument to deal with the situation.** In 1994, the International Institute for the Unification of Private Law (UNIDROIT) approved and issued a private codification or “restatement” of international contract law entitled “UNIDROIT Principles of International Commercial Contracts” (henceforth, the Principles).¹ Prepared by a group of independent experts from all the major legal systems and geo-political areas of the world, the Principles are now in their fourth edition, adopted in 2016, and have been translated into more than 20 languages.² The Principles represent the *only global instrument* offering a set of comprehensive general rules applicable to different types of commercial contract,

¹ UNIDROIT Principles of International Commercial Contracts, 4th ed. 2016, full text available in English at <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

² For the language editions freely available on the internet see <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

as opposed to other transnational law documents which are either geographically limited in origin or materially confined in scope to certain types of contract.³ One of the flagships of UNIDROIT, renowned among scholars and practitioners alike, the Principles have influenced national and international legislators and are being applied in practice by parties, arbitrators, and courts in a variety of ways.⁴

The different ways in which the UNIDROIT Principles can be used in practice are set out in their Preamble. In addition to their use as rules of law governing the contract and as a means of interpreting and supplementing international uniform law instruments, the Preamble expressly states that the Principles may be used as a means of interpreting and supplementing domestic law and "serve as a model for national and international legislators".

4. **The Principles and COVID: the purpose of the document.** This document seeks to offer guidance as to how the Principles could help solve the main contractual disruptions caused by the pandemic and by the measures adopted as a consequence thereof. Rather than prescribing specific solutions, the document guides the reader through the process, leading her to ask appropriate questions and to consider the relevant facts and circumstances of each case. Naturally, solutions will vary according to the disparate context of the pandemic in each jurisdiction and, even with a flexible set of rules such as the Principles, there is no one-size fits all.

5. The document, considering the different ways the Principles have so far been used in practice so far, purports to (i) help parties use the Principles when implementing and interpreting their existing contracts or when drafting new ones in the times of the pandemic and its aftermath; (ii) assist courts and arbitral tribunals or other adjudicating bodies in deciding disputes arising out of such contracts; and (iii) provide legislators with a tool to modernise their contract law regulations, wherever necessary, or possibly even to adopt special rules for the present emergency situation.

6. **The scope of the document: the effects of the pandemic and its containment measures on contract performance.** Although the pandemic may in many ways interfere with the ordinary execution of commercial contracts in many ways, the most evident problems concern performance by at least by one of the parties. It is necessary to analyse whether parties may invoke COVID-19 as an *excuse for non-performance*, and, if so, based on which concepts and under what conditions; furthermore, the analysis should also cover the situation, likely to be common in practice, where performance is still possible, but under the circumstances it has become *substantially more difficult and/or onerous*.

³ The Principles have been formally endorsed by the United Nations Commission on International Trade Law (UNCITRAL), which unanimously commended their use, as appropriate, for their intended purposes (Report of the Commission on the work of its 45th session (A/67/17), 2012, paras. 137-140).

⁴ For extensive reference to case-law and bibliography on the Principles see the data-base Unilex at <http://www.unilex.info/instrument/principles>.

7. **Concepts at a domestic level.** At domestic level, the two situations referenced above are normally discussed according to traditional concepts such as “frustration”, “act of God”, “*impossibilité*”, “*Unmöglichkeit*”, “*imposibilidad en el cumplimiento*”, or of “*imprévision*”, “*Störung der Geschäftsgrundlage*”, “*rebus sic stantibus*”, only to mention some of them, and the solutions may vary considerably from country to country. Moreover, in some jurisdictions these concepts are not expressly regulated in a relevant law or code, and the case law on the subject is not always consistent.

8. **Force Majeure and Hardship in the international dimension.** At a transnational level, a *flexible* and *uniform* approach is adopted by the UNIDROIT Principles, particularly in the provisions on *Force majeure* (Article 7.1.7) and “*Hardship*” (Articles 6.2.2-6.2.4). The treatment of *force majeure* and *hardship* in the Principles has been enormously influential in domestic and international contexts. The relevant articles have been introduced, either literally or with only few modifications, in a number of national codifications, including those of the People’s Republic of China (only *force majeure*), the Russian Federation, France, Argentina, Estonia, Lithuania or Brazil. At the international level, the *ICC Hardship Clause 2020* was inspired by Articles 6.2.1, 6.2.2 and 6.2.3 of the UNIDROIT Principles.⁵ Likewise, the *ITC Contractual Joint Venture Model Agreements* published in 2004 by the International Trade Centre UNCTAD/WTO expressly state that Articles 18 and 19, dealing with hardship and force majeure, respectively, were inspired by the corresponding provisions of the Principles.⁶

9. **The main advantage of the treatment of force majeure and hardship in the Principles lies with its flexibility.** As opposed to a more traditional approach, the Principles do not tie the possible use of force majeure to excuse non-performance to a strict impossibility of performing or a “frustration” of purpose. The reference to the concept of *impediment* allows the debtor to resort to force majeure, even when some sort of performance is still technically possible but the impediment meets the strict requirements set out in the provision (see below para. 13 et seq.).⁷ Moreover, the innovative regulation of hardship and its consequences (see below, para. 33 et seq.) takes into account the possible interest of the parties to preserve the value of the existing contract while at the same time addressing the supervening imbalance created by the hardship event. Perhaps the main feature of the regime applicable in case of hardship consists in entitling the disadvantaged party to request renegotiations, certainly a most flexible way to encourage parties to find the appropriate answers to the new situation created by the change of circumstances. As will be apparent in the coming sections, this sort of flexibility facilitates the reasonable solution of controversies, a feature most relevant for COVID-19 and post COVID times, when the avoidance of law suits may prove key to sustaining a jurisdiction’s legal system.

10. **The content of the document.** In the following sections, we will briefly introduce the main contours of both *force majeure* and *hardship* and focus on the way the Principles can help solve these types of contractual problems created by the COVID-19 crisis (II and

⁵ Cf. <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>, p. 6.

⁶ Cf. <http://www.mid-as.it/wp-content/uploads/ITC-Contractual-Joint-Venture-Model-Agreements>, pp 56-57.

⁷ In this respect, Art. 7.1.7 UNIDROIT Principles is modelled on Art. 79 of the UN Convention on Contracts for the International Sale of Goods (CISG).

III). Before that, however, this introductory section will provide a layout of the factual elements, stemming from official sources, that have been taken into consideration for the analysis (“Case description”). The reference to data from specific countries, representative of all regions of the world, is only included to provide a general picture of the global situation at given moments of time. It should be noted that some, or all, of these facts may not be applicable to - or relevant for - other specific jurisdictions. The Secretariat accepts no responsibility for the veracity of the information reproduced in the case description, and the analysis is to be read, *mutatis mutandis*, considering any superseding facts.

HOW TO READ THE DOCUMENT

The document is to be read together with the Principles and their commentary. Although cross references are included wherever relevant, the Principles provide a full, closed system, and other -non-cited- Articles and comments should assist in the interpretation of the note and in the application of the Principles to the COVID-19 generated cases. Moreover, the document is designed to be read in full. The part of the analysis which is common to force majeure and hardship is only included once, where it appears first. Hence, the reader who jumps straight to the section on hardship may miss out on some valuable information.

