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The Braganza duty featuring Force Majeure and the COVID-19

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The COVID-19 outbreak has caused havoc to business entities, owing to lockdowns, courts being shut, and disputes being on a surge. Businesses will appoint convenient alternatives in resolving their disputes. As a result, the parties will look to find alternatives to avoid their obligations under the contract. Enter force majeure. In essence, this paper discusses and touches upon, the practical needs for force majeure clause in commercial contracts, especially in the wake of the wider climate of the COVID-19, the effect on the choice of law, the types of force majeure rights (mutual or unilateral) and a sample practical force majeure clause, drafting considerations and preferred wordage used in the force majeure clause, the impact of case laws concerning force majeure, the practical considerations to take before invoking a force majeure clause, supplementary clauses facilitating force majeure clauses, strategic roles played by legal practitioners, implied and express duties, what the Braganza duty is and it's applicability with relevant case laws and finally the concluding thoughts of the author with a discussion of special case law.

Keywords: *force majeure, covid-19, pandemic, braganza duty.*

INTRODUCTION

FORCE MAJEURE FEATURING THE CORONAVIRUS

The COVID-19 pandemic (**"Pandemic"**) is an all-pervasive issue giving birth to new and unfettered issues on a daily basis, causing widespread radical disruption, hindering businesses

and therefore, the performance under several contracts are possibly delayed, stymied, upended, or even terminated. As a result of such hindrances, a likely outcome is that businesses may seek recourse from their contractual obligations and invoke force majeure clauses (**''Clauses''**) in the context of this Pandemic. To sustain business and function around this crisis, it is paramount to identify uncertainty, reflect and appropriate risk allocation between the parties, expound on the laws applicable to the respective transactions, delineate potential liability in the diverse circumstances that may arise[1] , and focus on how legal practitioners can address these uncertainties by adopting rational approaches in future. This paper aspires to serve these functions.

INTRODUCTION: WHAT IS A CLAUSE?

A Clause is a contractual provision that is intended to bestow legal relief(reallocate risk) upon a party on the happening of unforeseeable and uncontrollable supervening events, acts, or occurrences (be it factual or legal) not caused by the negligence or willful misconduct of the affected party which significantly affect or impacts the party capability to perform its contractual obligations despite exercising reasonable care and caution by that party to prevent, delay, avoid or mitigate such events, acts or occurrences.[2]

Example: Pandemics, riots, natural disasters.

***The effect and considerations of a Clause*:**

A rational approach for parties to follow is to address the widespread characteristics of force majeure events and the party's ability to secure alternative sources in the contract to perform their obligations under the contract. If the specified force majeure event is listed in the contract, this means that the parties have allocated the risk of the specified event to the obligee and thus, if the specified event occurs, the impacted party is excused from performance.

[1] Raymond O'Connor, 'Compare and Contrast Effictiveness of Risk Allocation Clauses in the UK' (*Lexology*, 25 May 2017) <https://www.lexology.com/library/detail.aspx?g=bde49fa1-ea55-46d0-9ece-8c7bdec7390e> accessed 21 April 2022

[2] Nancy A. Wodka, 'EPC Contract Drafting Considerations: Force Majeure Provisions' (*Westlaw*) <https://content.next.westlaw.com/GenericError?aspxerrorpath=/Document/I03f4d89eeee311e28578f7ccc38dcbee/ViewFullText.html> accessed 15 April 2022

However, if the specified force majeure event is not listed in the contract, in essence, this means that the parties have allocated the risk of the specified event to the impacted party, in other words, should the specified event occur and a dispute breaks out as a result of such an occurrence of the event, the impacted party:

- is not excused from performance, and must perform the contract; and
- a willful breach of the contract will occur if the impacted party chooses not to perform its obligations, even if the specified event renders performance impossible.

The above definition of the Clause covers various ingredients of a force majeure event. One of the key ingredients is the foreseeability of the event. In essence and in practice, there would be a no room for courts to inquire into the foreseeability of an event if the parties unambiguously allo**cate** the risk of the specified event in their contract, however, that would not amount to the courts disregarding the notion of inquiring into the foreseeability of an event if the parties have explicitly listed the said event as a force majeure event.[3]

***The need for undertaking reasonable actions by the invoking party of the Clause*:**

Despite the inclusions of various events in the contract between the parties to the transaction, there is an additional requirement accompanied by the caveat that the party choosing to invoke the protection of the Clause must have taken reasonable steps to perform their obligations under the said contract and law or prevent a force majeure trigger, to mitigate its effects or both.

***Other effects of the clause*:**

The force majeure clause does not generally relieve both parties from all liability or contractual obligations or bring the contract to an end. Depending on the wordage in the Clause, the parties may excuse a party from performing specified obligations (those obligations that the trigger event prevents or impacts) and may stipulate a procedure for communicating about or

[3] 'Force Majeure clauses: Key Issues' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/5-524-2181?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 19 April 2022

informing the intricacies of the said event between the parties and for varying the parties' obligations.[4]

***Perspectives and interpretations*:**

Well advised parties to a commercial transaction would opt to draft the Clauses differently to secure and propel their commercial objectives. For instance, the party (the seller or obligor) bearing the lion's share of the principal non-payment obligations of the commercial contract is typically is the main beneficiary of the Clause in a sale of goods transaction and therefore, the said party would attempt to negotiate a broadly drafted Clause, by using open-ended or catch-all language (acts beyond the reasonable control of the impacted party or other similar events beyond the reasonable control of the impacted party) that encapsulates an array of diverse specified events, giving rise to excused performance and limit the buyer's express contractual remedies when performance is excused.[5] In contrast, the buyer in a sale of goods transaction (**''Buyer''**) would desire to draft the force majeure provision as narrowly as possible, limiting the definition of the force majeure events to those events that are genuinely and conscientiously outside the seller's control and the ability to terminate the contract, should a force majeure event persist for a certain length of time.[6]The Buyer is least likely to be impacted by the happening of the force majeure event and therefore, would favour and seek recourse to this approach to insulate itself. Clauses are often subject to implied limitations and courts have the proclivity of construing them restrictively, for instance, In ***Metropolitan Water Board v Dick Kerr & Co***. [1918] AC 119, the Clause purported to cover delays "howsoever caused" and despite the wordage contained in the Clausebeing catch-all language, the House of Lords held that the Clause nonetheless did not cover substantial delays caused by the First World War: properly construed, the force majeure was only intended to cover minor delays.[7]

