COVID-19 Contractual issues for sport

Introduction

1. The COVID-19 pandemic has led to government orders around the world which have locked-down society. The effect of those orders has been to prevent both economic and social activity. In New Zealand orders under the Public Health Act 1956 closed all premises (with limited exceptions for dwelling houses, essential services and other places where access was required), and banned gatherings from 26 March 2020. Subsequent orders have relaxed the lockdown but significant restrictions remain under the current order covering Alert Level 2, in particular the restriction on public gatherings which means that crowds cannot attend events.[1] The effect of similar government responses around the world has meant that global commerce has been significantly disrupted. While the pandemic does have historical precedents, the global response and its economic effects are without precedent.

2. Sport has been profoundly affected in all its forms. From simple recreational activity to the small club operating in a local community, to the large professional leagues and sporting organisations, everything has come to a halt. While sporting activity can now recommence under the Alert Level 2 order in New Zealand and under similar restrictions around the world, sport is in the early stages of working out how to restart.

Central role of contract

3. As with commerce generally, contracts bind the sporting world together, whether contracts which bind members to rules of clubs and govern participation which may have limited economic value, or contracts for sponsorship of competitions, clubs, venues, for broadcasting rights, contracts of employment and services, which may be worth many millions of dollars. From the amateur grass-roots level upwards, sporting organisations and individuals involved in them, like all other organisations affected, have obligations under contracts which have now to be urgently addressed as part of planning for the future. As part of that planning, they also have to consider the terms of future agreements.

[1] Health Act Order section 70(1)(m) Health Act Order closing all premises and forbidding all congregation 25 March 2020; Health Act (Covid-19 Alert level 3) Order 2020, 27 April 2020; Covid-19 Public Health Response (Alert Level 2) Order 2020, May 14 2020. The orders were made under the Health Act 1956. The use of the powers under the Act was provided for by a notice declaring an epidemic under the Epidemic Preparedness Act 2006. Further orders declaring a national state of emergency were also made.

4. The law of contract provides the framework by which promises in agreements are upheld; its principles provide security which underpins all commercial activity. In a situation where extraordinary government measures have forbidden economic and social activity and continue to restrict it, parties have to address their current situation by reference to those principles. This paper outlines the general principles of contract law which are most likely to be relevant to contracting parties in sport (or, indeed, to any other organisation whose activity has been affected by recent events) as they consider the effect of recent events and look to the future.

The common law of contract – key general points

5. The first general point is that contract law in common law systems is largely judge-made law. The principles of common law operate in a practical way by application to particular circumstances, and, while they provide a consistent legal framework, much of the work of lawyers involves assessing how those principles apply in a particular set of circumstances.

6. The second point is that, in many disputes the most important issue is the meaning of the contract. Again, this underlines the way in which the common law and lawyer focus on the particulars of the particular situation and the relevant contract.

7. The third point is that the common law has always set great store on contracts being performed. This means that the fact that a contract has become more financially onerous or difficult to perform after it has been entered will not excuse a breach. A party which cannot perform as required by the contract and has no defence under the contract or otherwise will be in breach.

8. The fourth point is that, generally where parties have provided for rights and obligations in their agreement with sufficient certainty, the courts will uphold their agreement and enforce it in the event of breach, whether by awarding compensation for breach or ordering a party to perform its obligations. The last two points are important in considering the application of contract law to external supervening events which affect the performance of a contract.

9. The contract and fact-specific nature of contract problem solving will mean that the reaction of a common lawyer (and possibly a civil lawyer too) to questions about the effect of an external event on a varied range of contracts in differing circumstances will be to say, show me the particular contract, let me work out what it means and what the rights and obligations are, whether one party or another is potentially liable for breach, whether the contract provides for any defence to claims for breach, and whether the doctrine of frustration might possibly apply. In short, tell me the details, and I will give my view. I am a common lawyer and what follows are observations about the general legal principles which will inform the task of considering the effect of the pandemic and the government orders to prevent its spread, on contractual obligations. In addressing these effects, certain principles come to the fore but underpinning each is the interpretation of the contract in issue. This is not the place for an extensive discourse on this topic but the approach to interpretation should be noted before addressing *force majeure* (and other contract clauses which may be relevant) and frustration, and making some observations about the approach to future contracts.

