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Caught Between a Rock and COVID-19: Sharing the Pain of Onerous Oil and Gas Contracts in the Middle East

Graham COOP^{*} & Roberto LUPINI^{**}

ABSTRACT

The obligations under many oil and gas contracts have become highly onerous as a result of the COVID-19 pandemic. Whether on the losing or winning side, governments and companies face difficult choices between—on one hand—negotiating a balanced solution to the contractual imbalances created by COVID-19, and—on the other—invoking legal remedies that could potentially mitigate the burden of onerous performance. This article navigates some of those remedies and, in doing so, offers strategic and tactical considerations for parties operating in the Middle East considering whether to revise, suspend and/or terminate their long-term oil and gas contracts.

1 INTRODUCTION

The measures adopted in response to the COVID-19 pandemic have caused an unprecedented global contraction in both oil and gas activities and demand. Oil consumption is estimated to have fallen an unprecedented 25 million barrels per day in the first quarter of 2020.¹ At the same time, the fall in gas consumption in

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¹ See, e.g., “COVID-19 in the Middle East and Gulf States: Coping With Historic Demand Drop”, Energy Council, 22 June 2020 (last accessed on 30 April 2021), available at: <https://www.worldenergy.org/news-views/entry/covid-19-in-the-middle-east-and-gulf-states-coping-with-historic-demand-drop>.

2020 is expected to bring the largest recorded demand shock in the history of global natural gas markets.²

The measures adopted in response to the COVID-19 pandemic have had a particular impact in the Middle East due to the region's heavy dependency on oil and gas. Lockdowns, travel restrictions and rig closures are just some of the measures affecting the oil and gas industry in the Middle East.³ Those measures—together with plummeting oil prices—have made contractual performance for most companies uneconomic or simply impossible. Many oil and gas companies operating in the Middle East have therefore started looking at ways to either renegotiate, suspend or terminate their long-term energy contracts.⁴

Whether on the losing or winning side, companies (and governments) face difficult choices between—on one hand—negotiating a balanced solution to the contractual imbalances caused by the COVID-19 pandemic,⁵ and—on the other—invoking legal remedies that could potentially mitigate the burden of onerous performance. This article navigates some of those legal remedies and, in doing so, offers strategic and tactical considerations for parties seeking to revise, suspend and/or terminate their long-term oil and gas contracts in the Middle East.

2 BRIEF OVERVIEW OF IMPACT OF COVID-19 MEASURES ON THE OIL AND GAS INDUSTRY IN THE MIDDLE EAST

It is hard to overstate the importance of the oil and gas industry for the Middle East. The region holds nearly half of the world's proven oil reserves and is the world's largest oil-producing region.⁶ It also holds the world's largest natural gas

² See, e.g., “Gas 2020 Analysing the impact of the Covid-19 pandemic on global natural gas markets”, IEA, June 2020 (last accessed on 30 April 2021), available at: <https://www.iea.org/reports/gas-2020/2020-meltdown>.

³ See, e.g., “Middle East imposes further restrictions on public events, closes borders in effort to tackle coronavirus”, Arab News, 16 March 2020 (last accessed on 30 April 2021), available at: <https://www.arabnews.com/node/1641636/middle-east>.

⁴ By way of example, the Kuwait Petroleum Corporation cancelled a significant number of tenders and contracts in 2020 amid the slump in oil demand caused by the COVID-19 pandemic (See, e.g., “Kuwait Petroleum cancels contracts, slashes expat jobs amid coronavirus oil slump”, Al Arabiya, 19 July 2020 (last accessed on 30 April 2021), available at: <https://english.alarabiya.net/en/coronavirus/2020/07/19/Kuwait-Petroleum-cancels-contracts-slashes-expat-jobs-amid-coronavirus-oil-slump>).

⁵ For the sake of brevity and clarity, this article uses the term “COVID-19 pandemic” in a broad sense. In other words, it is intended to include the related measures, effects and consequences of the COVID-19 pandemic.

⁶ See, e.g., “Statistical Review of World Energy”, BP, 2020 (69th edition) (last accessed on 30 April 2021), available at: <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2020-full-report.pdf>, pages 14 and 17.

reserves and is the third largest producer of natural gas.⁷ Naturally, such abundance of resources has propelled the region's recent economic development.