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[4] 'COVID-19: Commercial Contracts FAQs' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/Document/I7a4d4ad76eb611ea80afece799150095/View/FullText.html?contextData=(sc.Default)&transitionType=Default> accessed 24 April 2022

[5] Force Majeure clauses: Key Issues (n 3)

[6] *Ibid*

[7] Peter de Verneuil Smith QC, Adam Kramer, QC & William Day, 'COVID-19: force majeure, frustration and illegality in English law: a detailed guide' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/w-024-

It is paramount to negotiate and draft reasonably well balanced (not one-sided) and fair Clauses for the benefit of both the parties to the transaction, in order for such Clauses to hold good concerning their enforceability in the court of law. Reasonably well-balanced Clauses serve a two-fold function, firstly, legal enforceability of such Clauses in court, and secondly, propelling commercial certainty thereof. For instance, in the context of this Pandemic, as regards legal enforceability, the listing of events in the Clause that are well known and that the parties were aware of at the time of bespoke contract negotiations, therefore reasonably foreseeable such as, the outbreak of the COVID-19 mutations or variants (Coronavirus Omicron) or subsequent waves of this Pandemic may not, in the circumstances of that case, be tenable, defeating the underlying purpose of the said Clause, to the extent that, the courts would be unwilling to countenance such events and therefore, falling short to meet the requirements of a valid force majeure event. Greater the foreseeability of a force majeure event, the higher the chances of preventing or staving off the consequences of the purported force majeure event. Objectively, this would mean that since the purported force majeure event is likely foreseeable and the parties have possibly accepted or assumed the running risks accompanied in the transaction and cannot ward off such risks through the wordage of the contract.

THE LISTING OF SIMILAR VERSUS DISSIMILAR EVENTS IN CLAUSES

To add to what was earlier discussed, the obligor would employ this approach of including catch-all language or draft broadly and extend the ambit of the force majeure. A typical example would amount to parties entering into contracts in the period between waves of this Pandemic, in the period when the restrictions (lockdown restrictions for instance) are eased, however, the possibility of an upcoming wave of the Pandemic is reasonably foreseeable.

Obligors include catch-all language in the clause to capture events that are either or both:

- similar to the listed force majeure events; and/or
- dissimilar to the listed force majeure events.

6685?transitionType=Default&contextData=%28sc.Default%29> accessed 20 April 2022

However, a caveat for parties to watch out for when incorporating the catch-all language in relevant provisos is whether such catch-all language is in congruence with applicable statutory law or common law, this is because, this approach may lead to unintended consequences, for instance:

i) unintended consequences when using catch-all language relating to similar listed events: In this case, the court may interpret the Clause to capture only unlisted events that are similar in nature to the listed events and this would narrow the scope of this clause if parties intended to capture unlisted dissimilar events contained in the Clause;[8] or

ii) unintended consequences when using catch-all language relating to dissimilar unlisted events: In this case, the court may interpret the Clause to capture only unlisted events which are dissimilar in nature to the listed events and this broadens the scope of the Clause if the parties intended to capture events that are similar to the listed events contained in the Clause.[9]However, it is important to note that, apart from the wordage used in the Clauses, the courts in determining the scope and degree of unintended consequences, will have to grant careful consideration to other factors such as the factual matrix differing in a case to case basis, the occurrence and nature of causation, the breadth of the Clause, the intention and commercial objectives of the parties in entering into the contract and the type of sectors that are involved in the commercial transaction, inter alia.

For example, the factors taken into consideration in an insurance policy (**''Policy''**) ideally illustrates what the above paragraph conveys. Therefore, it is not sufficient for a Policy to cover the Pandemic even though the insured party suffered a loss because the rights under the Policy will have to be assessed and applied to the facts. As with Clauses, there is a need for proximate causation to occur and it should be reasonably shown that by virtue of such an occurrence, the party seeking to rely on the Clause was unable to perform its contractual obligations.

[8] Force Majeure clauses: Key Issues (n 3)
[9] *Ibid*

THE EFFECT OF FAILURE TO RELY ON A FORCE MAJEURE CLAUSE

The party that seeks to rely on a Clause may fail, therefore, and the effect of such failure would lead to a breach of contract. However, that party may attempt to assuage the loss or liability by offering alternative performances, but the impacted party may not be under the duty to welcome these alternatives even though such alternatives are reasonable enough to mitigate the loss.

WHAT ARE THE RAMIFICATIONS ON THE PARTIES IF THE CONTRACT DOES NOT CONTAIN A CLAUSE?

If a Clause is absent in the contract between the parties and in such an instance if an occurrence of a force majeure event takes place, no remedy will flow from the happening of the said force majeure event, further common law has no specific rule of force majeure. Therefore, if the impacted party's right is absolute under the contract, then failure to perform the obligations will amount to a breach and in this case, the impacted party would have a right to claim damages, and perhaps be entitled to terminate the contract. Thus, in the exclusion of an express provision, a Clause will generally not be implied in the contract.

***Practical steps to assess a Clause*:**

There are five essentials that parties must be on the lookout for and assess before invoking the Clause under the contract. These essentials are addressed and broken down through a series of steps below.

***Step-1*:** Examine whether the contract includes a Clause? If the contract does not include a Clause then the purported force majeure event is generally not to be implied. The Clause serves the function of bringing certainty to the questions being faced by turning them into ordinary construction of contract questions, in contrast with common law doctrines, which require resort to general principles and detailed case law.[10]

***Step-2*:** Have the consequences of a force majeure been triggered

[10] Peter de Verneuil Smith QC, Adam Kramer, QC & William Day (n 7)

In essence, the party that wants to claim relief from the Clause must show the following:

- trigger event: The occurrence of the force majeure event that is provided for, or defined in, the contract;
- foreseeability: The trigger event was unforeseeable;
- causation: the trigger event prevented or delayed or negatively the performance of the party's obligations as stipulated in the contract;
- uncontrollable: the non-performance of obligations is because of circumstances beyond the relevant party's control, for which the relevant party did not assume responsibility; and
- mitigation: the relevant party has taken all reasonable steps, to avoid the impact of its non-performance, or assuage, and mitigate the losses caused by virtue of non-performance.[11]