Interpretation

10. In the common law world, while there are differences in relation to the admission of evidence of background to a contract, the general approach is to interpret a contract objectively in its context or background in order to determine what the parties meant by their contract. The exercise involves reading the contract through the eyes of a reasonable reader in the position of the parties at the time of the contract with all the background knowledge reasonably available to the parties. Australia has a more restrictive approach to referring to context than New Zealand, which might make a difference in some cases. The important point is that the exercise is objective and involves a practical approach to arriving at a meaning. The description of the exercise of interpretation as involving using text and context in a manner which is appropriate for the particular contract to allow the court to put itself in the shoes of the parties and work out what the bargain means, is helpful[2]. Sporting contracts come in many different forms, from contracts which are informal and drafted without lawyers, to the highly formal and sophisticated prepared by specialist skilled

[2] *Wood v Capita Insurance Services Limited* [2017] UKSC 24 Lord Hodge on contract interpretation principles at paras 10-15.

advisers. The extent to which the background assists in arriving at the correct interpretation will vary according to the circumstances of the contract.

11. Traditionally, the common law developed various techniques to read down exception clauses but, while clauses have to use clear language to be effective, the modern approach is not to adopt a strained, artificial construction to deny a clause's effectiveness, but rather to apply the general principles of interpretation and decide what the clause means[3]. Clauses which provide for relief where exceptional events prevent or delay performance will be interpreted with due regard to the contract as a whole and to the precise terms of the clause.

Law of contract

12. In a sporting contract, as with any other contract, it is important to decide which system of law applies to the contract. That will be decided by conflict of law rules. Many sporting contracts will contain express choice of law clauses together with references to domestic or international arbitration. Sporting contracts with an international focus may well contain a reference to the Court of Arbitration for Sport (CAS) and a choice of law clause applying Swiss law. Where there is a reference to CAS in the contract, the CAS rules[4]also mean that, in the absence of a choice of law by the parties, a CAS Panel may apply Swiss law in ordinary arbitrations and the law of the country in which the federation whose decision is challenged is domiciled in appeal arbitrations. This will often be the law of a civil law country. Under civil law systems, like Swiss law, a code will govern contract law and different principles in matters such as interpretation and the application of *force majeure* will be applicable. If that situation applies a New Zealand lawyer will need to seek assistance from a foreign lawyer.

13. Under Swiss law (and other civil law jurisdictions) the principles of the interpretation of contracts are formulated differently in terms of finding the subjective contractual intention of the parties. If that subjective intention cannot be determined the contract is interpreted by reference to the principle of good faith. This involves asking what a reasonable person in the place of the contracting parities would have considered to be the contractual intention[5].

[3] See, for example, *DHL v Richmond* [1993] 3 NZLR 10.
[4] CAS Rules, R45 and R58.
[5] CAS 2017/A/5172 explaining the principles of contract interpretation under Swiss law - Article 18 Code of Obligations.

While the expression of the principles is different, results would not seem to differ that much. Again, if Swiss law or another civil law system was applicable, the civil law concept of *force majeure* would be potentially available. Like the doctrine of frustration at common law, the civil law concept is a principle provided for by law – by the relevant civil code. As expressed in CAS awards, *force majeure* involves an objective impediment beyond the control of the party which is unforeseeable that cannot be resisted and that renders the performance impossible.

The effect of external events

14. At common law where an external event affects the performance of a contract and prevents one or other of the parties from performing, the main questions will be:

    - Does the contract provide for relief from the failure to perform by excluding or excusing a breach of contract caused by the event?

    - Has the contract been discharged under the doctrine of frustration?

15. The important initial point to make is that, while both questions involve the exercise of construing the contract, they involve different substantive principles. The first involves examining the terms of the contract to decide whether particular contract terms apply in the circumstances. This is the familiar exercise of determining what the parties have agreed in their contract.

16. The second involves considering the terms of the contract, its overall context and wider considerations, in particular as to the assumptions about the risk of external events, to find what the parties' expectations of performance were, and deciding whether the effect of the changed circumstances created by an external event on those expectations means that the contract has been discharged by operation of law. The approach to the exercise like that to interpretation is objective. The application of this substantive legal principle is an exceptional course for the common law.

