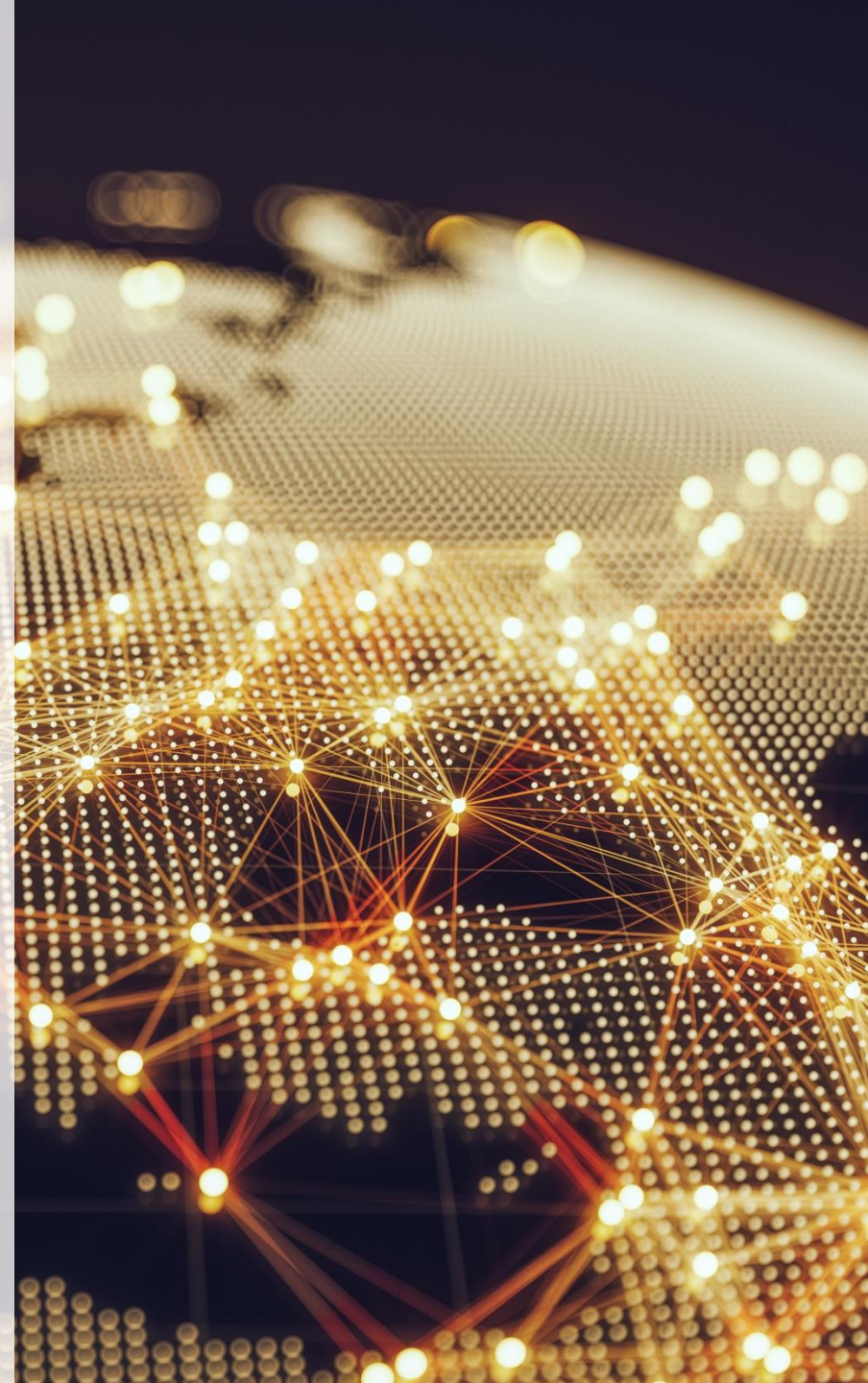


COVID-19: Impact on Contracts and Dispute Resolution

**Peter Goldsmith QC, PC
David W. Rivkin**

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- I. Introduction
- II. Implications for Commercial Contracts
- III. Implications for Dispute Resolution
- IV. Implications for Investment Protection
- V. Immediate Strategic Considerations