CASE DESCRIPTION

On 31 December 2019, the Wuhan Municipal Health Commission reported a cluster of cases of pneumonia in Wuhan linked to a novel coronavirus. On 13 January 2020, the first case of this virus outside China was confirmed in Thailand. On 30 January 2020, the World Health Organization (WHO) declared a Public Health Emergency of International Concern (PHEIC). On this date, there were 7818 total confirmed cases worldwide, with the majority of these in China, and 82 cases reported in 18 countries outside China. On 11 February 2020, the novel coronavirus was named COVID-19. On 7 March 2020, the total number of COVID-19 cases worldwide crossed 100,000, with cases reported in 100 countries. On 11 March 2020, WHO characterised COVID-19 as a pandemic. From early 2020, the evolution of the situation was publicly reported internationally, soon reaching mainstream media channels. As the situation worsened, the availability of information about the virus and its main characteristics grew. At the time WHO declared the pandemic, it was commonplace that (i) the virus had the capacity to spread rapidly and aggressively; (ii) special measures were needed in every country where the presence of the virus had been detected; (iii) the types of measures adopted depended on the country, at that point in time.⁸

Concerning the spread of the virus, the dates of officially recorded cases are as follows, organised by regions: (i) December 2019, China; 16 January 2020, Japan; 20 January, first cases recorded in South Korea; between 21 and 24 January, cases were registered in Taiwan, Hong Kong, Macau, Singapore, Malaysia, Vietnam and Nepal. The first case in North America was identified in the United States on 21 January, and Canada 25 January. In Europe, the first cases were registered in France (24 January), Germany (27 January), Finland (29 January), and Spain, Italy and United Kingdom (31 January). The

⁸ Source: WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

progress of cases was quick and steady, with 100,000 (7 March), 1 Million (2 April), 2 Million (15 April), 5 Million (21 May), 9 Million (22 June), and over 10,190,000 cases as at 29 June. Similarly, the number of officially recorded deaths also grew quickly: the first death outside China was recorded on 1 February (Philippines); the progress includes, as milestones, 5,000 deaths (13 March), 30,000 deaths (28 March), 50,000 deaths (2 April), 100,000 (10 April), 200,000 (25 April), 300,000 (14 May), 400,000 (8 June); and, on 29 June, the current number is more than half a million.⁹

Numbers show that, while there is regional contagion, there is no necessary direct correlation between contagion and geographical proximity. Due to the intense cross-border movement of persons, contagion happens between different regions at high speed. While the number of cases and casualties vary between different countries, it is safe to assume that, at a given moment in time, a high percentage of persons in every country were aware of (i) the existence of a threat to health, (ii) the probability that special measures limiting movement and economic activities might need to be adopted. Concerning the measures adopted, all countries adopted measures restrictive on social and economic activities as the pandemic spread within their borders. These varied in intensity in different parts of the world and may be divided into three categories: type 1 with strict restrictions, either nationwide or regional lockdowns of social activity and freedom of movement imposed through legal decrees and large scale suspension of economic activities; type 2 with restrictions on social activity, moderate-to-strict rules on social distancing, mild-to-strict restrictions of freedom of movement, partially closed borders with economic activity hampered; and type 3 with limited-to-no mandatory confinement, some economic measures, and mostly recommendations on social distancing with borders open or closed to varying degrees. Almost all countries declared public health emergencies to manage their crises. Among the 30 countries examined for this paper, 14 (Australia, China, France, Germany, India, Italy, Jordan, Malaysia, Mexico, Morocco, Nigeria, Saudi Arabia, South Africa, and Spain) implemented measures which may be regarded as Type 1; 13 (Algeria, Brazil, Cameroon, Canada, Indonesia, Iran, Kenya, Pakistan, Russia, the Netherlands, Turkey, United Kingdom, and the United States of America) implemented measures which may be regarded as Type 2; whereas 3 (Japan, South Korea, and Sweden) implemented measures which be regarded as Type 3.¹⁰

It would seem safe to assume that, with the possible exception of very extreme cases of high sophistication or of certain sectors with considerably more information than ordinary parties to a contract, the outbreak of a pandemic of this intensity was not foreseeable. Yet, once there is a health alert in a country and the information available on the virus grows, the foreseeability of the arrival of the impediment to one's own jurisdiction grows accordingly. The consideration of the measures adopted to contain the health crisis starts only after there is a certain level of information about the type of sickness, which would trail public knowledge about the likelihood of expansion of the pandemic: i.e., the foreseeability of the types of measure comes after the foreseeability of the pandemic, since there are no measures until there is a health problem. And, except in some areas of the medical sector, a reasonably learned opinion on what the containment measures might entail would only appear after some time has passed from the outbreak, and, given the different responses given by countries at the beginning of the COVID-19 crisis, the parties would be expected to pay attention to the national

⁹ Source: John Hopkins University, <https://coronavirus.jhu.edu/map.html>.

¹⁰ Source: the International Monetary Fund, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>.

political response (i.e., while, after only a few weeks, there was relatively clear information as to the potential threat of contagion posed by the pandemic, neither the exact gravity of the sickness nor the best way to tackle the problem could be clearly inferred from a comparative outlook).

11. TIME, PLACE AND OTHER RELEVANT CIRCUMSTANCES. In relation to the case description provided above, a relevant variable influencing the outcome of the analysis may be the time of conclusion of the contract whose performance is affected by the pandemic. It is envisaged that there could be at least four different situations depending on the moment of conclusion of the contract: (i) before 31 December 2019; (ii) after 31 December 2019 but before 13 March 2020 (pandemic declared by WHO) or when the health crisis was in the public domain in the relevant country, whichever happened first; (iii) during the state of emergency of the relevant jurisdiction (i.e., the period during which extraordinary measures were implemented in the jurisdiction); and (iv) after the state of emergency has ended. The reader who seeks guidance as to how the Principles may apply to the situation of a specific contract, in a given jurisdiction, may want to consider the different scenarios posed by these moments in time. A reader concerned with a contract concluded in situations (iii) and (iv) above might be particularly interested in the part of this document concerning the inclusion of contractual clauses. The other variable which will be of relevance is the place of business of the obligor, and in some cases indeed of both parties, at the relevant time (for the potential impact of these factors and their limitations see below, para. 14 et seq.). Thus, the analysis of all cases must be conducted as if the interpreter were solving a binary space-time equation, with a number of additional variables that may be necessary to consider - or not - depending on each specific contract.

12. FACTS TO CONSIDER WHEN ANALYSING FORCE MAJEURE AND HARDSHIP. This document focuses on impediments and changes of circumstances affecting contractual relationships as a consequence of COVID-19. In the analysis below, we have chosen to cluster all these circumstances into two groups: the pandemic itself, and, more importantly for their effect on contract performance, the measures adopted to contain it. This separation is, obviously, purely functional, and its aim is merely to simplify a task which would be, otherwise, impossible to conduct with an acceptable level of success. The reader will do well to fine tune her own analysis of the specific circumstances of a particular case, but we need to keep the general analysis at a more abstract level. It is all a matter of degrees of causation. All -relevant- impediments and changes of circumstances originate with the health crisis (i.e., there would be no measures if there were no pandemic); many of those impediments and changes derive more directly from the containment measures (e.g., there would be no impossibility to perform if borders were not closed or if production was not subject to a lockdown); and, from here, a wide array of consequences ensue, forming a never-ending chain of causes and effects (e.g., the inability of an obligor to pay derived from a rise in prices of raw materials used in its production as a consequence of a containment measure). Many of the problems affecting contractual performance will be caused by an economic crisis originated, first, by the pandemic, and, later, by the measures implemented to contain it. But creating additional categories would not help the analysis, since it would broaden the set of relevant circumstances to factor-in and introduce such a large amount of possible additional variables to consider that force majeure and hardship could be used to justify almost any non-performance. We are persuaded that this would be unhelpful.

- II -
FORCE MAJEURE

ARTICLE 7.1.7

(Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

13. **THE CONTOURS OF FORCE MAJEURE IN THE PRINCIPLES.** The regulation of *force majeure* in the Principles is to be found in the chapter on *Non-Performance* (Chapter 7), more precisely in the section on *Non-Performance in General*. The effect of the application of Article 7.1.7 is to exonerate the obligor from paying damages for non-performance, and to suspend performance when the impediment is only temporary, while other rights of the obligee are not affected (see below para. 23). Despite its name, the concept of *force majeure* envisaged in Article 7.1.7 does not coincide with the traditional meaning given to that same expression in many civil law jurisdictions. It differs in some elements also from equivalent constructs of civil and common law. Rather, it seeks to respond to the needs of commercial contractual practice¹¹.