Contract Clauses – force majeure, exceptions and other clauses

17. In the current situation, the contract clauses which seem likely to attract most attention will be those which are headed *force majeure*. This description of the clauses come from civil law but, at common law, exceptions from performance for *force majeure* are only relevant if a contract provides for them in terms which are certain enough to be enforced[6]. This is solely a matter of contract and *force majeure* is not a term of art. As noted, in civil law systems *force majeure* is a separate legal principle (like frustration at common law) which may provide relief where external circumstances affect contract performance.

18. Parties to contracts in a wide range of commercial activity, such as international trade, construction projects and shipping, have long included clauses in their contracts in order to address possible exceptional events not brought about by the contracting parties, and beyond their control, which may affect contractual performance. Where parties negotiate and enter into a long-term agreement, they will usually recognise that many possible changes in circumstances may affect performance under the contract and they may agree to insert a *force majeure* or mutual exceptions clause which provides for some relief from liability for breach. There are standard clauses in different standard trading forms and international instruments but the clauses come in many different forms. Clauses headed *force majeure* may well be present in commercial contracts in sport, particularly those for a longer term – team participation agreements, sponsorship for competitions, clubs, broadcasting, individual contracts of service.

19. Clauses will have to be interpreted on their particular terms. Clauses usually list a number of external causes beyond the control of the parties and provide for relief from a breach where performance has been made impossible (or hindered or delayed) by such an event. Usually a list will be drafted in a manner which allows other events which are beyond the control of the parties but which are not listed to be relied on. The relief may take the form of suspending the effect of the contract for a period and providing that the party entitled to the benefit of the clause will not be in breach for the period during which the event operates. Clauses often provide that the party relying on the clause has to take all steps to

[6] See *British Electrical Assoc Ltd v Patley Pressings Ltd* [1953] 1 All ER 94 where "usual force majeure clauses" too vague to be enforceable because there were many clauses in use in the trade. Court said *obiter* that 'subject to force majeure" would have been enforceable. Such cases of uncertainty are most unlikely to arise.

avoid the effect of the *force majeure* event. In many clauses, if the event lasts for a specified period of time the party not relying on the clause or both parties may terminate the contract, with provisions for payments due to be made and those in future not to be payable. The clauses which I have seen do not usually provide for any revision of obligations or for any obligation to negotiate variation to terms where performance is affected by a force majeure event. Clauses will usually contain notice requirements as a condition precedent for the application of the clause.

20. The list of events which trigger the clause is likely to be drafted in a manner which allows for an expanded as opposed to *eiusdem generis* reading but all will depend on the precise wording of the clause. Absent express provision, the general broadening of possible events by such phrases as "or any other cause beyond the control of …" will not mean that economic factors such as unanticipated economic downturns or credit tightening will be interpreted as falling within the events covered by a force majeure clause[7].

21. It will be for the party seeking to rely on the clause to show that it applies on the facts. Where performance has to be shown to be impossible (as will be the case absent specific wording), the party will have to show that other means of alternative performance were not available. This will depend on the particular circumstances and the evidence as to the means of alternative performance which were available.

22. Although some *force majeure* clauses provide for a form of automatic frustration, under many clauses the party which seeks to rely on the clause will have to show that it was ready, willing and able to perform its obligations were it not for the *force majeure* event[8].

23. In summary, a party seeking to rely on a *force majeure* provision will generally have to show that:
    - The event relied on is within the clause:
    - The event has affected the performance as provided by clause – impossible/ hindered or delayed;

[7] *Tennants v CS Wilson Co Ltd* [1917] AC 495; *Tandrin Aviation v Aero Toy Store LLC* [2010] EWHC (Comm) 40.

[8] For an instructive recent decision on the interpretation and application of a provision in a long-term contract of affreightment which provided for exclusion from liability for force majeure events, see *Limbungan v Classic Maritime* [2019] 4 All ER 1145.

- The party would have been ready willing and able to perform its obligation but for the event; and
- All steps to mitigate/avoid the effect of the event have been taken.

24. It is important to note that clauses giving relief may come under different headings – it is the content of the clause which counts, not the heading. Exceptions clauses of application to both parties may provide exclusions from liability in straightforward terms where events fall within the wording.