***Step-3*:** Has the other party provided adequate proof?

The party wanting to claim relief from the Clause must prove the following:

- the facts in question fall within the scope under the Clause;[12]
- that the purported force majeure event solely had a direct causal link to that of their default of performance; and
- any other information that the Clause requires from the relevant party (for example the relevant party has strictly complied with the procedure of serving a notice to rely on a purported force event to the other party as stipulated under the contract).[13]

***Step-4*:** Examine the reliefs available under the Clause?

There may be several reliefs available to either both the parties or just the affected party. For example: When a force majeure event occurs, the parties are now, as a consequence, entitled to new termination rights or there might be a time limit for the suspension of

[11] 'COVID-19: Commercial Contracts FAQs' (n 4)
[12] *Great Elephant Corp v TrafiguraBeheer BV* [2013] EWCA Civ 905 [31]
[13] 'COVID-19: Commercial Contracts FAQs'(n 4)

contractual obligations. It is paramount to examine and understand what are the remedies available to the parties under the Clause provides, to serve a twofold function, namely:

- what relief the relevant party or both the parties are seeking to opt for; and
- to enforce a claim under the Clause.

***Step-5*:** Examine the entire contract. The contract may contain other relevant supplementary clauses to assist the parties or the affected party solely. For instance, the contract may stipulate that the parties need to follow certain a process or steps (a business continuity clause) or invoke other remedies before seeking refuge in the Clause. There lies a possibility of other provisions under the contract that might exempt the parties from performing their contractual obligations. Therefore, it is important to read the contract as a whole before claiming relief in the Clause.[14]

Undertaking these rational steps would help the parties in assessing and understanding the intricacies of the Clause, and identifying their legal position before deciding to enforce the Clause.

***Legislation and applicability*:**

The usual principles of contract interpretation apply to Clauses and this includes restrictive interpretation of provisions that excuse a party from liability for what would otherwise be a breach of contract.[15]A Clause by nature is a contractual remedy and not a statutory remedy, therefore in practice, when the courts decide on its applicability, they are influenced by the scrupulous analysis and review of the wordage and its interpretation contained within the Clause to derive the intention of the parties vis-à-vis the facts of the case, the context of the information available or reasonably known to the parties at the time of entering into the contract,[16]the proximate link between the non-performance of the contractual obligations and the event (otherwise excludable event), measures taken to avoid or mitigate the event,

[14] *Ibid*
[15] *Ibid*
[16] *Ibid*

adherence to notice provisions and the degree of event unforeseeability. Therefore, the applicability of this Clause will primarily depend on and be influenced by sound legal drafting principles.

CAN A CONTRACT PROVIDE THAT IT WILL NOT COME INTO FORCE UNTIL PANDEMIC RESTRICTIONS ARE EASED?

In effect, a contract is binding on the parties if such a contract is in force. In the case of a contract coming into force after the Pandemic restrictions are eased is not binding on the parties because there is no intention to be bound by the contract and the wordage in the respective clause in the contract is likely to be a non-binding statement of intent by which any party is free to withdraw before the contract comes into force.[17] In essence, in a binding contract, the parties will not be able to withdraw from the contract or insist on the change of the contract's terms unless specified otherwise in the contract therefor and therefore, for instance, confidentiality and representation clauses are in force as soon as the contract is entered into.

PRACTICAL SAMPLE CLAUSE AND DEFINITION CLAUSE

***Definition clause of force majeure*:**

"**Force Majeure**" means and includes any Vis Major (acts of God) and any circumstance beyond the reasonable control of the party, including without limitation, the following: any act of nature, accident, explosion, earthquake, flood, drought, other potential disasters or catastrophes such as epidemics and pandemics (and their mutations), casualty, strikes, lock-outs, damage, labour troubles, riots, embargo, war (whether or not declared), governmental order, action or law, regulations, or decrees and other similar events, acts or occurrences beyond the reasonable control of the parties.[18]

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[17] *Ibid*

[18] 'General Contract Clauses: Force Majeure' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/3-518-4224?transitionType=Default&contextData=(sc.Default)> accessed 11 April 2022

Force Majeure:

- Neither party shall be held responsible, or liable for the inability to perform any or all of the obligations and duties under this agreement upon the occurrence of an event of Force Majeure.
- Neither party shall bear the liability of any kind, where the impossibility (temporary or permanent) of performance or fulfilling of obligations under this agreement or the happening of an event of Force Majeure, is unforeseen, or even if foreseen, out of the control of the parties and when neither of the parties had intended the occurrence of such impossibility.
- In allocating the risk of delay or failure of performance of the parties' respective contractual obligations under this agreement, the parties have not taken into account the possible occurrence of any of the events listed herein or any similar or dissimilar events beyond their control, irrespective of whether such listed, similar or dissimilar events were foreseeable as of the date of this agreement.[19]
- Upon the occurrence of such event, the party which claims that its performance under this agreement has been rendered impossible by the aforesaid Force Majeure event, shall within a period of ten (**''10''**) days from the occurrence of such event, give notice by sending an email or written communication to the other party regarding the same and the period of time the occurrence is expected to continue. The party claiming the impossibility in performance under this agreement shall cause the necessary particulars of such Force Majeure event to be given to the other party and shall use diligent and reasonable efforts to end the failure or prevent or delay and ensure the effects of such a Force Majeure event are minimised.
- The performance or fulfilling of obligations under this agreement shall be suspended only till the time the Force Majeure event lasts. On the ending of the said Force Majeure Event, the parties to this agreement shall be obligated to resume their performance of their contractual obligations as soon as reasonably practicable and so long as there is no impediment or negative impact in the performance of such contractual obligations or

[19] *Ibid*

otherwise the performance of obligations is no longer of any relevance, considering the object of this agreement.

TYPES OF CLAUSES: SELECTING MUTUAL VERSUS UNILATERAL PROVISIONS

It is commonplace in practice for standard Clauses to be drafted to apply mutually for both the parties, however, a unilateral provision functions solely to excuse the specified party in the Clause on the happening of a force majeure event. The nature of the transaction, the term of the transaction, and the bargaining power of the parties are key factors that influence the decision of whether to vault in a mutual or unilateral provision in the contract.