INTRODUCTION

- COVID-19 declared a '**pandemic**' by the World Health Organisation
- '**Extraordinary** event' which carries trans-national implications, and may require immediate international action
- Spread to over **170 countries** and territories across the world, and continues to spread at an incredibly rapid pace, with over 1.3 million confirmed cases at present



Image from Centres for Disease Control and Prevention, U.S. Department of Health & Human Services

COVID-19 cases by location as of 6 April 2020

COVID-19: Stock Markets Plunge

- Crash in the global stock markets; worst fall since 1987
- Impact felt globally
- *“The outlook for global growth: for 2020 it is negative—a recession at least as bad as during the global financial crisis or worse”, Kristalina Georgieva, IMF Managing Director (WSJ, 24 March 2020)*



Image Source: Wall Street Journal Market Data

COVID-19: Severe Impact on Business

- Aviation and tourism industries most directly suffering from travel restrictions and lockdowns
- Standstill in global manufacturing impacts global supply chains, particularly in sectors such as automobile and electronics



Image Source: MHL News



Image Source: MHL News

- Ripple effect felt on oil and gas, commodities, and service sectors
- Combined with the oil-price crisis, leaves global markets in chaos
- Travel and work restrictions impact mining, construction and shipping sectors, as global supply chains come to a halt

COVID-19: Severe Impact on Business (cont.)



Image source: Arch Daily

- Supply and cash flow restrictions and output bottlenecks may force parties to renegotiate, terminate or breach contracts
- Stricter government regulations may interfere with investor expectations; productivity and profits. Potential disputes may arise between investors and State entities

- Companies need to analyse potential business impact and formulate a response to the crisis situation
- Workplace measures require balance between maintaining productivity and managing protection of employee rights and wellbeing



Image source: Reuters

COVID-19 Impact Exacerbated: The Oil Price-War



Image source: Alarabiya

Effects on the economy worsened by the crash in oil prices. Oil exporting nations facing adverse effects on income, as a result of crude oil prices falling and sharp decrease in consumption



Image source: BBC

Failed multilateral talks between OPEC, Russia and other oil-exporting nations; end of the three years of output cuts which were aimed at supporting prices and reducing stockpiles

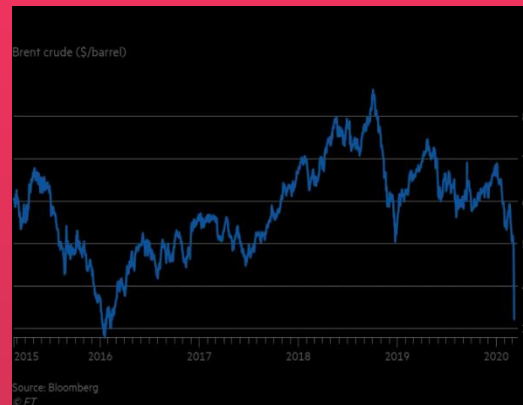
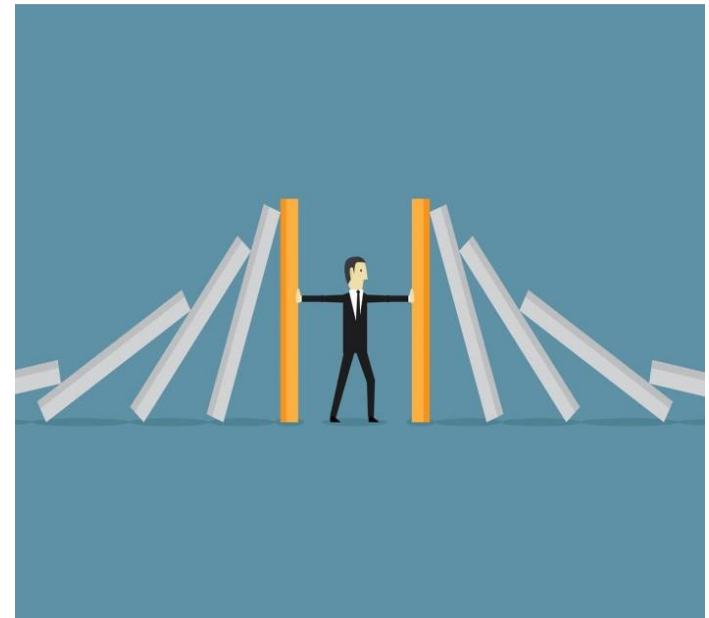