The collapse in demand for oil and gas caused by the COVID-19 pandemic has had a significant impact on the Middle East owing to the region's heavy dependence on oil and gas. To illustrate this, the oil export revenues of Iran—one of the region's most oil-dependent States—fell from USD 6.1 billion (in January 2020) to USD 1.4 billion (in April 2020), leaving a deficit of approximately USD 4.1 billion.⁸ Consequently, most Gulf States have been forced to adopt a series of extraordinary measures. For instance, the Kingdom of Saudi Arabia ordered its ministries to cut public spending by as much as 30%. It also took the unprecedented measure of tripling the national VAT rate from 5% to 15% overnight.⁹

In addition, oil and gas companies are also facing a dual shock caused by the recent decline in oil prices. The decision of certain key oil producers (*i.e.*, Russia and Saudi Arabia) to increase their production in early March 2020, together with a crippling fall in demand for oil and gas caused by the COVID-19 pandemic, created an oversupplied market. As a result, West Texas Intermediate (WTI)—the benchmark for US oil—fell below zero for the first time in history.¹⁰ As for gas, industry experts estimate that global demand will fall twice as much as it did in the aftermath of the 2008 financial crisis.¹¹

Naturally, this dual shock has had—and is still having—a significant impact on oil and gas contracts in the Middle East. Companies that find themselves on the wrong economic side of contracts have had to suffer the pain of onerous performance. Fortunately, some of those companies might have access to contractual and/or extra-contractual legal remedies which could mitigate that burden.

⁷ See, e.g., *ibid.* pages 32 and 34.

⁸ See, e.g., “COVID-19 crisis response in MENA countries”, OECD, updated 6 November 2020 (last accessed on 30 April 2021), available at: <http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-mena-countries-4b366396/>.

⁹ See, e.g., “Saudi Arabia asked state agencies to implement big budget cuts: sources”, REUTERS, 11 March 2020 (last accessed on 30 April 2021), available at: <https://uk.reuters.com/article/us-saudi-economy-budget/saudi-arabia-asked-state-agencies-to-implement-big-budget-cuts-sources-idUKKBN20Y0QA>; “Saudi shoppers hit by tripling of VAT rate”, Financial Times, 15 July 2020 (last accessed on 30 April 2021), available at: <https://www.ft.com/content/f605dada-9c93-49c3-a506-1f75e8104a74>.

¹⁰ See, e.g., “US oil price below zero for first time in history”, Financial Times, 21 April 2020 (last accessed on 30 April 2021), available at: <https://www.ft.com/content/a5292644-958d-4065-92e8-ace55d766654>.

¹¹ See, e.g., “IEA: COVID-19 Crushed Global Natural Gas Demand”, Power Magazine, 11 June 2020, (last accessed on 30 April 2021), available at: <https://www.powermag.com/iea-covid-19-crushed-global-natural-gas-demand/>.

3 LEGAL MEANS TO REVISE, SUSPEND AND/OR TERMINATE LONG-TERM OIL AND GAS CONTRACTS IN THE MIDDLE EAST

Each jurisdiction has its own set of rules to deal with supervening events such as the COVID-19 pandemic. Therefore, there are potentially many legal means to revise, suspend and/or terminate contracts impacted by the COVID-19 pandemic. This article does not purport to address all these exhaustively.¹² Rather, this article provides a general description of some of the legal remedies that are often available to revise, suspend and/or terminate long-term oil and gas contracts on the basis of supervening events. Such remedies were mainly developed in certain legal systems in the West (*e.g.*, French law, English law and US law), but they have now permeated into legal systems all over the world, including in the Middle East.

3.1 CONTRACTUAL REMEDIES TO REVISE, SUSPEND AND/OR TERMINATE CONTRACTS ON THE BASIS OF SUPERVENING EVENTS SUCH AS THE COVID-19 PANDEMIC

3.1[a] Force majeure clauses

Force majeure clauses are contractual provisions that enable a party “to suspend or terminate the contract on the occurrence of an event which is beyond the control of the parties and which prevents, impedes, or delays the performance of the contract.”¹³ These clauses are, perhaps, the most common contractual remedy to deal with unforeseen events such as the COVID-19 pandemic. They are routinely included in long-term oil and gas contracts all over the world, including in the Middle East.