14. According to Article 7.1.7 (1), for the obligor to be excused, non-performance must have been caused by an *impediment* that:

- (a) was beyond the obligor's control
- (b) could not reasonably have been foreseen by the obligor at the time of conclusion of the contract, and
- (c) the obligor could not reasonably be expected to avoid or to overcome, nor to avoid or overcome its consequences.

¹¹ As already noted, Art. 7.1.7 was inspired by Art. 79 CISG, with some clarifications (e.g., regarding temporary impediments – see para. 26 below) and the exercise of remedies other than damages (see para. 28 below).

Hence, the first step of the analysis would consist in determining whether the outbreak of COVID-19 and its consequences meet these requirements.

15. **A TOTAL OR PARTIAL IMPEDIMENT TO PERFORMANCE AS A REQUIREMENT.** In answering this question, it should in the first place be ascertained whether performance really has been impeded. The Principles *do not require strict impossibility of performance* to invoke force majeure, but there needs to exist a relevant obstacle and a causal link between the obstacle and the non-performance. In this case, the obligor (i.e., the party invoking the force majeure) will need to prove causation between the pandemic, or the measures adopted because of the pandemic, and the non-performance of the obligation due under the contract. The solution may then vary depending on the *type of contract or obligation involved*. For example, the outbreak of COVID-19 may have impeded performance of certain contracts by *directly* affecting the health of a key performer (i.e., in those cases where the personal characteristics of the obligor constitute an essential part of the contractual consideration)¹², or *indirectly* causing the temporary suspension or restriction of certain activities through containment measures imposed by public authorities (shutdown of factories; limitations of cross-border movements affecting employees or other workers, or impacting on the possibility to conduct an activity abroad; impediments affecting the activity of business parties in other countries, who, e.g., cannot import the goods from their suppliers because of an export ban; etc.). This, however, does not apply to all types of contract. Other types of contract could - and can still - be regularly executed during the time of COVID-19 because their performance is not affected, or only affected in a limited way, by the pandemic itself or by the containment measures (for example, certain areas of e-commerce have even thrived during the pandemic). Further indirect consequences may impact on contractual performance and, depending on the circumstances of the case, may require consideration in this context: for example, containment measures may affect the price of commodities by contributing to a dramatic (and unforeseeable) fall in consumption of a specific commodity; employees' or other workers' apprehension of danger to health or life may impact on economic activities even where continuation of production is allowed; bans on travel and on international movement may affect performance under travel packages or similar contractual arrangements¹³. Many of these examples, however, might more easily fall into the category of hardship (see below para. 33 et seq.) and, in any case, they would have to pass the test of the strict requirements prescribed in the relevant provisions.

¹² As will be noted later in the document, the impediment needs to be external and objective, in the sense of it not being a subjective problem of the obligor. For example, an "ordinary" illness of the obligor (e.g., a case of appendicitis), which impedes her performance, would normally not be regarded as force majeure since such events are part of the ordinary risk assumed by parties to a contract. The difference with the pandemic is the latter's exceptionality: an overwhelming, generalised contagion in a brief period of time, unforeseeable by the population, and entailing a risk increase which could not have possibly been regarded *ex ante* as part of the risk sphere of any of the parties. In any case, this distinction is more of theoretical than practical interest: a person sick with the COVID-19 would immediately -and, to our knowledge, everywhere- be forced to confinement, and hence performance would have been undoubtedly impeded by the measures. It is precisely due to the containment measures that the physical effects of the COVID-19 sickness on the obligor are irrelevant: even a sick person with no symptoms would be prevented from performing if performance implies a risk of contagion to third parties.

¹³ According to their Preamble, the Principles apply to "commercial" contracts, i.e. exclude those contracts concluded by a party otherwise than in the course of its trade or profession (cf. Preamble, Comment 2). While one side of travel packages concern consumers (and hence would be excluded from the scope of the Principles), there is also another side which involves commercial and professional contracts, with travel agents, tour guides, hotels, or transportation services forming a network of contracts where the Principles would be applicable.

16. **ON THE NATURE OF CERTAIN IMPEDIMENTS.** A further element that needs to be given proper consideration concerns the nature of the restrictions or containment measures. In order to gauge the relevance of the impediment, the mandatory nature of the restrictions would seem essential. For example, while there is no doubt that a mandatory shutdown of the activity of a factory where the item to be supplied is produced constitutes a relevant impediment for the producer who is contractually obliged to supply the item, a mere recommendation to observe caution in the production, or the imposition of a limited number of employees in the work space may not always so clearly meet this requirement. Additional elements of the factual case would need to be factored-in before an answer is reached. In any case, this latter type of situation might better be solved resorting to hardship (see below Part III).

17. **FORCE MAJEURE AND “REASONABLENESS”.** The criteria set forth in Article 7.1.7 are based on the notion of “reasonableness” and are therefore deliberately very flexible. The application of the criteria does not lend itself to clear-cut general answers *in abstracto*, but only provides the elements to reach solutions *in concreto*: as will be seen in the forthcoming analysis, the interpreter needs to consider what a person acting in good faith and in the same situation as the parties would consider to be reasonable, taking into account the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved.

The Principles, like other international instruments on uniform contract law such as the CISG, do not contain an express definition of “reasonableness”. For an express definition, in line with its meaning within the Principles, see for example Article 1:302 of the Principles of European Contract Law: “*Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account*”

18. **BEYOND THE CONTROL OF THE PARTIES.** In accordance with Article 7.1.7, the impediment causing the force majeure must be beyond the control of the obligor. There can be little doubt that both the outbreak of the COVID-19 crisis and the measures adopted to prevent contagion are beyond the control of all parties to a contract, since these cannot possibly influence the origination of either¹⁴. The requirement of control concerns the impediment as such (e.g., the pandemic, the lockdown), and its ability to affect performance generally, but it does not refer to the subjective situation of the obligor. For example, the case in which the obligor, physical person, fails to enforce a contract *intuitu personae* due to the illness, which (i) the obligor contracted willingly (e.g., the obligor was

¹⁴ Arguably, this might even be the case, concerning the measures adopted to prevent contagion, when one of the contracting parties is a public institution. In this situation, the adoption of the measure would be beyond the control of the public party when -as would be the most frequent case- the approval of the decision to, for example, decree a lockdown is beyond the competences of the particular State-owned enterprise or agency; similarly, the same result would be achieved where the public administration has a general mandate to procure public interest, and such public interest would consist in preventing contagion for the population.

young, unafraid and used the sickness to avoid performance), or (ii) through careless failure to observe mandatory measures, there would likely not be a force majeure exception, but this would possibly be due to the absence of good faith and/or to the obligor's failure to overcome the circumstances, but probably not because the obligor's health can be said to have been under his control.

19. THE REQUIREMENT OF UNFORSEEABILITY AND THE POSSIBLE RELEVANCE OF THE DISTINCTION BETWEEN THE OUTBREAK OF THE VIRUS AND ITS CONSEQUENCES. With respect to the requirement that the impediment be unforeseeable at the time of conclusion of the contract (Article 7.1.7. (1)), the analysis might in some cases benefit from distinguishing between the pandemic as such and the various containment measures imposed by the public authorities in the different countries, since their foreseeability may not necessarily be the same. We shall differentiate between the two in the analysis in the following paragraphs, where relevant.

20. TIME AND PLACE AS KEY FACTUAL COMPONENTS OF THE ANALYSIS. In order to ascertain if the impediment consisting of the outbreak of COVID-19 was unforeseeable, all relevant factual circumstances need to be factored-in. Two elements would seem to be relevant in every case: the time of conclusion of the contract and the place of business of the parties.¹⁵ Both time and place will be necessary to allow for a crystallisation of the relevant circumstances applicable to a specific contract, since neither the moment of the outbreak of the health crisis nor the measures adopted to contain it happened everywhere at the same time.