***Learnings, application, and reflection*:**

With the prevalence of this Pandemic, governments, and health experts issue informed guidelines regularly, the law is dynamic and quick to catch up with the present (foreseeability), arguably, this pandemic would not shake the sound principles of contract law. It would be difficult for businesses to establish the performance of their obligations because of this pandemic. Instead, the following approaches can be adopted.

***Learnings*:**

Revamp the wordage contained in the Clause and rope in alternative remedial clauses to supplement the Clause(Definition, notice provisions, invoking alternative remedial contractual clauses).

Application by law practitioners: Whilst drafting a Clause, legal practitioners must carefully review its definition contained in the contract and insert terms within the Clause, such as:

- certain exceptional, extreme, and express events (i.e. the Pandemic) and review the language of the Clause in a manner reasonably qualifying as a force majeure taking into consideration the type of the contract that, upon occurrence, absolves performance of the contract; and
- specific obligations: Upon the happening of such event, the other party should be promptly notified by the non-performing party on such happening, inter alia (furnish

the magnitude to which the performance is compromised and periodical reports on progress, including the anticipated non-performance duration), adopt measures to avoid or mitigate the event to resume performance and include a default term,[20] upon completion of such term, entitles the parties to terminate the contract.

REFLECTION

The effect of including a default term: Brings certainty to the contract and provides for, a relief term by which protection is granted from unilateral termination.

Cons of drafting a Clause: Conversely, taking this Pandemic as an example, in the future, there are possibilities of inchoate contingencies arising that carry a likelihood of legal practitioners not being able to predict and enlist all the exceptional events (at the time of outbreak), for instance, the break out of COVID-19 variants, that should ideally be included in the Clause.

Alternatives:

Hence, it is advisable to also consider the protection of alternative remedies in the law of contract (frustration of contract).

To further invigorate client protection, encapsulating events (independent of Clauses) that are foreseeable with the specific risks that they carry and their likelihood of stymying the client's ability to perform contractual obligations into risk allocation clauses, so that clients can avoid such risks depending on the line of business.

Learnings:

Inclusions of supplementary clauses with selective usage (categorise clauses to the relevant case) - i.e. Usage of specific clauses (renegotiation clause) better relevant to larger firms vis-à-vis others.

[20] 'ICC Force Majeure and Hardship Clauses March 2020' (*International Chamber of Commerce*, March 2020) <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> accessed 11 April 2022

Reflection: It is a given that this Pandemic represents a volatile market, possibly resulting in a significant change in financial circumstances. In such instances, legal practitioners should consider drafting corporate risk management clauses ensuring that the client's contract is up to speed with the ever-changing business landscape.

ARE THE PARTIES PERMITTED TO RENEGOTIATE THE TERMS OF THE CONTRACT?

The answer to this question is answered in the affirmative. Be it the outbreak of the Pandemic or its variations, there are radical global changes that take place during each outbreak. Therefore, parties can revisit their contract and renegotiate the terms of the contract in one of two ways, namely:

- through mutual consent of the parties; or
- though the inclusion of a renegotiation clause in the contract is a safer approach.
- The best solution, where possible, maybe to keep the contract alive and avoid disputes during the time of change therefore when the parties agree to renegotiate their contract terms, either temporarily or through a longer term, they must comply with the contract's requirements of recording any variation in writing.[21] However, the parties must consider the knock-on effects of their renegotiations on other terms of the contract (insurance provisions) and on other related contracts.

Example: The inclusion of a price renegotiation clause is better suited to larger firms and long-term contracts rather than smaller firms. Hence, on the occurrence of an event representing a significant change in financial circumstances, and the results of such change adversely affect the operations of the parties, invoking a price renegotiation clause in such a case is suitable and stands enforceable in court. If the provision in the clause provides a purpose for a trigger event to renegotiation at price and such price shall be fair and reasonable at the time when parties negotiate. The courts will further assist parties in contracts such as these that feature high expenditure to avoid uncertainties and preserve bargains rather than destroying them

[21] COVID-19: Commercial Contracts FAQs (n 4)

where certainty can be ascertained.[22]

Application by law practitioners: Legal practitioners must consider the foregoing with caution whilst drafting price renegotiation clauses, appreciating the uniqueness of the facts and transactions each case has on offer.

Note: Applying strict construction/approach to the interpretation of wordage in this clause and limiting the scope by ensuring they are drafted on equal footing with established case laws (application of the above example). There lies a proclivity of leaving price renegotiation clauses too open-ended (an agreement to agree into the future is unenforceable), causing uncertainty. Disagreements between the parties on enforcing such provisions may lead to discord in the course of business and lead to an inadvertent contractual termination.

Learnings:

Change in the approach of companies rather than the law per se (seeking alternative sources of relief)

''Nothing changes, if nothing changes''

Application by law practitioners: This Pandemic is indiscriminate in nature, affecting businesses, the restricted view of courts, and limited statutory intervention, it is unlikely to impact a significant change in contract law. Keeping in mind the above factors, it is rather in the interest of the parties to the contract to work jointly and adopt pragmatic approaches (contract negotiations) for businesses to subsist rather than assume protection under the law.

The main application to legal practitioners here is the usage of sound drafting principles through legal vetting of the client's documents, contract lifecycle management, and contract negotiations ensuring that contracts are compliant with government regulations ("change in law clauses").

[22] *Ibid*

Contract negotiation is a process in which parties with their legal practitioners take part jointly to better understand the transaction of the contract, reduce operational/ financial risk and draft legally binding and watertight clauses to facilitate the transaction.

REFLECTION

The effects of including legal strategy building: This makes a case for certainty because counterparties being present, the bargaining power of the parties will be considered, the outcome of the contract is likely to be well balanced (rather than one-sided), and more importantly stand enforceable in the court of law (if and when necessary).

Note: The primary reason why litigation is sought:

- poor standards (loosely drafted clauses in a contract) of contractual drafting or a contractual breach. With the application of the above negotiation measures, parties can curb to an extent, at least one of the above reasons (poor drafting) which is substantially within their control before entering into a legal relationship. Additionally, comprehensive legal drafting reduces grey areas present in the contract by drafting clauses relevant to the transaction, establishes predictability, and reduces the chances of invoking litigation. If executed with precision and vigilance, it will certainly save parties time and duplication of effort.