Other clauses

25. In addition to *force majeure* or exceptions clauses some contracts, particularly those which are of long duration, may provide for obligations to review or renegotiate terms where external circumstances affect performance. Parties may expressly provide for obligations of good faith to apply to such reviews and negotiation. New Zealand law, like English law, does not recognise a general implied principle of good faith underpinning contract law. Common law courts have, however, recognised and enforced express obligations of good faith agreed by commercial parties in their contracts[9]. In addition to those contractual relations which are established as being subject to fiduciary obligations such as joint venture contracts, the courts have also recognised a group of relational contracts which will be subject to implied obligations of good faith.

26. Contractual discretions may also be relevant where performance has been affected by an external event. A contract may expressly provide for a party to have a discretion whether to consider exercising a contractual power varying the content of obligations in certain circumstances. Discretions will generally be interpreted as requiring that the party given the discretion will not act capriciously or arbitrarily but, more rarely, depending on the provisions of the contract and the context, discretions may be interpreted as requiring that the result of the exercise produces an objectively reasonable result in the context of the parties' bargain.

[9] See for example decisions in the UK courts – *Emirates Trading Agency LLC v Prime Mineral Exports Ltd* [2014] EWHC 2104 (Comm); *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB).

Effect of contract on availability of frustration

27. The basic position is that, if the contract is interpreted as providing for the event which has occurred on its terms, whether expressly or by allocating risk for unforeseen events, the contract will govern and the doctrine of frustration will not be applicable. This will, however, be a matter of construction of the contract, and it may be that a contractual provision providing for relief from liability arising from an external event is found not to cover the particular event which has occurred, or the extent of the consequences of the event, so as to preclude reliance on the doctrine of frustration.

28. If a contract contains no exception or *force majeure* clause, the basic position will apply and a party which cannot perform as a result of an external event will be in breach, unless the contract has been frustrated by the circumstances which have arisen.

The doctrine of frustration

29. Under New Zealand law, as in other common law jurisdictions, a contract may be discharged by operation of law under the doctrine of frustration where an event occurs after the contract, without the fault of either party, which so fundamentally affects the performance of the contract that, in the eyes of the law, the contract is no more. Until the middle of the nineteenth century[10] the reluctance of the common law to recognise an impediment to performance as an excuse not to perform meant that, unless the parties stipulated in their contract for some variation of performance in their contract, the law would not intervene[11].

30. The underlying principle that the common law upholds the performance of binding agreements is also reflected in the general difficulty in establishing that a contract has been frustrated. This means that, in many instances, where unforeseen events impede performance under a contract, the party which cannot perform or can only perform at a

[10] *Taylor v Caldwell* (1863) 3 B & S 826;122ER 309 – 4-day licence agreement for purpose of shows held discharged where fire destroyed building – recognition of frustration based on writings of civil lawyers. Implied term basis.
[11] See for example *Paradine v Jane* (1647) Aleyn 26 – expulsion from leased premises by invading force no defence to claim for rent arrears.

significant loss, will not be relieved of its obligations unless the contract stipulates for this.[12] Unexpected cost or economic difficulties or the effect of inflation will not mean that a contract is frustrated – the law holds that these are foreseeable risks in commerce.

31. The well-known dicta in leading English cases were adopted by the New Zealand Court in *Planet Kids v Auckland CC* in which the Court reversed a decision that a settlement agreement had been frustrated.[13] The Supreme Court referred to well-known *dictum* of Lord Radford in *Davis Contractors Ltd v Fareham UDC*[14]:

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the *contract*.

And, also, to Lord Reid in the same case. The Court also referred to the statement of Lord Simon in *National Carriers Ltd v Panalpina*[15] which is to the same effect but which also captures the idea that the interest of justice in the particular case is a factor in deciding whether to declare that a contract has been frustrated.

The Supreme Court also adopted the broad "multi-factorial" approach to the inquiry into whether a contract has been frustrated expressed by Rix LJ in *The Sea Angel*[16].Rix LJ referred to the approach to the question as being: "modern and flexible and not subject to being constricted to a narrow formula".

32. The various tests and approaches are general in nature and underline how the exercise involves very specific consideration and assessment of the circumstances in issue. They show that, while the question whether a contract has been frustrated is a matter of law, the answer is very much a matter of arbitrator or judicial assessment[17].

---

[12] See for example *The Power Co v Gore DC* [1997] 1 NZLR 537.
[13] [2013] NZSC 147.
[14] *Davis Contractors v Fareham UDC* [1956] AC 14 at 728.
[15] [1981] A.C 675.
[16] [2007] EWCA 547.
[17] "… the conclusion is almost completely determined by what is ascertained as the mercantile usage and the understanding of commercial men" per Lord Roskill in *The Nema* making the point that provided a decision by an arbitrator should not be overturned unless the wrong approach on the law has been taken or the decision can be said to be one which no reasonable arbitrator would have made.