21. Barring consideration of other circumstances, whether parties could - or could not - *reasonably* have been expected to foresee the outbreak of COVID-19 would depend on the time of conclusion of the contract, with respect to which different dates may come into play, namely certain relevant milestones in the development of the health crisis and their arrival in the public domain: (i) *internationally*, the end of December 2019, in conjunction with the first announcements of the disease by the Chinese authorities; after 30 January 2020, when the WHO declared COVID-19 a "Public Health Emergency of International Concern"; or after 11 March 2020, when COVID-19 was formally declared to be a pandemic; (ii) *in relation to a specific jurisdiction*, when the situation reached a certain level of gravity and attracted sufficient public attention, a fact which needs to be determined on a case by case basis and which might seem to influence foreseeability more than the general, international dates mentioned earlier. Until the pandemic reaches the jurisdiction(s) where the parties have their place of business, news of a health hazard happening abroad would, in some cases, relate only to the *likelihood* of the pandemic spreading to the relevant jurisdiction. In this type of case, on the face of it, where the parties have their places of business in the regions first hit by the virus, the probability of contagion might have in fact increased and hence the foreseeability of the impediment. In theory - so the argument would go - the closer the jurisdiction of the places of business of the parties to a country where the health crisis is already present, the more reasonable it would have been to expect them to foresee the pandemic and its consequences on the performance of contracts. And yet, facts show that the spread of the disease did not

¹⁵ For the definition of the relevant "place of business" where a party has more than one place of business see Article 1.11 of the Principles: "the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract".

necessarily happen between bordering countries, so that regional contagion might not be an incontrovertible conclusion, and, perhaps more importantly, the geographic distance between two jurisdictions might not be, *per se*, sufficient to rule foreseeability out. This only goes to show the complexity of embarking on an analysis of foreseeability based on news or on information which concerns foreign jurisdictions. Further, the situation in which a party's jurisdiction has not yet been hit by the pandemic (and there are no measures in place) also concerns a group of cases where foreseeability could be expected, because the events in the foreign - already undergoing health problems - jurisdictions are likely to affect performance of the obligor. For example, a company with place of business in Country A, not yet with a health crisis, purchases supplies of raw material for its own production and transformation process from a company located in Country B, severely hit by COVID-19. In this case, it could be argued that the company from Country A could reasonably be expected, at a relevant moment in time, to foresee that the possible failure to deliver of the supplier from Country B would cause an impediment to its own performance under another contract with a third party.

22. **GOVERNMENT MEASURES AND FORESEEABILITY.** The complexity of the analysis increases once the pandemic has crossed the borders of the jurisdiction (s) of the parties, where the element of the measures adopted by the domestic governments needs to be factored-in. There has not been only one uniform package of measures applied by governments across the board: the types of measure vary from mere recommendations to complete economic lockdown and full home confinement; and the timing of the adoption of the measures has also varied, depending mostly on the domestic evolution of the health crisis. Each jurisdiction has its variations and the analysis of foreseeability needs, again, to be local. To the extent that it is deemed relevant to determine objective foreseeability in a given case, the following information could be considered relevant to gauge foreseeability: (i) a majority of countries applied a full lock down, strict confinement measures and travel bans during at least part of the time of occurrence of the health crisis, and news about such strict measures made the international media almost immediately after adoption; (ii) with some salient exceptions, a majority of countries applied measures gradually; (iii) with some salient exceptions, restrictions were mandatory, i.e. imposed on those living in each jurisdiction. Considering this *global* scenario, and depending on the time of conclusion of the contract and the places of business of the parties, it would be necessary to determine whether these parties could *reasonably* have foreseen the measures adopted *locally* by their governments, taking into account the variables just mentioned as well as the additional complexities created by the possibility that, in specific circumstances, the obligor may reasonably be expected to be aware of the measures introduced in another country, irrespective of the geographical proximity (see the example given above, in the previous paragraph). Yet another factual twist which may have to be considered is the potentially "regional/territorial dimension" of governmental action. E.g., it should be analysed the extent to which a company with a place of business in a territory of a State not (yet) subject to containment measures, where other territories of the same State have been made subject to such measures, should reasonably foresee that its own territory is likely to be subjected to similar restrictions in the near future.

23. **FORESEEABILITY AFTER THE PANDEMIC HAS BEEN CONTROLLED AND MEASURES LIFTED.** Concerning the time of conclusion of the contract, the analysis needs to provide a forward-looking insight into the situation of contracts in the aftermath of the pandemic. More precisely, the question would concern the foreseeability of the consequences on contract performance in case of a potential second wave -or subsequent waves - of the pandemic.

A factual analysis would seem to indicate that there is no clear-cut answer to this question either, since it seems unlikely that there will be a defined moment of finalisation of the health crisis, at least for as long as a vaccine or any other sort of permanent remedy is not found. Experience has shown that even countries which had reduced the pandemic to the point of recording no cases for longer than the incubation period (i.e., 15 days with no cases) have suffered occasional clusters of infection. If global mobility of passengers and goods is revived, considering also the high degree of penetration of the virus suffered by many jurisdictions across the world, the likelihood of resurgence of the crisis at least locally ought not to be overlooked. The complexity of the analysis grows when taking into account the need to foresee also the type of measures which would be adopted in case of a general -or many local- second and successive waves. Could a contractual party expect that even stricter containment measures be reasonably foreseeable, or at least measures similar to the ones currently adopted? Or, rather, in the light of the information already at hand, wouldn't it correspond to a reasonable expectation that the strategy focuses on seeking local containment of focal points (hence with no general lockdown or wholesale travel restrictions imposed)? To be sure, this scenario features a high level of uncertainty, which may advocate for its specific regulation in future contracts by way of ad hoc contractual clauses.¹⁶

24. FORCE MAJEURE AND THE OBLIGOR'S (LACK OF) NEED TO ACT TO OVERCOME THE CIRCUMSTANCES. According to article 7.1.7, in addition to the impediment being out of the control of the obligor and unforeseeable at the time of conclusion of the contract, exemption of liability for non-performance requires that the obligor proves that she could not have *reasonably* been expected to avoid or overcome the impediment or its consequences. In relation to the *direct* consequences of the outbreak, it seems difficult to dispute that should the obligor not be able to fulfil her obligation due to sickness and should the performance be linked to her person (e.g. a singer contractually bound to a specific soirée), the obligor could easily prove she had not been in a position to avoid or overcome the impediment. Also in relation to the effect of the containment measures the obligor has to prove that she could not avoid or overcome the impediment. This proof may be relatively easy if the measures imposed cause a complete shutdown of economic activity. But what if economic activity was less affected and/or alternative sources of supply or routes or means of transportation were available, possibly even in other parts of the respective countries of the parties or at least abroad? To what extent could the obligor *reasonably* be expected to resort to them? Even if it has to pay a substantially higher price? In such a case the obligor might be entitled to invoke, if not force majeure, at least hardship and request renegotiation of the contract (see the section on hardship at para. 33 et seq. *below*).

25. NOTICE OF THE IMPEDING EVENT. According to Article 7.1.7 (3) of the Principles the obligor must "inform the obligee of the impending event and its effects on its ability to perform within a reasonable time after it knew or ought to have known of the impending event", or may otherwise be liable for damages resulting from the failure to give such notice.¹⁷ For instance, if the obligee, absent any notice by the obligor and therefore unaware that the obligor is prevented by an impending event from delivering the goods in

¹⁶ See para. 30 below.

¹⁷ The Principles do not expressly provide for a duty to give notice of the cessation of the impediment in cases of temporary force majeure events. For the possibility of parties to insert additional clauses on notice see below, para. 30.

time, resells the goods to a third party and the goods are to be delivered to that third party after the occurrence of the impeding event but before the obligee effectively received late notice of the impeding event, it may claim *reliance damages* from the obligor, i.e. to be put in the same situation it would have been if it had received the notice of the impeding event on time. Naturally, the duty to compensate for damages, or the amount of the damages, may be affected by the likelihood that the obligee was aware, or should have been aware, of the impediment and/or its consequences, in spite of the lack of notice. In other words, the duty to compensate the damage suffered by a lack of - or late - notice may be balanced, in certain factual situations, when, given the widespread presence in the public domain of the pandemic and its measures in the public domain, the obligee would be deemed to have been aware of the impediment.