Image source: Financial Times

Experts predict that if current market condition continue, income from oil & gas will fall between 80-85%, with crude oil prices falling below USD 35 a barrel

IMPLICATIONS FOR COMMERCIAL CONTRACTS

- Direct effects of:
 - Government intervention
 - Availability of labour and materials
 - Delayed or non-performance by others
- Indirect effects of:
 - Material prices
 - Oil prices
 - Share prices
 - Cash flow
 - Access to lending



Source: www.fnllondon.com

- Review the terms of relevant contract:
 - Contractual obligations (warranties/conditions)
 - Specific provisions potentially engaged:
 - Force majeure clauses
 - Material Adverse Change clauses
 - Suspension and termination clauses
 - Covenants
 - Price revision clauses
- Other legal concepts:
 - Frustration
 - Hardship/ Impracticability

Force Majeure

- A force majeure event is usually:
 - An event “beyond the reasonable control of a party”, which prevents a party from performing its obligations under a contract
- Potentially available in both common and civil law jurisdictions



Source: www.nuscimag.com



Source: www.Livescience.com



Source: www.Nationalgeographic.com

- Common Law Jurisdictions:

- Not generally provided in statutes
- Must be expressly provided for in the contract

- Civil Law Jurisdictions:

- Usually defined in the relevant Code
- Can be implied
 - Even without an express contractual provision, parties can often look to invoke the principle by virtue of the relevant Civil Code

- A party wishing to rely on a force majeure clause will need to ensure that the requirements of the relevant clause are met:
 - Whether the event falls within the ambit of the force majeure event clause
 - The extent of the obstruction caused to the relevant contractual obligations
 - What contractual requirements must be fulfilled (notice etc.)
- Several countries have declared COVID-19 a force majeure event
- Whether force majeure clause covers oil or share price fluctuations or payment obligations, depends on the contract

- Effect of invoking force majeure:
 - Depends on the contract wording
 - The relevant provisions may relieve the affected party from performance of the relevant obligation only temporarily or in its entirety
 - In long term contracts, more common to only suspend performance for a period of time, or extend contractual deadlines for the duration of the force majeure event
 - Some provisions may provide for the contract to terminate automatically or at the option of a party

Frustration

- Only applies where there is no force majeure clause
- A contract under English law may be frustrated when the event:
 - Occurs after the contract has been signed by both parties
 - Could not have been foreseen by the parties
 - Was not within the control of any of the parties
 - Did not occur by any fault of the parties
- Renders further performance of the contract by one or more of the parties impossible or illegal, or means that performance becomes radically different from when the contract was entered into
- **New York law.** Similar approach, but possible statutory defence for sale of goods contracts: s.2-615(a) NY Uniform Commercial Code

- Effect of Frustration:
 - Depends on the relevant law. It either:
 - terminates the contract automatically, releasing parties from their remaining contractual obligations, or
 - rescinds the contract, potentially entitling parties to recover anything already transferred
- General reluctance to find frustration:
 - Harsh consequences = high bar for establishing frustration
 - Unlikely that fluctuation in oil/share prices alone will meet the bar
 - Key question: has the underlying rationale for the contract been undermined?
 - Statutory claim may be available, but does not guarantee full recovery

- **Hardship** occurs where an event (*e.g.* an economic crash, war, other economic disaster, or exceptional weather event) changes the circumstances under which parties had initially calculated risks, benefits, and costs
- Not recognised in English law:
 - “no English decision supports a general rule of discharge by impracticability, and [...] a high number of dicta of high authority appear emphatically to reject such rule.”* Treitel
- Many civil law jurisdictions have a statutory doctrine of **imprevision**
- **New York law** recognises the principle of **impracticability**, in respect of sale of goods only, when performance is made impracticable as a result of unreasonable delivery or excessive costs

Material Adverse Change

- Often referred to as “MAC” clauses. Most commonly appear in finance agreements
- The occurrence of a MAC will typically entitle a lender to accelerate repayment obligations
- Available in both civil and common law jurisdictions
- Narrowly construed:
 - Event must not be temporary
 - Must significantly affect the borrower’s ability to perform