33. The fact that an event is forseeable by the parties at the time of the contract does not necessarily mean that the doctrine of frustration cannot apply, although a high degree of foreseeability may well have that consequence. As noted above, if the parties have provided for the event by the terms of their contract, the doctrine will not apply. This will depend on the construction of the contract and a court may find that a contract which does not fully address the risk of a supervening event and its consequences, does not prevent the application of the doctrine.[18]

34. The doctrine can be applied to all contracts. Various different events and circumstances may cause a contract to be discharged by frustration. The impact of government regulation or orders preventing or radically changing performance under the contract is a standard known example of a possibly frustrating event[19]. The events must not be the result of the actions of the parties.

35. External events may cause delay in contract performance. In such cases where the length of delay is uncertain, its effect will have to be assessed in the circumstances at the time in order to ascertain whether the likely delay will be of such a length to frustrate the contract by making performance radically different. Where there is uncertainty, the decision whether a contract has been frustrated will be made by deciding whether the prospect of delay on the information available to the parties at the time was such that, on the balance of probabilities, it frustrated the contract. The Courts have acknowledged that, in some circumstances, a court or arbitrator may have to decide a question of frustration rather than forcing parties to wait and see how long delay in fact lasts.

36. As might be expected, the New Zealand cases are rare and involve a range of events and circumstances in commercial life, although the courts have not seen the shipping and trade cases which make up a good deal of the common law in this area. The doctrine is potentially generally applicable to any contract[20]. In one of the older NZ cases, the forseeability of earthquake risk was one reason for not finding that a contract for the provision of electricity was not frustrated by damage caused by fire to premises after an earthquake – the result

[18] *Bank Line v Capel* [1919] A.C. 435.
[19] See the various charterparty cases at the time of the World Wars and other international times of crisis – the doctrine can be said to have been developed in charterparty cases.
[20] The Court of Appeal held that it was applicable to contracts of employment in *Karelrybflot v Udovenko* [2000] 2 NZLR 26 (CA) although the Court rejected the plea on the ground that the parties had been aware of the risk of the frustrating event and assumed the risk in the contract.

seems to be better founded on the nature of the agreement[21]. In the aftermath of the Christchurch earthquakes the High Court held that the doctrine was applicable to leases, following established UK precedent, but that the effect of the earthquakes did not frustrate a contract of perpetual lease of 999 years.[22]

Effect of Frustration

37. The effect of the application of the doctrine at common law is that the contract is discharged as a matter of law as regards the future obligations of both parties. The contract remains a good contract up until the time of frustration. The harsh position at common law which was that payments made before discharge could not be recovered (unless there had been a total failure of consideration), there was no payment for part performance where there was an entire contract and payment obligations arising before discharge had to be met, was mitigated by *The Frustrated Contracts Act 1944* – now ss 60-69 Contracts and Commercial Law Act 2017 (CCLA). These provisions do not deal with whether a contract has been frustrated – that is for the common law – but address the consequences. To my knowledge their application has not been considered by a New Zealand court.

38. Under the CCLA provisions, payments made before frustration are recoverable and payments due but not paid before discharge cease to be payable. A party to whom a payment has been made or is payable who has incurred expenses may be able to retain a portion of the payment or recover a sum for expenses (the assessment can include overhead expenses). A party which has received a valuable benefit before discharge from another party may be ordered to make a payment to the other party in relation to the benefit. The amount of the payment will depend on the circumstances of the case, the amount of any expenses incurred by the party receiving the benefit and any sums payable under the other provisions.

[21] *Hawkes Bay Electric Power Board v Thomas Borthwick* [1933] NZLR 873 (SC).
[22] To my knowledge there were two decisions in which consideration was considered after the earthquakes – *Roman Catholic Bishop v RFD Ltd* [2015] NZHC 2647; *GP 96 Ltd v FM Custodians* [2011] 12 NZCPR 489 (frustration was one issue in injunction proceedings). It is surprising that the question of frustration does not appear to have been finally considered in commercial leases where properties subject to lease were inaccessible for significant periods of time as a result of government orders. The uncertainty over the position on payment of rent/frustration where properties were inaccessible led to changes in the ADLS standard form of lease to provide for abatement of rent to a fair rental and termination if inaccessibility continued for a specified period of time.