26. **THE DUTY TO MITIGATE THE HARM.** And indeed, in application of the general duty of mitigation of harm contained in the Principles the obligee cannot just passively sit back, and any harm which it could have avoided by taking "*reasonable steps*" to reduce the harm would not be compensated (cf. Article 7.4.8). Thus, if in example given above, the obligee – as may well be the case in the context of a force majeure case due to COVID-19 – has knowledge from other sources (e.g. press or other media) of the obligor's inability to perform, it could reasonably have been expected to take measures to reduce the harm, e.g. by not reselling the goods or by reselling them on other conditions.

27. **THE TIME OF EFFECTIVENESS OF FORCE MAJEURE TO EXCUSE PERFORMANCE.** Since most of the containment measures are (or at least originally were intended to be) of temporary nature, the excuse shall have effect "for such period as is *reasonable* having regard to the effect of the impeding event on the performance of the contract" (Article 7.1.7 (2)). It must be noted that the time-span of the excuse from performance is not equivalent to the duration of the impeding event as such (in this case, e.g., the declared state of emergency or the closure of a factory), but on this event's effect on the possibility to execute the performance due under the contract, which may be shorter or - more frequently - longer than the impeding event. Thus, if, for instance, due to COVID-19 the factory was shut down for five months, but the production process could *reasonably* be resumed completely only after another month, the non-performance of the obligor is excused for a total of six months.

28. **THE APPLICATION OF ADDITIONAL GENERAL PRINCIPLES BY THE PARTIES TO THE COVID SITUATION: PRINCIPLE OF GOOD FAITH AND DUTY OF COOPERATION.** In application of the general principle of good faith and the duty of cooperation between the parties contained in the Principles (cf. Articles 1.7 and 5.1.3)¹⁸, the obligee must do whatever may *reasonably* be expected from it to enable the obligor to avoid the impeding event or to overcome its consequences (cf. Article 5.1.3). For example, if the obligor can no longer rely on its usual supplier situated in Country X because of an export ban imposed by the State authorities of that country, and the obligee knows of alternative channels of supply still available in Country Y, it may be expected to inform the obligor of such possibility.

¹⁸ Article 1.7. *Good faith and fair dealing.* - (1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.

Article 5.1.3. *Co-operation between the parties.* - Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

29. **REMEDIES AVAILABLE TO THE OBLIGEE.** Once the existence of a force majeure excuse for the obligor has been established, what are the remedies available to the obligee? According to Article 7.1.7 (4) *the obligee may immediately withhold its performance (cf. Article 7.1.3 (2)¹⁹) and, if the delay of performance by the obligor amounts to a fundamental non-performance, it may terminate the contract (cf. Article 7.3.1)²⁰: a fundamental non-performance would materialise, for example, when the obligee has reason to believe that it cannot rely on a performance by the obligor in the relevant future, or if a certain delay objectively renders performance useless. Moreover, if the excused non-performance by the obligor consists in a delay of payment due, for example, to exchange control regulations imposed as a consequence of the economic crisis triggered by the COVID-19 crisis, the obligee may also request interest on the blocked money as a sort of compensation for the interest gained by the obligor during the time of non-payment; or the same logic would apply, *mutatis mutandis*, concerning the export or delivery of an asset which was withheld by customs authorities but of which possession remained with the obligor. In any case the obligee's rights are not subject to the ordinary limitation period of three years as long as the obligor may invoke a force majeure defence (cf. Article 10.8)²¹.*

30. **THE INCLUSION OF AD HOC FORCE MAJEURE CLAUSES.** Since the UNIDROIT Principles necessarily contain general provisions on force majeure, mitigation of harm and the duty of cooperation between the parties, parties may wish to stipulate in their existing (where subject to renegotiation) and future contracts a specific force majeure clause including more detailed provisions, or deviating from some requirements of the general rules of the Principles. Frequent features of force majeure clauses as they appear in practice are, for instance, the attenuation of some of the above-mentioned requirements of force majeure; more specific indications of the ways to provide evidence of the impeding event; or the inclusion of a mechanism for renegotiation of contract terms in case the impediment lasts over a certain period of time, which may contain provisions for the situation where renegotiation fails. Given the uncertainty about the duration of the health crisis and the potential resurgence of new waves, the inclusion by the parties of a detailed clause might be advisable for future contracts, or for existing contracts which are subject to renegotiation. Possible content of the said clauses may include:

30.1 With specific reference to the situations created by a pandemic such as the COVID-19, parties may agree that, if the impeding events cease to exist, the obligor must without undue delay inform the obligee so as to permit the said obligee to act accordingly, e.g. by not entering into a replacement transaction or by renegotiating the terms of the contract for the aftermath of the pandemic and/or the containment measures.

¹⁹ Article 7.1.3 *Withholding performance.*- (...) (2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

²⁰ Article 7.3.1. *Right to terminate the contract.*- (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

²¹ Article 10.8. *Suspension in case of force majeure, death or incapacity.*-(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding Articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

30.2 Parties may also wish to make the exempting effect of the pandemic or the containment measures imposed by the public authority dependent on their territorial extension, i.e. local or nationwide. This seems particularly relevant, given the possibility that future outbreaks may have a local dimension, and so may the measures imposed to tackle each new cluster. They may also provide that, if the duration of the pandemic and/or the containment measures has the effect of substantially depriving the parties of what they were reasonably entitled to expect under the contract (or exceeds a certain period of time (e.g. 120 days)), either party is entitled to terminate the contract by notice within a reasonable time.

30.3 Especially parties to long-term contracts may alternatively agree that, with a view to continuing rather than terminating their business relationship because of the outbreak of the pandemic and/or the adoption of containment measures, the contractual obligations of the obligor be temporarily suspended for the length of the impeding events (or for another specified period, eg. 90 additional days), that any right of either party to terminate the contract be similarly suspended, and that, if at the end of that time period the impeding events continue to exist, the parties will negotiate with a view to prolonging the suspension on terms that are mutually agreeable; parties could also provide a way out in case such agreement cannot be reached, such as for example a right to request renegotiations (on this latter point see paras. 42 et seq. on hardship).

31. **GUIDANCE TO DRAFTING DOMESTIC AD HOC REGULATION.** Finally, the suggestions made above for contractual drafting could also, *mutatis mutandis*, inspire national legislators wishing to introduce special laws tailored to react to the emergency or its aftermath, further specifying conditions and requirements also in relation to the special needs of long-term contracts.

32. **FORCE MAJEURE CLAUSES AND THE INTERPRETATION OF THE CONTRACT.** When a force majeure clause is provided in the contract, it prevails over the provisions of the Principles. In this regard, however, one important issue to be considered – which often arises in practice also in relation to the application of domestic law – is connected to the way the clause is drafted and concerns its interpretation and its relationship with the general default provisions. For example, it often happens that the clause adds a list of specific events (such as natural catastrophes, wars, explosions, breakage of machinery, strikes, public prohibitions, etc., though from past experience, pandemics involving humankind seemed to be rarely, if ever, included in such lists). Attention should be drawn here to the fact that the inclusion of a list of specific events following a more general definition of force majeure may cause problems of interpretation: are the listed events to be considered as force majeure events per se, or - more likely - only provided they satisfy the requirements of the general definition? Also, is the list in the clause only including examples of potential events, or is it exhaustive? If pandemics are not expressly listed in the clause, and it is not clear that the clause is not exhaustive, does it mean that pandemics are *a priori* not considered as force majeure? Or can the pandemic be deemed covered by other more general expressions, such as “natural catastrophes”, or, more likely, “plagues” or “health emergencies”? In this respect, it should be noted that any issue arising from the interpretation of the clause and its relationship with the default provisions of the Principles would be solved by the application of the rules on the interpretation of the contract in the Principles themselves (cf Chapter 4 of the Principles: Articles 4.1 to 4.8). Such problems could no doubt be mitigated by an accurate drafting of the clause.