- Suspension and termination rights
 - Possible trigger of contractual suspension and termination rights
- Covenants
 - Usually an agreement or promise to do something, or refrain from doing something. Possible breach of covenants
- Price revision clauses
 - Typically appear in long-term agreements. Allow changes in price to reflect changes in market value over time of a particular good

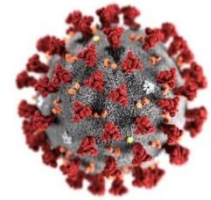
- Ways to mitigate risk:
 - Seek information from customers/suppliers
 - Seek legal advice
 - Learn lessons for future contracts
- Act in good faith:
 - Duty of good faith exists or can be implied in most civil law jurisdictions, NY law and in English law for relational contracts (*e.g.* JV agreements)
 - Follow government guidelines
 - Communicate with all contracting parties

IMPACT ON DISPUTE RESOLUTION

- Disruption to hearings: cancellations, postponement, or conducted remotely
- Difficulties in following the arbitral procedure and conducting evidence gathering
- Potential risks if in-person hearings go ahead
- Potential increase in complex and energy disputes
- Potentially greater demand for emergency relief

Disruption (1): Hearing Cancellations & Changes

- Inherent need to revisit dispute resolution choices, all currently under threat
- International Arbitration:
 - In-person hearings cancelled or postponed
 - Outbreak may mark the end of *some arbitral seats*?
 - Technological options are being leveraged
 - HKIAC, LCIA, ICC and SCC continue to operate remotely
- English courts:
 - In-person trials cancelled and rescheduled
 - Remote hearings to be held “*wherever possible*”
- Other ADR methods:
 - Milan Chamber of Arbitration cancelled all mediation hearings. Other mediations inhibited by local restrictions on gatherings



- **English Courts:** Practice Direction Y15 on Video or Audio Hearings in Civil Proceedings during the Coronavirus Pandemic
- **ICC:** *“Hearings and other meetings scheduled to take place at the ICC Hearing Centre in Paris until 13 April 2020 have been postponed or cancelled”*
- **AAA-ICDR:** *“no hearings will take place in AAA-ICDR hearing facilities until at least June 1, 2020.”*
- **IDRC:** premises currently closed. IDRC able to arrange virtual hearings and meetings

- Making use of ‘contactless’ options such as video conference, online chat rooms, conference calls
- **BUT:** new considerations
 - Technical testing before online hearings/CMCs
 - Reserving extra time for (un)expected teething issues
 - Importance of recording in case of interruptions
 - Tailored online hearing-related rules to be developed
 - Multiple camera angles to capture each participant
- COVID-19 *“may be the turning point in bringing online dispute resolution to the world of international arbitration”* [Gary Benton ‘Founder and Chairman of the Silicon Valley Arbitration and Mediation Center’]



Image source:
https://en.wikipedia.org/wiki/Contactless_payment

- To avoid contagion through physical documents, parties may be more likely to conduct document search, reviews and production digitally
- Hearings may be postponed, depending on:
 - the availability and attendance of witnesses/experts/interpreters
 - the possibility of conducting cross-examination remotely; and
 - whether the most experienced arbitrators, who may be in high-risk categories, can implement precautionary measures



Image Source :
<http://www.slaw.ca/2020/03/20/the-end-is-not-nigh-remote-dispute-resolution-in-the-age-of-COVID-19/>

Local restrictions and health facilities

- Local population may be under restrictions on *entering or leaving*
- Health facilities in hearing location might be strained: increased risks

Tips if the hearing is intended to go ahead

- Key to reduce the participants to the minimum possible (only essential ones)
- Check if anyone assisting comes from Affected Areas (as defined by WHO)
- Review local regulations: *e.g.* restrictions *on* gatherings, public space closures
- Shorten the length of the hearing (*e.g.* written rather than oral closings)?
- Hire larger hearing rooms or larger breakout rooms to maintain distance
- Keep good hygiene

Potential Increase in Complex Disputes

Sale
contracts

International
Transit

Construction



Shipping

Manufacturing

Energy

Image Source: <https://www.finglobal-touchpoints.co.uk/cfo-best-practice-supply-chain-disruption.html/>