Mitigation measures: Companies must record the measures they have undertaken in the past to mitigate the event or avoid it and peruse alternative sources to undertake obligations.

Example: Sourcing of goods from another supplier, even though at higher costs.[23]

Cons: Smaller firms may find it challenging and onerous in applying mitigation measures to their full potential.

[23] *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 40

CONCLUSION

It can be argued, that the application of the foregoing futuristic measures jointly may not serve as a one size fits all solution, rather a strategic application will be coloured greatly by the commercial context on a case by case basis. However, these are positive steps towards injecting the much needed legal vaccine that businesses need to attain immunity from contractual uncertainty and to sustain their business activities (both current and futuristic).

Choice of law: The options available to the parties when choosing jurisdiction or a choice of law in an international commercial sale.

CHOICE OF LAW

Learnings: Review and reconsider the choice of law clauses and suggest alternatives (an arbitration clause)

Reflection:

Commercial contracts are primarily entered into by the parties with a spirit of competitive cooperation with an objective to secure and maximise their own legitimate commercial interests[24], formed out of, and influenced by, the bargaining power and intentions of the parties, and have little to do with the legislation.

Example: Different parties to a commercial transaction may belong to different countries United Kingdom (**''UK''**) and various European Union (**''EU''**) countries respectively. In this specific instance, EU laws will not affect the UK contract law. The application of English law is lucrative as it possesses enriched judicial precedent and respects the party's commercial bargains. Perhaps, inserting an exclusive jurisdiction clause by subjecting the English courts to govern the contract should a dispute arise. This may bring about commercial certainty concerning what jurisdiction applies. However, this premise is bound to fail because

[24] Paul S. Davis, 'Excluding Good Faith and Restricting Discretion' (*Discovery*) <https://discovery.ucl.ac.uk/id/eprint/10088548/3/Davies_6.Davies%20-%20Excluding%20Good%20Faith.pdf> accessed 19 April 2022

enforcing decisions concluded in the English courts may not be necessarily effectuated in the EU countries or such decisions may lack binding authority and reciprocally which may adversely lead to parallel proceedings. Conversely, inserting a non-exclusive jurisdiction to English courts in the contract may lead to a lot of flexibility if and when the dispute arises, the relevant jurisdiction can be applied, however, this approach comes at a cost of uncertainty which the clause of exclusive jurisdiction to the English courts provides. Additionally, the EU is a massive market and it is in all likelihood that contracts need to be compliant with EU laws to ensure seamless business continuity, however, splitting governing law and jurisdiction is unwise as this approach would create uncertainty to rely on a different jurisdiction to apply English laws. As a consequence, this is an open risk to rely on other jurisdictions to have the law applied rightly. The best-case scenario is the presence of a harmonising procedure relating to cross-border enforceability. However, the closest to attaining that procedure and a viable alternative is inserting a dispute resolution clause. The UK is a signatory to the New York Convention and the local arbitration framework is relatively independent. An arbitral award passed by the arbitral tribunals will be binding on the parties, recognised, and enforceable in the member states of the EU and the UK,[25] however, great consideration must be given to the structure of the arbitration.

Note: Arbitration is generally more flexible and informal in nature that could assist in the fast-tracking of dispensing awards in times such as these. When the parties negotiate on Clauses, careful consideration must be given to whether:

- immediate relief is available and what options of such reliefs (if any);
- force majeure related disputes must be arbitrated;
- what are the specific types of events are covered or excluded by the parties' respective commercial general liability, business interruption, and such other contingencies; and
- the legitimate interests and remedies of the impacted party are upheld on the

[25] James Carter, Adam Ibrahim, Jamie Curle, Dan Jewell, Paul Hardy & Clare Semple, 'Brexit: Choice of Law, Jurisdiction, Enforcement, and Service' (*DLA Piper*, 27 November 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/11/brexit-choice-of-law-jurisdiction-enforcement-and-service/> accessed 16 April 2022

happening of a force majeure event, for instance, the impacted party's right to terminate the contract without liability if the force majeure event sustains and continues to remain in effect or prolongs after a specified number of days or consecutive days (such number of specified days is affixed and must be specified in the contract).[26]

APPLICATION BY LEGAL PRACTITIONERS

Drafting an arbitration clause: Legal practitioners should consider the line of business and take into consideration possible factors of arbitration such as (costs, interim relief, discretion, etc) when resorting to arbitration. Generally, the selection of the seat of the arbitration would generally be a neutral venue (London, Singapore, New York, etc) in sizable and complex commercial transactions depending on the feasibility. In essence, this clause must expressly mention the governing law with the jurisdiction (exclusive or non-exclusive). This clause can be tailored to aptly replicate the commerciality that courts provide.

Conclusion: During the times of the Pandemic, the changing landscape in the legislative framework and the choice of law are crucial factors in influencing any commercial transaction featuring parties from different jurisdictions. Grey areas may pop up in the choice of jurisdiction and the enforcement of judgements outside the UK. Instead of playing the waiting game until legal certainty is derived, opting for arbitration as a mode of dispute resolution might be the path forward and is likely to become the new normal to circumvent post-Pandemic impediments.

CONTINGENCIES FEATURING COMMERCIAL CONTRACTS

Commercial Impact relating to Businesses: Some of the obvious impediments of the Pandemic are delays in the supply chain (border delays), compliance with new documentation, import/export formalities, credit exposure, red-tapism, currency volatility, and then there might be possible opportunities such as the recession which might lead to a spike in domestic demand (until certainty is deduced).

[26] Force Majeure clauses: Key Issues (n 3)

Primary Measures: Future-proofing of contracts to mitigate risks is the way forward, the most important aspect to consider is for legal practitioners to interpret what are the possible clauses that can impact the client's transaction (Cross-Border transactions) and then decide whether to terminate, amend or leave the clauses just the same. The main clauses that could be used strategically by legal practitioners would include business continuity clauses, price variation clauses, and hardship clauses, inter alia.