**-III-
HARDSHIP**

<p style="text-align: center;">ARTICLE 6.2.2 (Definition of hardship)</p> <p><i>There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and</i></p> <p><i>(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;</i></p> <p><i>(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;</i></p> <p><i>(c) the events are beyond the control of the disadvantaged party; and</i></p> <p><i>(d) the risk of the events was not assumed by the disadvantaged party.</i></p>	<p style="text-align: center;">ARTICLE 6.2.3 (Effects of hardship)</p> <p><i>(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.</i></p> <p><i>(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.</i></p> <p><i>(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.</i></p> <p><i>(4) If the court finds hardship it may, if reasonable,</i></p> <p><i>(a) terminate the contract at a date and on terms to be fixed, or</i></p> <p><i>(b) adapt the contract with a view to restoring its equilibrium.</i></p>
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33. **CHANGE OF CIRCUMSTANCES CAUSED BY COVID-19 AND THE REGULATION OF HARDSHIP IN THE PRINCIPLES.** As mentioned in previous sections of this note, the situation caused by the outbreak of the COVID-19 health crisis and its containment measures may not only affect the obligor's ability to perform, but also substantially alter the circumstances of the performance originally envisaged in the contract for the said obligor. The Principles deal with this type of situation through the provisions on *hardship*. The section on hardship starts by underpinning the binding character of the contract and its risk allocation as originally envisaged by the parties (Article 6.2.1): "*Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship*" (i.e., Articles 6.2.2 and 6.2.3, reproduced *verbatim* above). Performance as initially agreed is hence conceived as binding notwithstanding a change of circumstances, in principle regardless of the burden it may impose on the obligor. But this general rule is subject to exceptions when *supervening circumstances fundamentally alter the equilibrium of the contract*. This alteration would constitute *hardship* for the Principles, provided additional requirements are met.

34. **THE REQUIREMENTS TO INVOKE HARDSHIP UNDER THE PRINCIPLES.** According to Article 6.2.2 of the UNIDROIT Principles, there is hardship where the occurrence of events *fundamentally* alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has

diminished, and the events: (a) occur or become known to the disadvantaged party after the conclusion of the contract; (b) could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party. By *disadvantaged party*, the Principles understand the party to the contract whose performance has become unduly burdensome as a consequence of the events meeting the requirements listed above. The question is whether the surge of the COVID-19 pandemic and its consequences can result in a hardship case for one of the parties -the disadvantaged one- in a contract under the Principles.

35. THE CHANGE OF CIRCUMSTANCES MUST BE FUNDAMENTAL AND OBJECTIVELY ASCERTAINABLE. As was the case for the force majeure defence, the possibility to invoke hardship in a COVID-derived situation will naturally depend on all the relevant circumstances of each case. *In primis*, a distinction might again have to be made between the pandemic as such and the various containment measures imposed by the public authorities in the different countries, although most problems will be directly linked with the latter. The change of circumstances generated by the COVID-19 will need to alter the balance between the parties provided for in the contract in a *fundamental* way. There is no exact quantitative measure of what should be deemed “fundamental”, but any application to a particular case should be based on all relevant circumstances of and surrounding the contract (nature of the contract, characteristics of the expected performance, conditions of the relevant market at the relevant time, etc.). Moreover, the new facts have to alter the situation so substantially, that it may objectively have led the parties not to conclude the contract or to have concluded it on different terms had it been considered by the parties *ex ante*. The fundamental alteration of the equilibrium by a COVID-19-related cause must have increased the cost of performance of one party or diminished the value of the said performance for one of the parties (including cases where the performance no longer has any value at all for the receiving party), and, in both cases, the increase in cost or the reduction in value must be *objectively* ascertainable and determined. It should be noted, however, that hardship will only concern performance not rendered: the disadvantaged party may not invoke a substantial increase of costs or decrease in value of the part it has already performed.

36. EXAMPLES OF INCREASE IN THE COST OF PERFORMANCE. Concerning the increase in the costs, the change of circumstances giving rise to hardship often concerns the party that is expected to perform a non-monetary obligation. A manifestation of hardship of this kind might, for instance, arise when a distributor of protective masks and clothing, due to an export ban imposed as a consequence of COVID-19 by the public authority in country X where its usual supplier is located, has to acquire them at a substantially higher price from another supplier in another country. Or a similar situation might ensue when the specific raw material used in the manufacturing of products to be delivered under the contract suffer a large increase in cost, either because the health crisis has increased the extraction costs of the material due to the mandatory limitation of the number of workers in one same space or because the supplier of the material may not obtain certain substances necessary to use mechanical means of extraction.

37. EXAMPLES OF REDUCTION IN THE VALUE OF PERFORMANCE. The reduction (or elimination) of the value of the performance of one of the parties is likely to have occurred often during the COVID-19 crisis, especially in jurisdictions where the economic activity

has been all but suspended for a period of time. A manifestation of hardship may arise, for instance - and would naturally depend on all other relevant circumstances of the case - where a lessee operating a restaurant is obliged to continue to pay the lessor, owner of the premises where the restaurant is situated, the rent originally agreed despite the fact that due to COVID-19 the public authority allows the restaurant to operate only on a takeaway basis (or, posing an even greater complexity of analysis, with only one-third of the usual tables). Or when the lessee under an operational lease of a large multi-ton, high capacity lorry cannot use it due to the movement lockdown of this type of vehicle. Or when a football club should continue to pay its players the originally agreed far-from-modest salaries despite the fact that football matches have to be played without spectators for the rest of the season ²².

38. THE TIMING OF THE CHANGE OF CIRCUMSTANCES. If, for the sake of discussion, it is accepted that the examples above cause a fundamental alteration of the equilibrium between the parties, the disadvantaged party must still meet a number of additional requirements. In accordance with Article 6.2.2, in order for the disadvantaged party to successfully invoke hardship with the effects laid down in Article 6.2.3, the containment measures causing the hardship (e.g., the export ban imposed by the public authority of Country X, or the partial closure of restaurants and the stadium restrictions referred to in para. 37) must, firstly, have occurred or become known to the disadvantaged party *after the conclusion of the contract*. Hence, it would seem that this requirement is met in the case of contracts concluded before the end of December 2019. From that moment on, the possibility of impeding measures having been adopted before the conclusion of the contract will vary with the time and the country, but, in any case, this is a requirement which would, in principle, not present problems of interpretation: both the date of release of the relevant measures as well as, in most cases, the date of conclusion of the contract should be accessible and non-controvertible facts. An aspect which might require further analysis concerns the determination of the relevant moment of occurrence of the event. The interpreter will need to decide, based on the circumstances of the case, what "occurrence" of the event is for the purpose of meeting this requirement of the hardship rule. Should there be a relevant difference between the announcement of measures and their entry into force, for example? What would be the solution if the contract was concluded between the day of approval of the relevant measure by the Government, and its entry into force, say, 3 days later? On its face, the answer to these questions might depend on the likelihood of knowledge by the relevant party. Considering that these measures are often regulated by law (in a broad sense, including binding regulations), and that, in any case, they have generally been in the public domain throughout, the difference, time-wise, between occurrence of the containment measures and the effective knowledge of the disadvantaged party might be negligible in a generality of cases. Yet again, the existence of elements of internationality may add complexity to this analysis. For example, it may be harder to ascertain at what point in time the obligor should have been aware of containment measures taken in another country that may affect her own ability to perform under a contract, and to what extent public announcements of such measures should be distinguished from passed legislation or regulation.