Potential Increase in Energy & Financial Disputes

- **Financial**

- All major US indexes fell by more than 10%.
- Rise in international arbitrations post-COVID-19



- **Energy disputes:**

- COVID-19 to shake supply and pricing expectations in nearly every global market
- Many energy projects have come to a halt; high risk of disputes requiring adjudication, mediation and arbitration

- A temporary measure which aims to protect one or both parties to a dispute against damage occurring during the course of the arbitration
- **Tribunals typically consider the following factors:**
 - *Prima facie* jurisdiction
 - *Prima facie* case on the merits
 - Risk of irreparable or substantial harm
 - Urgency
 - Proportionality
- **Obstacles to obtaining emergency relief:**
 - Needs genuine urgency
 - Subsequently-constituted tribunal not bound by a decision of an emergency arbitrator
 - very difficult to enforce in practice

IMPLICATIONS FOR INVESTMENT PROTECTION

- Governments have introduced a host of measures in response to the crisis:
 - Declarations of national emergencies
 - Social distancing and quarantines
 - Closing of “non-essential” businesses
 - Strict regulation of commodities
 - Travel restrictions
- Governments' measures are causing severe disruptions
- Multiple operations are adversely affected
- Foreign investors' assets may be diminished in value as a result

- Impact of travel restrictions greatest on manufacturing, tourism and airline industries
- Consequent adverse impact on production, travel related stocks and banks



Image Source: <https://www.terminalfour.com/blog/posts/visa--travel-restrictions-the-impact-on-student-recruitment.html>

Image Source: <https://www.bbc.co.uk/news/uk-england-tyne-51972329>



- Most drastic export restriction comes from India holding 20% stake of the global generic drugs market
- EU has banned export of medical protective equipment
- Foreign investors affected by restricted access to global demand
- Export restrictions can potentially lead to claims of breach of investment protections