Price variation clauses:[27] These are common for larger transactions, this clause is a balanced clause that helps deal with contingencies beyond the control of the supplier (mainly) and entitles the customer with the right on notice, to terminate the contract. Here, the scope of such clauses must be narrowed and critically focused for price rise on the ramifications solely relevant (supplier must establish a direct causal link) to the Pandemic and not remote or adverse consequences (this may lead to unintended rift and termination of the contract if not undertaken transparently). Furnishingnotice (with a minimum time period) to the other party regarding price rise with the cause is a strict obligation to uphold the transparency between the parties before the performance is undertaken. Therefore, the takeaway from this clause is the supplier is galvanised with additional protection before investing, establishes certainty, and provides less fear of performance on both sides. I believe the inclusion of a percentage of price rise in the clause reassures the customer by tracking the veracity behind such a price hike and then using high discretion to further the contract. On the face of it, such clauses tilt in the favour of pro-customer, however, it seems like an effective measure to propel high transaction business in these trying times (if the scope is limited to the Pandemic only). Ideally, this clause (dealing with price fluctuation) must be supplemented with a price clause that deals with the price and currency to flush out further ambiguity and derive a stronger benefit to combat market volatility.

Application: This clause must include general provisions: price variation, notice period (with a

[27] 'Price variation clauses' (*LexisNexis*) <https://www.lexisnexis.com/uk/lexispsl/commercial/document/391447/55S7-6091-F189-40WH-00000-00/Price-variation-clauses> accessed 19 April 2022

minimum notice period) to notify the other party, reasons for the price hike which are beyond the control of the supplier, rate of fluctuation, the number of times price rise can be invoked, and termination on notice, etc.

Drafting considerations: The bargaining power of the parties will reflect in the contract, it is important to limit the scope of this clause solely to the ramifications caused by this pandemic only.

Business continuity clauses: Intends to invigorate protection and the supplier warrants to undertake an extensive process to undertake mitigation measures right from devising the continuity plan, receiving written approval from the customer upon receipt, endeavouring to retrieve the business to normalcy, and executing the same under fixed time frames on the happening of a supervening event (anticipatory or not). This clause serves to revamp the confidence and assurance of the customer. Additionally, appointing an officer on behalf of the customer escalates accountability and transparency.

Albeit this clause would largely depend on the party's bargaining power and such will reflect in the negotiation, legal practitioners must work with precision to understand the transaction and draft transaction relevant clauses. The challenge lies in drafting this clause in a manner that is not too onerous on the supplier to apply and safeguard the interests of the customer at the same time. To neutralise this clause, suppliers can collect proportions of the payments in advance to sustain funding when possible and keep a check on the creditworthiness of the customer.

Application: Whilst drafting, this clause must include, general provisions defining the happening of the events that may take place which would compromise operations and prompt notification, distribution of approval of the contractual plan, furnishing of periodic reports (over progress), mitigation measures, alternative sources to supply and priorities.

Drafting considerations: The line of business, the term of the contract, location, supply line of resource with alternative sources, and economic implications, inter alia.

Conclusion: Businesses can draw lessons from mitigating measures taken whilst combating this Pandemic, that mitigation uncertainty is on equal footing as legal protection. It is paramount that business activities are not interrupted and legal practitioners draft contracts to mitigate or stave off underlying risks at any stage of the business. If the purpose of the contract may tend to deviate from the purpose, companies must conduct due diligence, negotiate with counterparties, resolve disputes by friendly discussion[28] and strive for a mutually beneficial outcome from the contract.

THE BRAGANZA DUTY AND THE DUTY OF GOOD FAITH

There has been plenty of discussions both of implied duties of good faith in the performance of a contract, and of implied terms dictating the use of contractual powers. However, there appears a lot of grey area, uncertainty, and ambiguity in the application of good faith in a transaction where the express terms in the contract are absent or silent in the use of implied duties of good faith in the performance of contractual obligations and by virtue of such an absence or silence, the courts would generally refrain applying such implied duties on the parties, as this would create obligations that are potentially vague and subjective.[29]Contract law embodies an ethos of individualism and freedom of contract so that parties are free to pursue their own self-interest and this could undermine the underlying objectives of contractual certainty, on which contract law places great weight. The parties are entitled to the right to control and manage the extent of their contractual obligations to which they grant consent.[30] It is long established that there is no duty to act fairly in commercial contracts, and neither is there a general doctrine of good faith in English contract law, however, the concept of good faith may still apply to a transaction and impact a contract in three ways, namely:

- **implied duty:** the courts might imply a general duty of good faith into a contract or may apply the concept of good faith to imply other fact-specific duties through

[28] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 [50]
[29] Richard Cumbley & Peter Church, 'Contracts: good faith' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/2-603-0189?transitionType=Default&contextData=(sc.Default)> accessed 21 April 2022
[30] *Ibid*

interpretation of clauses in the contract;

- **express duty:** the parties choose to expressly agree to govern their relationship with specific acts of good faith and the limits of such acts will depend largely on the flexibility of the wordage embedded in the contract and what it will mean in practice, however where applicable, this express obligation to act in good faith is to be applied narrowly;[31] or
- **rationality:** a party having discretion has the duty to exercise such discretion with honesty and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably[32], in essence, this duty is referred to as the ''Braganza duty''. In other words, the party that holds a discretion must exercise the discretion in congruence to the contractual purposes.[33] The Braganza duty has found itself being applied and manifested into a slew of English case laws in recent times and it appears to be implied by law and is not subject to the strict rules that apply to the implication of terms in fact.[34]

WHEN IS THE BRAGANZA DUTY APPLICABLE?

The Braganza duty does not intend for the courts to re-write the parties' bargain for them, nor to substitute themselves for the contractually agreed decision-maker, however, the Braganza duty would typically effectuate when one party to the contract is entitled with the right to exercise a subjective discretion from several options which, by virtue of exercising such discretion results in affecting both the parties to the contract which may give birth to a clear conflict of interest and such conflict would cause a yawning gap concerning the imbalance of power between the parties.[35] The Braganza duty serves the function of shielding a party (decision recipient) against any abuse of power in the discretion that is exercised on the part of the other party. The Braganza duty intends to curb any abuse of power on the party of the party exercising discretion. The application of the Braganza duty will be limited to the

[31] James Carter, Adam Ibrahim, Jamie Curle, Dan Jewell, Paul Hardy & Clare Semple (n 25)
[32] *Braganza v BP Shipping Ltd* [2015] UKSC 17 [21]
[33] *British Telecommunications plc v Telefónica O2 UK Ltd [2014] UKSC 42* [43]
[34] Richard Cumbley & Peter Church (n 29)
[35] Braganza (n 32), 18

circumstances when it is necessary to make the contract work or if its inclusion would have been so obvious at the time of contracting that it goes without saying.[36] The standard of review that is adopted by the courts to the decisions of a contracting party is no more demanding than the standard of review adopted in the judicial review of administrative action[37], applying what is known as the Wednesbury test.