39. Notwithstanding this power to adjust payments where frustration has occurred, the important point is that frustration operates on an all or nothing basis. It brings the contract to an end by discharge – this is not a matter of election by either party.

40. Under New Zealand law, the only way to provide for a more nuanced approach to supervening events which affect performance is to stipulate for this in the contract. Commercial contracts may seek to do this in more developed terms but, from my review of some standard clauses used in sporting contracts, this is not common in these contracts. The clauses usually relieve a party which can bring itself within its provisions from breach for a period of time before providing for termination after that period has elapsed.

Application and looking ahead

41. COVID-19 and the government orders in response which made the activity required for sporting competition illegal, are likely to fall within the events in *force majeure* clauses (and possibly other mutual exception clauses in contracts). They are also the kind of external event which can bring about the frustration of a contract. Whether it is the contract or the doctrine of frustration which applies will depend on the terms of the contract, and whether the parties have provided for the event and its consequences in their contract.

42. As has been outlined, a consideration of the application of the doctrine of frustration will involve a broad "multi-factorial" objective inquiry considering the expectations of performance under the contract at the time it was entered into, and whether that expected performance has been radically affected by the event, when reasonable expectations as to the future changed performance are considered.

43. The effect of COVID-19 and the orders preventing the playing of sport have in some instances brought a season to an end or meant that a season has to be completely altered to be finished without crowds. Where a contract is based on the provision of sport over a competition or series of events and its purpose is to provide the benefit of the sporting product to one of the parties in a particular form, as will be the case with many contracts, a plea of frustration is likely to be available. Whether it succeeds will depend on the specific circumstances. While the traditional reluctance to declare that a contract has been frustrated must be noted, the circumstances which seem likely to be applicable in the context of contracts whose purpose is linked to sporting performance over a season are

likely to be exceptional, and may well support such orders. Parties which consider that contracts have been frustrated by events may wish to seek declarations to the effect at an early stage so that the position is clear.

44. A simple example of a seasonal contract would the position of season-ticket holders at clubs which cannot provide the advertised home games. Absent express stipulations, the contracts are likely to be frustrated and refunds will be due subject to any adjustment for reasonable overhead expenses. The more detailed commercial agreements will produce issues of greater complexity on the terms of the contracts and the facts relevant to the expected contractual performance, but if their purpose is linked in a similar way to the provision of sporting events over a season, the results might be similar.

45. Where more developed commercial agreements contain *force majeure* clauses, parties will have to determine whether those clauses apply and what their effect is under the contract (and whether they exclude the operation of the doctrine of frustration). The pandemic and/ or government regulation is likely to fall within any *force majeure* clause and is likely to have prevented performance (and still be preventing performance). Under many clauses, protection may be limited and lead to termination at the end of the period of relief.

46. Some commercial parties may be discovering that the *force majeure* clauses, which are often seen as boilerplate additions in the drafting process, do not adequately address the position brought about by recent events.

47. Of course, if there has been a failure to perform obligations under the contract and the contract contains no defence or relief, and frustration does not apply, a party may face significant claims for damages.

Negotiations

48. Many parties, particularly those with ongoing inter-dependent relationships, will wish to try and arrive at negotiated solutions – the first step in that is to work out the current legal position under existing contracts. Often parties may seek to negotiate to vary existing arrangements or reach an agreement on their discharge. It will be important to make clear what is being done. Parties should expressly provide for the discharge of previous

agreements if that is what is intended. Agreements to vary existing agreements will need to comply with clauses for variation in the existing agreement and should be in writing.

The future

49. In many situations sporting bodies will have to negotiate new agreements (presumably after the position under existing contracts has been resolved or reserved). In some agreements, parties may wish to provide specifically for variation of the obligations and rights in the event of unforeseen future events, or for a process to address the consequences, and to provide specifically for the effect of further outbreaks of COVID-19 and related government orders on performance. Any inadequacy in the existing agreements should be carefully worked through and identified. The bluntness of the doctrine of frustration and the limited scope of some current *force majeure* provisions seem likely to see a good deal of thought being given by commercial parties and advisers to this process.

Paul David QC

23 May 2020.