State Measure: Rescue Packages & Financial Aid

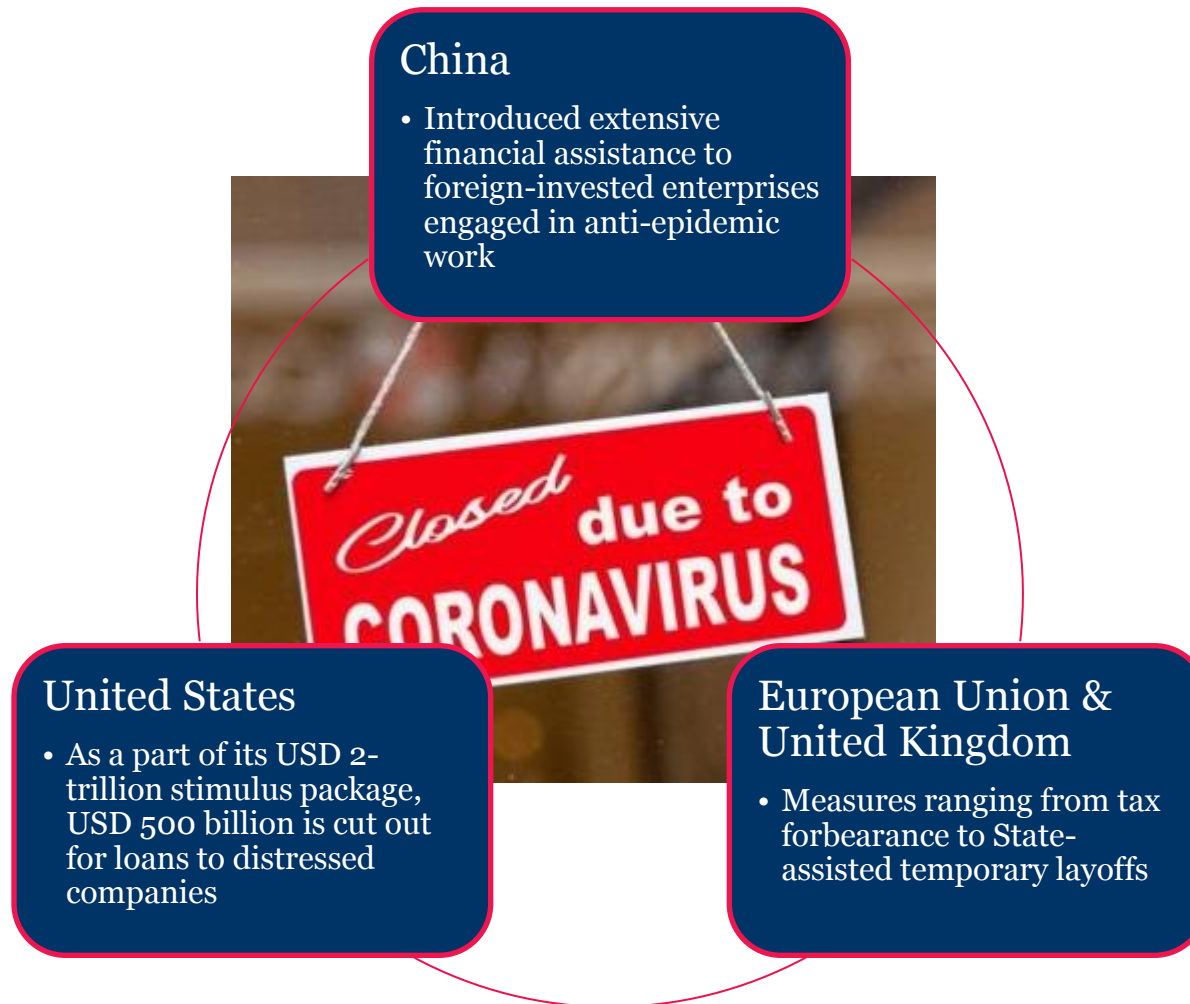


Image Source : <https://www.bbc.co.uk/news/uk-scotland-51889013>

State Measure: Uncompensated Expropriation



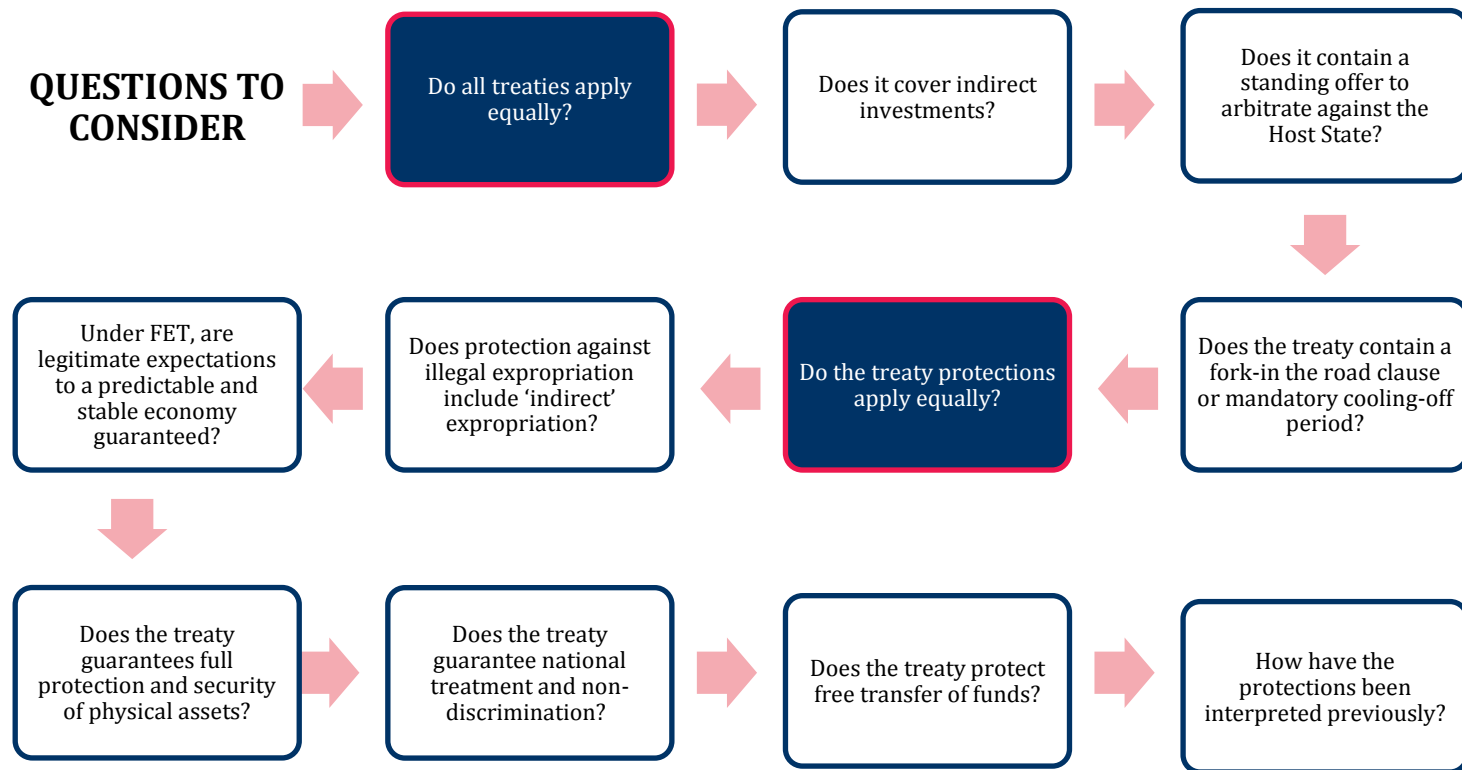
Image Source :
<https://newsocialist.org.uk/well-own-it-kind-maybe-one-day-nationalisation-labour-leadership-contest/>