NON-APPLICABILITY OF THE BRAGANZA DUTY

The Braganza duty does not apply to the following:

- **the exercise of absolute contractual rights:** for matters that are to be assessed objectively and it is for the court to play decision-maker in the application of the Braganza duty to matters where a party is entitled with absolute contractual rights. A right is more likely to be regarded as absolute where it is apparent that that was part of the price of the deal;[38]
- **entitlement of unilateral rights:** where the decision making party has a unilateral right to act in a particular manner (i.e. to terminate the contract);[39] and
- **sophisticated parties receiving expert legal advice:** there is a narrow scope of the Braganza duty applying a case where both the parties are sophisticated (well-resourced parties) and are receiving expert legal advice.[40]

For example, The right to enforce the bank's security is an absolute contractual right and could not be the subject of any obligation of good faith.[41]

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[36] *Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 [18], [62]
[37] Braganza (n 32), 19
[38] *Greenclose Ltd v National Westminster Bank Plc*[2014] EWHC 1156 (Ch), *See also*; Jason Rix, 'Contractual Right or Discretion? How To Tell The Difference and Why It Matters' (*Allen &Overy*, 5 December 2017) <https://www.allenovery.com/en-gb/global/blogs/compact-contract/contractual-right-or-discretion-how-to-tell-the-difference-and-why-it-matters#:~:text=Contractual%20discretion%20has%20been%20described,an%20%22absolute%20contractual%20right%22.> accessed 23 April 2022
[39] *UBS AG v Rose Capital Ventures Ltd &Ors* [2018] EWHC 3137 (Ch) [49]
[40] *Cathay Pacific Airways Ltd v Lufthansa* [2020] EWHC 1789) [117]
[41] *Morley v RBS* [2020] EWHC 88 (Ch) [151]

SHOULD THERE BE AN EXCLUSION OF IMPLIED DUTY TO ACT IN GOOD FAITH THROUGH EXPRESS PROVISIONS IN THE CONTRACT?

The answer to this question is in the affirmative as the freedom of contracts grants the parties the autonomy to agree to terms that are not barred by law, and therefore, an implied duty of good faith can be entirely excluded from a contract the inclusion of express provisions. However, a commercially palatable and efficacious approach would amount to:

- identifying a limited number of obligations that as subject to an express duty of good faith; and
- stipulate in the contract that the good faith duties apply only where they are mentioned in the contract.

The potential advantage of excluding implied duties of good faith (implied in fact or law) would narrow the scope of interpretations (if any) of the provisions in the contract, and invigorates the parties' ability to control the content of the agreements they voluntarily enter into and the express terms would control the outcome of the obligations of the parties, resulting in accommodating better commercial certainty. However, an"implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract"[42] and an implied duty based on good faith is only likely to arise where the contract would lack commercial or practical coherence without it.[43] Therefore, in other words, this would mean that it is only possible for implied terms of good faith to be interpreted in a manner that facilitates, and aligns with the intentions of the unambiguous express terms of the contract. This may result in contracts lacking any moderating agents in implied duties of good faith and therefore, the express terms may be open to challenge as commercially unreasonable or unacceptable. In any event, there is no one-size-fits-all solution, and the decision of excluding implied terms of good faith in the contract would also depend on the choice or wants of the parties in the transaction. Whether in transactions requiring long-term

[42] *Globe Motors, Inc&Ors v TRW Lucas Varity Electric Steering Ltd & Anor* [2016] EWCA Civ 396 [68] (Beatson LJ), relying on *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch)
[43] *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472

engagement and trust between the counterparties, would such parties want to run the risk of not being subject to act in good faith? Rather, a healthy and common practice would amount to the inclusion of express duties of good faith in contracts because this approach is likely to fill any lacunas in the commercial relationship of the parties and this would spur the parties to act mutually in a manner fair and honest. An express duty of good faith in the contract does not cut across other express contractual provisions and hence, it is important to appreciate the overall benefit of this approach.[44]

However, a gleaming disadvantage to this approach is that, ascertaining the meaning of a duty of good faith because its meaning may vary contextually on a case to case basis and there lies a possibility have an effect that neither party may have anticipated. An example of such an unanticipated effect would amount to the disclosure of material facts as a requirement by the implied duty of good faith.[45]

THE BURDEN OF PROOF TO INVOKE THE BRAGANZA DUTY

The burden of proof lies on the party that is invoking the Braganza duty., in other words, the burden of proving that the said duty applies to the transaction is the decision recipient. The Braganza duty is backed by rationality (though it is not a duty to act in a way that is objectively reasonable)[46]and if the outcome of a decision on the part of the decision-makers is apparently and conspicuously irrational, the decision recipient may also be able to argue that the decision making process was prima facie irrational and it would be challenging for the decision-maker to adduce evidence and demonstrate that an unreasonable outcome of a decision was accompanied by a rational decision-making process.[47] As a result, the decision-maker would be in the shoes of the decision recipient at the time of invoking the Braganza

[44] Richard Cumbley & Peter Church (n 30)
[45] *Horn &ors v Commercial Acceptances Ltd* [2011] EWHC 1757 (Ch) [66]
[46] 'Jon Chapman' (*Clarkslegal*, 10 December 2018) <https://www.clarkslegal.com/Blog/Post/The_Braganza_duty_If_you_have_a_discretionary_right_in_a_contract_is_it_always_truly_discretionary> accessed 20 April 2022
[47] David Hall, Tom Whittaker & Harry Jewson, 'Time to decide...how to exercise contractual discretion five years after the Braganza case' (*Burges Salmon*, 13 February 2020) <https://www.burges-salmon.com/news-and-insight/legal-updates/disputes/time-to-decide-how-to-exercise-contractual-discretion-five-years-after-the-braganza-case> accessed 18 April 2022

duty in the transaction and the burden of proof would shift to the decision-maker of proving that the process of decision making was rational.[48] Albeit there is a trend towards the marked application of the *Braganza* duty, asserting that a party has not acted in good faith is a serious allegation. The English courts have fittingly reminded us that this duty is challenging to breach and if the decision-making process is not unreasonable, there would be no room to contribute toward this trend. In the case, Adrian Faieta v ICAP Management Services Ltd, the court had confirmed that there is a "high hurdle" to establish a breach of the Braganza duty[49] and it must be established that the relevant party has exercised its discretion in a way which no reasonable person having that same discretion would have exercised it.[50]Therefore, careful consideration must be given to the high burden of proof standards, and an objective assessment in the commercial context must be made before a party decides to invoke a breach of the Braganza duty.