²² As always, this would be a case of hardship subject to the careful consideration of all circumstances of the case. For example, the existence of hardship, or the extent of the disadvantage, may be qualified by the percentage of overall business of the football club represented by the revenue generated by spectators attending football matches: would it be justified to reduce the salaries when, say, 95% of revenue come from alternative sources (tv rights, etc.)? This is an example of the type of circumstance that might have to be factored in when conducting the analysis.

39. **THE LACK OF OBJECTIVE FORESEEABILITY OF THE CHANGE OF CIRCUMSTANCES.** Another relevant element for the application of hardship is that the disadvantaged party has to prove that she could not reasonably have taken into account the future extent of the spread of the pandemic or the occurrence of the containment measures at the time of the conclusion of the contract. In relation to this point, we refer to the analysis conducted above with respect to force majeure (see paras. 19 and 23). Here again, the solution would ultimately depend on the circumstances of the case, and particularly on where and when the contract was concluded, where parties had their place of business, and when and how the consequent containment measures were adopted by the public authorities in their respective countries. Moreover, the fact that circumstances are possibly subject to a gradual change would seem to make any solution dependant on the details of each case. For example, it could be that the contract had been concluded after there was widespread public knowledge of the COVID-19 problem, say after 13 March, when the WHO declared the health crisis a pandemic. It might be reasonable to infer that, if a contract had been concluded on 20 March and the country of operation of the – later disadvantaged – party had already seen a few cases, the -later disadvantaged- party might have had sufficient information to foresee the event. But what if the Government of that country had, repeatedly, denied the severity of the problem, or, more likely, it had openly stated that it had no intention to issue severe containment measures or indeed a lockdown? When, only a few days later, the Government changes approach and imposes a full lockdown and a complete stop to any economic activity, would that have been foreseeable? For the reader who rushes to nod, would the answer also be positive if the Government's u-turn was not supported by a sharp increase in cases?

40. **ADDITIONAL REQUIREMENTS TO INVOKE HARDSHIP.** The last two requirements with respect to the outbreak of the COVID-19 and the containment measures imposed as a consequence would not generally seem to be difficult to meet: both the pandemic and its obligatory, publicly-mandated containment measures would be beyond the control of the parties to the contract; and the parties should know how the risk of their occurrence had been allocated in their contract.

41. **THE ASSUMPTION OF THE RISK BY THE DISADVANTAGED PARTY.** The voluntary assumption of the consequences of the outbreak of the pandemic, however, merits further consideration. Hardship being a qualified, exceptional interference with the principle of risk allocation in contractual performance, the disadvantaged party may obviously have excluded it by assuming the risk of the relevant change of circumstances, most often expressly, but possibly also in an implicit manner, which would be ascertained interpreting the contract in the light of all the circumstances (see in particular Article 4.3 of the Principles). An example of tacit assumption of the risk: a foreign opera singer accepts to sing in an opera with local singers in Country X, in which the first COVID-19 cases had been reported. The guest singer accepted to sing despite the fact that a few days before the scheduled performance two of the local singers tested positive and had to be replaced by other local singers. The guest singer was infected and had to go into quarantine for two weeks, suffering substantial loss of income. The question here is whether or not the singer would be entitled or not to invoke hardship vis-à-vis the *impresario* of the performance, because it had assumed the risk of being infected. Concerning an express assumption of the risk, the disadvantaged party would be, *ex ante*, excluding the remedies envisaged for hardship by the inclusion of a clause providing for the automatic adaptation of the contract. It is worthy of note that, for this clause to waive hardship remedies, the adaptation clause

must contemplate the specific event causing the supervening imbalance between the parties.

42. **THE RENEGOTIATION OF THE CONTRACT IN LIGHT OF THE NEW CIRCUMSTANCES.** In case of hardship, the UNIDROIT Principles seek to allow the parties to reinstate the equilibrium that has been altered by a set of circumstances that have placed one of the parties in a fundamentally disadvantaged position. This is a particularly relevant and useful tool for long-term contracts, where it might often be in the interest of both parties to ensure that temporary, exceptional circumstances (such as those generated by the COVID-19 and measures attached to it) do not thwart a relationship otherwise considered to be balanced and beneficial for all. In light of this aim, the disadvantaged party is entitled to request renegotiation of the original agreement with a view to adapting it to the changed circumstances. The request is to be made without undue delay and shall indicate the grounds on which it is based (Article 6.2.3(1)). The reasonable time to request renegotiations depends on the specific circumstances, and it may be longer when the change of circumstances takes place gradually, as could be the case with measures to contain the COVID-19 crisis being adopted gradually in a given jurisdiction. The request to open renegotiations does not in itself entitle the disadvantaged party to withhold its performance (Article 6.2.3(2)), unless there are exceptional circumstances which objectively warrant it, circumstances that could be linked with the impossibility to remove - even partially - the consequences of performance before renegotiation takes place²³.

43. **THE CONDUCT OF THE RENEGOTIATIONS.** Both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith and fair dealing (see Article 1.7) and to the duty of co-operation (see Article 5.1.3). Thus, the disadvantaged party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical manoeuvre. Similarly, once the request is made, both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information (see Comment 5 to Article 6.2.3). The renegotiations must be conducted to restore the lost, initially agreed equilibrium. They are thus not conceived as a fresh start to renegotiate the terms of a contract *ex novo*, but rather as an opportunity to replicate, under the new circumstances, the allocation of rights based on the proportionality envisaged in the original agreement. It should be noted that the provisions of the Principles on the conclusion of the contract (Chapter 2) and its validity (Chapter 3) would be applicable to the conclusion of the new agreement resulting from the renegotiations. These provisions would offer a remedy, for example, in case a party, availing itself of the exceptional circumstances created by the pandemic, would unjustifiably seek to take unfair advantage of the other party's dependence, economic distress or urgent need deriving from the COVID-19 situation (see Article 3.2.7).

²³ A possible illustration, which follows the comments of the Principles (see Comment 4 to Article 6.2.3), would consist of the following facts: A enters into a contract with B for the construction of a plant, which is to be built in country X. This country adopts new safety regulations in the light of the risks posed by the COVID-19 pandemic, requiring the use of additional machinery, and a different type of materials, more costly but safer for builders due to its higher isolation power. This situation makes A's performance substantially more onerous. Depending on all other requirements of art. 6.2.3 being met, A might be entitled to temporarily withhold - at least partial - performance in view of the time it needs to implement the new regulations.

44. **THE INTERVENTION OF AN ADJUDICATOR IN ABSENCE OF AGREEMENT BETWEEN THE PARTIES.** If the parties fail to reach an agreement within a reasonable time, either of them may resort to a court or arbitral tribunal which, if it finds hardship, may terminate the contract at a date and on terms to be fixed, or adapt the contract with a view to restoring its equilibrium, but only if this is *reasonable* (Article 6.2.3 (3) and (4)). Thus, the court or arbitral tribunal may, for instance, terminate the contract but contextually postpone the moment when the termination takes effect and/or exclude for both parties any right to damages, or revise the price so as to distribute equally among the parties the increased costs or the loss suffered. However, if in the case at hand the court finds that neither of these solutions is appropriate, it may either direct the parties to resume negotiations or simply confirm the terms of the contract as they stand (cf. Comment 7 to Article 6.2.3 (4)). At least for contracts concluded before the end of 2019, or in the first stages of development of the health crisis, the outbreak of a global pandemic and the extreme measures adopted in many jurisdictions would seem to be a likely case for some sort of apportionment of the damage arisen by such extraordinary circumstances. But again, this assertion might have to be qualified considering the specific circumstances of the case. The importance of an adequate renegotiation and restoration of the contractual balance between the parties cannot be overestimated in an exceptional situation such as the one created by the COVID-19, where a large percentage of contracts will be affected, many of them valuable commercial contracts whose preservation would avoid conflict, reduce additional transaction costs to the system, alleviate already clogged-up judicial and dispute resolution systems, and contain economic damage. In circumstances such as those created by the pandemic, the use of online resolution systems (ODR) may provide a useful tool either to facilitate the renegotiation of the contract, or to reach a satisfactory solution of the dispute.