- Spain has temporarily nationalised all of its hospitals and healthcare providers
- Italy's Alitalia being primed to be taken into government control
- UK considering nationalising railway operators and temporary nationalisation of airlines to prevent firms from going 'bust'
- France considering temporary nationalisation of certain industries

- **Investment arbitrations** often follow economic, financial, or other crisis. (*e.g. Argentina's 2001-02 financial and economic crisis led to more than 40 ICSID arbitrations (e.g. Abaclat and others v Argentina).*)
- **Political instability** can lead to claims by banks and financial institutions (*e.g. PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation (PCA Case No. 2015-21).*)
- *Can COVID-19-related measures breach a State's international obligations with respect to treatment of foreign investments?*
 - Proportionality and reasonableness.
 - Treaty exceptions (*e.g. public health measures*).
 - Customary international law defences (*e.g. necessity, distress*).

Investment Claims Over States' Measures (cont.)

- Often, given the ownership structure of foreign investments, more than one investment treaty can apply
- While comparing applicable investment treaties, consider:



IMMEDIATE STRATEGIC CONSIDERATIONS

- **Check terms** of contracts

- Is a pandemic a force majeure event?
- Any notification requirements?
- Check governing law (*i.e.* force majeure treatment might differ depending on jurisdiction, *e.g.* common law vis-à-vis civil law system)
- Check insurance policies



- **Consider ADR mechanisms:**

- No general answer on whether COVID-19 is a covered event or not; whether COVID-19 amounts to force majeure – depends on the contract
- Mediation, Conciliation, Negotiation could avoid an unexpected or unpredictable result from a decision-maker

- **Loan agreements** – engage the lender early
 - Seek early legal advice: timing could be everything
- **Insolvency or default** – risk for companies
 - Consider raising additional finance
 - *Restructuring* and formal insolvency procedures
- **Current litigation or arbitration** – consider whether the counterparty may become insolvent (*e.g.* request security for costs if you are defendant / if you are claimant consider *carefully your enforcement strategy*)
- **Investment treaty arbitrations** – for state parties and claimants, see whether non-preclusion clauses are included under BITs or under customary international law, *excusing responsibility* of the states in cases of *force majeure* or necessity (*e.g.* pandemic)



- **Remedies and recourses available** – flow from applicable governing documents & prevailing law
- **Contractual remedies** – specific performance, restitution & damages
- **Recourses for contractual breaches** – study contract for exclusive jurisdiction clauses
- **Remedies for breach of investor rights** – damages
- **Recourse for breach of investor rights** – host state courts, international arbitration



For additional questions:



Lord Goldsmith QC, PC <phgoldsmith@debevoise.com>



David W. Rivkin <dwrivkin@debevoise.com>