THE LIMBS OF THE BRAGANZA DUTY

The Braganza duty is subjective, whereas the duty to act reasonably is objective.

First limb (the decision-making process) – Did the decision-maker refuse to take something into account that should have been taken into account before reaching a contractual decision?

Second limb (the decision itself) – Was the decisions perverse that no reasonable person, acting reasonably, could have made it, even though the decision-making process itself did not fall short of reasonable requirements?

Hence, the party affecting a decision must take into consideration the above limbs of the Braganza duty to influence such decision and therefore, the following practical pointers that should be considered therefor, namely:

- If one has the discretion to exercise, contemplate the "target or objective" of that discretion and what this discretion sets to achieve, in other words, consider what issue

[48] *Ibid*
[49] *Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB) [40]
[50] *Ibid*

it allows you to determine and what considerations are to be borne in mind.

- Be aware that decisions made pursuant to the exercise of a contractual discretion may be subject to challenges and reviews, therefore, bear in mind both at the fledging stage of the transaction (i.e. negotiations), at the drafting stage and when exercising a discretion;
- keep a paper trail that demonstrates that a proper decision-making process has been strictly adhered to, record and adduce any evidence that supports proper decision making in the exercise of discretion, and demonstrate that the said decision was reached rationally, taking relevant factors into account but disregarding irrelevant factors;[51] and
- consider the inclusions of epithets in clauses such as, 'in our sole and absolute discretion appears from leading cases that clause wording like this in relation to a decision will not oust the Braganza implied term. The Braganza judgment itself was about a decision which the decision-maker was entitled to effectuate "in its opinion" a discretion and this power seemed, at face value, to be completely unfettered, yet it was held to be subject to the implied term.[52]

CONCLUDING THOUGHTS

In the case of Dwyer (UK Franchising) Ltd v Fredbar Ltd and another [2021] EWHC 1218 (Ch), the duty to act fairly is discussed in correlation with that of the times in the Pandemic. In a franchise agreement (the **''Agreement''**) between Dwyer, the franchisor, and Fredbar Limited the franchisee[53] had purchased the exclusive license to obtain the right to trade under the name 'Drain Doctor'[54] for plumbing and drain repair services. Mr. Bartlett was running the

[51]Adam Ibrahim and Paula Johnson,'Lessons on exercising a contractual discretion post Braganza'(*DLA Piper*, 5 January 2018) <https://www.dlapiper.com/en/uk/insights/publications/2018/01/lessons-on-exercising-a-contractual-discretion-post-braganza/c> accessed 12 April 2022

[52] Victoria Hobbs & Andrew White 'Up to speed on good faith under English law? It's never been more relevant FEB 01 2021'(*Bird&Bird*, 01 February 2021) <https://www.twobirds.com/en/insights/2021/uk/up-to-speed-on-good-faith-under-english-law-its-never-been-more-relevant> accessed 18 April 2022

[53] *Dwyer (UK Franchising) Ltd v Fredbar Ltd & Anor* [2021] EWHC 1218 (Ch) [1]

[54] *Ibid*, 8

franchisee and was also the guarantor, therefore. The Agreement contained a clause[55] that provided for the suspension of the Agreement during any period when either of the parties was prevented from complying with their obligations by any cause that Dwyer designated as a force majeure, including disruption to the supply chain, financial distress, etc. Mr. Bartlett contacted Dwyer to explain that the Pandemic had taken a toll on the business, as a result, a lack of calls, and requested to suspend the contract. Additionally, Mr. Bartlett's son was clinically vulnerable and was recommended self-isolation for the next 12 weeks (with the notification of the medical director for NHS Wales)[56] and therefore, suggested self-isolation for the welfare of his family. Dwyer emailed Mr. Bartlett stated that the force majeure did not apply and purported that the scope of work fell under a key industry and threatened to terminate the contract for breach if payments were not made.

Dwyer subsequently terminated the agreement on grounds of repudiatory breach. Dwyer then issued proceedings against Mr. Bartlett. Dwyer failed to treat his franchisee compassionately in the context of exceptional circumstances. The court held in favour of Dwyer on its entitlement to terminate the agreement and was awarded damages[57] but Dwyer flouted his implied duties under the Clause as he had the sole discretion to designate a force majeure event and apply the principles of the Braganza V BP Shipping Ltd and another[2015] UKSC 17; [2015] 1 WLR 1661, Dwyer did not exercise his discretion in good faith, genuinely and in an honest manner but rather arbitrarily.[58] The two limbs of the Braganza duty which were earlier discussed in this paper were applied and Dwyer's discretion was set aside for the reason that no reasonable decision-maker could have reached and he did not take into account matters that were ought to be relevant (this did not take into account, the need for self-isolation). This judgment showcases the expectation, which was voiced by the government at the time (early on into the Pandemic) that contracting parties should be constructive when in dialogue over disputes arising from the Pandemic and not focus solely on enforcing strictly the legal rights,[59]

[55] *Ibid*, 24
[56] *Ibid*, 267
[57] *Ibid*, 310
[58] *Ibid*, 263
[59] *Ibid*, 197

Dwyer had failed to treat the franchisor compassionately.[60] However, with the recurrent waves of the Pandemic, there is much foreseeability on the triggers of such events and the continued ramifications of the Pandemic will not shake the strong foundations/principles of contract law, nor would the court's bargain on the behalf of, either of the parties, even if the contract is loosely drafted. The courts would not give effect to the parties' subjective motivations but rather would apply an objective assessment vis-à-vis the factual matrix of the case. It is for the legal practitioners to step in, carefully inspect and assess the intricacies and appreciate the uniqueness of the transaction and inject into the contract, specific risk allocation clauses accordingly.

[60] *Ibid*