45. **REGULATING HARDSHIP IN THE CONTRACT.** As is the case with force majeure, parties may wish to stipulate in their contract a specific hardship clause with more detailed provisions or deviating from some requirements or other elements of the general rules of the Principles, which would prevail over such default rules.

45.1 With specific reference to cases of pandemic such as COVID-19, a hardship clause may for example take into account the different ways in which a fundamental alteration of the equilibrium of their contract may arise, as a consequence of the pandemic as such and/or of the containment measures adopted by public authorities. Parties could restrict the right to invoke hardship by making it dependent on the territorial extension (e.g. local or nationwide) and/or the duration (e.g. a minimum of X days) of the pandemic and/or the containment measures adopted by the public authorities. Parties may, on the other hand, prefer a different or more specific criterion than the “fundamental alteration of the equilibrium” provided for in the Principles to determine a situation of hardship. A grace period could be stipulated before the occurrence of hardship can be invoked. Finally, in relation to long-term contracts which require a significant level of investment by both parties, parties may further wish to allow for renegotiation even when not all the requisites of Art. 6.2.1 – and particularly that of unforeseeability – are met, with a view to redistribute the risk of a future adverse event similar to the present pandemic.

45.2 **IN RELATION TO THE CONSEQUENCES OF HARDSHIP.** Parties may draw inspiration from the remedies provided in Article 6.2.3 of the UNIDROIT Principles, if appropriate adapting them to their needs. In respect to the right to request renegotiations, for

example, parties may wish to introduce further elements concerning the organisation of the renegotiations (e.g. location, duration, aims, etc.), and/or specify its effects on any performance otherwise due (continuation, or temporary suspension).

45.3 PARTIES MAY ALSO WISH TO EXPRESSLY REGULATE THE SITUATION WHERE RENEGOTIATIONS FAIL. Solutions more frequently found in the practice of international contracts are to provide that in case renegotiation fails, a party (or both) will have the possibility to terminate the contract, or on the contrary, that performance of the contract will be resumed on unchanged terms. These are radical solutions, the main purpose of which is to give a strong incentive to parties to try to negotiate in the most constructive way. Particularly in the case of long-term contracts parties may, however, opt for other solutions, such as, for example, that the disputed matters be discussed in the framework of a mediation board facilitating the reaching of a consensus, or be referred to a neutral dispute resolution board or other adjudicating organ. In this respect, and as noted above (para. 44), considering the special circumstances created by the pandemic parties may wish to resort to online dispute resolution organs. Parties may also wish to agree on several dispute resolution methods to be used on a sequential basis in order to avoid and solve conflicts.

46. AGREEMENT ON THE APPLICATION OF RULES IN THE ABSENCE OF A SPECIFIC CLAUSE. If the contract does not contain a hardship clause, nothing prevents the parties to agree now on certain provisions which would apply should performance actually be so greatly affected by either the pandemic itself or the consequences of the containment measures. Here too, the default provisions of the UNIDROIT Principles may serve as a model, while parties may also consider whether to specify them further, or to derogate from them, following some of the suggestions mentioned above.

47. As was seen in the context of force majeure, the suggestions above could also serve as model for the drafting of hardship clauses in new contracts, with provisions inspired by the experience of COVID-19 but meant to apply in similar cases in the future.

48. HARDSHIP CLAUSES AND THE INTERPRETATION OF THE CONTRACT. Like force majeure clauses, hardship clauses often list events which are qualified as causes for hardship. Such lists may cause problems of interpretation similar to those which were mentioned in the context of force majeure (see para. 32 above). Here too, epidemics involving humankind were rarely mentioned in the past; they could, however, meet the requirements of a general definition if the clause contains one, and provided the list of events is not interpreted as being exhaustive. Any issue arising from the interpretation of the clause and its relationship with the default provisions of the Principles will be solved by the application of the rules on the interpretation of the contract contained in the Principles (cf. Chapter 4 of the UNIDROIT Principles).

49. GUIDANCE TO DRAFTING DOMESTIC AD HOC REGULATION. Finally, the suggestions made above for contractual drafting could also, *mutatis mutandis*, inspire national legislators wishing to introduce special laws tailored to react to the COVID-19 emergency or its aftermath, further specifying conditions and requirements also in relation to the special needs of long-term contracts. In particular, national legislators may wish to further specify

conditions and requirements and to adopt specific rules, for example concerning the conduct and the aims of the renegotiation with special attention to the situation where the parties could not agree.

- IV -

RELATIONSHIP BETWEEN FORCE MAJEURE AND HARDSHIP

50. **FACTUAL SITUATIONS FALLING UNDER BOTH THE FORCE MAJEURE AND THE HARDSHIP PROVISIONS.** In view of the definitions of hardship in Article 6.2.2, and of force majeure in Article 7.1.7, under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. This may happen because the definition of force majeure does not refer to a literal notion of “impossibility” of the performance but relies on a supervening “impediment” beyond the party’s control fulfilling the requirements of Article 7.1.7 (1). Such an impediment, depending on the circumstances, may satisfy also the requirements of Article 6.2.2. For example, when an export ban imposed as a consequence of COVID-19 by the public authority in one country effectively impedes a party’s access to a needed raw material which is almost exclusively produced in that country, if all respective requirements are met the impediment could be qualified both as force majeure and as hardship. The fact that the raw material could still be purchased from another source, but probably with great difficulty and at a higher price, could be considered as an “impediment” to performance, but at the same time such an expensive alternative purchase could fundamentally alter the equilibrium of the contract.

51. **FLEXIBILITY IN THE CHOICE OF REMEDY.** If this is the case, it is for the party affected by these events to decide which remedy to pursue. If the affected party invokes force majeure, it is with a view to its non-performance being temporarily excused and its obligations suspended, with the possibility that the other party may terminate the contract if the delay amounts to a fundamental non-performance. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms (cf. Comment 6 to Article 6.2.2), but withholding performance in itself will not be allowed.

- V -

CONCLUSION

52. The outbreak of the COVID-19 global pandemic has endangered populations, generated strict contagion-avoidance measures and affected severely economies throughout the world. Performance of commercial contracts has often been impeded or drastically altered. The UNIDROIT Principles of International Commercial Contracts provide a useful tool to deal with the distress caused to contractual relationships, offering solutions

to the parties (concerning existing or future contracts), adjudicators (judicial or in the context of alternative dispute resolution) and legislators (seeking to adjust or modernise their contract law) alike. The Principles deal with the consequences of the pandemic and its measures through the regulation of force majeure and hardship. It is clear that, provided all circumstances are met, the COVID-19 related situations may constitute a case of force majeure or, at least, hardship. It is also clear, given the complexity of the situation (e.g., disparity of timing of the pandemic, variation in the types of measures and their effects), that it is not possible to make valid general assertions, and that, also under the Principles, the existence -or not- of force majeure and hardship will depend on the relevant facts of each specific case. The open nature of the Principles furnishes the parties and interpreters with a much-needed flexibility in such an extreme context. The Principles constitute an efficient tool to offer a nuanced solution that can help preserve valuable contracts for the parties. Specially in mid-to-long term contracts, and in view of the -apparently- temporary nature of the impediment, mechanisms that allow for an adequate renegotiation and proportionate allocation of losses could ultimately help preserve the contract and maximise value for the jurisdiction (s) involved.

Arguably, the world of contracts has never suffered such an unforeseeable, global, intense interference. Extraordinary situations require extraordinary solutions, and there is a global need to ensure the economic value enshrined in commercial exchanges is not destroyed. The Principles offer state-of-the-art, best-practice tools to deal with the problem; a set of rules that result from years of study and analysis, with the participation -and consensus- of the most prominent academics and practitioners in the field, of civil law and common law traditions. These instruments are useful for everyone. And they are here, up for grabs. We hope the reader will find them -and this document- useful.