The wording of *force majeure* clauses differs greatly among contracts. As a result, each clause should be carefully considered on its own terms. However, despite textual differences, *force majeure* clauses have a series of common features. They usually require the party invoking the clause to demonstrate at least four things:

- a. First, the existence of a *force majeure* event. Most contracts include a definition of this. As can be seen from the example provided by the Westernzagros contract quoted below, such definitions often include a non-exhaustive list of circumstances meant to describe certain specific

¹² In addition to being a titanic task, such an exhaustive review would be of little use to the average reader. The legal remedies described in this Section have been selected because they are frequently provided in long-term oil and gas contracts in the Middle East. The authors also bear in mind that many long-term oil and gas contracts in the Middle East are governed by English law, US law or the law of a Middle Eastern jurisdiction originally influenced by French civil law.

¹³ Ewan McKendrick, *Contract Law* (Oxford University Press, 2nd ed., 2005), page 434.

force majeure events. Those events often include wars, insurrections, riots, civil commotions, acts of terrorism, strikes or other labour conflicts, natural disasters, acts of God, quarantine restrictions and epidemics. Apart from the description of specific events, contracts frequently include a catch-all phrase covering any unforeseen events beyond the parties' control.¹⁴

- b. Second, that the *force majeure* event has had a severe impact on its ability to perform the contract. The severity of that inability to perform depends on the language of the contract. Typically, contracts state that the *force majeure* event must "prevent," "preclude" or "impede" performance of the contract. Those terms are often interpreted as requiring the disadvantaged party to show that its performance has become physically or legally impossible.¹⁵ It is worth noting that, unless the contract contains less stringent language, courts and tribunals usually take the view that economic hardship which merely makes performance more difficult from an economic viewpoint does not amount to *force majeure*.¹⁶
- c. Third, that the *force majeure* event was "unforeseeable" and "irresistible." The requirement that the event must be unforeseeable is in line with the idea that, if the event were foreseeable, the defaulting party should be considered as having assumed the risk of its realisation.¹⁷ The

¹⁴ See, e.g., Production Sharing Contract for the Garmian Block (Kurdistan Region), entered into between the Kurdistan Regional Government of Iraq and Westernzagros Limited, 25 July 2011 (last accessed on 30 April 2021), Article 40.1, available at: <https://www.resourcecontracts.org/contract/ocds-591adf-9205170350/download/pdf> ("Force Majeure" means any event that is unforeseeable, insurmountable and irresistible, not due to any error or omission by the CONTRACTOR but due to circumstances beyond its control, which prevents or impedes execution of all or part of its obligations under this Contract" (emphasis omitted.)).

¹⁵ For instance, in the case of *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495, the relevant English court analysed the meaning of the word "prevent." In that case, the court concluded that, if a *force majeure* clause states that the triggering event had to "prevent" performance, then the disadvantaged party must show that performance was made legally or physically impossible, not just difficult or unprofitable. Notably, some contracts include less stringent language such as "hindered" or "delayed." English courts also have made clear that those terms have a wider scope, which requires showing that performance was made substantially more burdensome rather than impossible. For instance, in *Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* [1961] 2 All ER 577, the court concluded that the relevant event would have had to be so severe as to place the affected party in a position where it could not perform its contractual obligations unless it breached other contracts.

¹⁶ See, e.g., *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273 at 288 (under Delaware law, "financial hardship itself does not constitute a condition excusing performance under a *force majeure* provision").

¹⁷ See, e.g., Joern Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), ed. Pace International Law Review (Kluwer, The Hague, 2001), page 216.

requirement that the event be irresistible essentially means that the event must be unavoidable. This constitutes a clear difference between *force majeure* and hardship clauses.

- d. Fourth, that there were no reasonable steps that the party invoking the *force majeure* clause could have taken to avoid or mitigate the *force majeure* event. The contract may provide that the parties should meet in order to discuss actions to mitigate or overcome the effects of the *force majeure* event. Some clauses require the disadvantaged party to carry out “all reasonable endeavours” to avoid or mitigate the effects of the *force majeure* event.¹⁸

An illustrative example of a *force majeure* clause containing the abovementioned requirements can be found in Article 40 of a Production Sharing Contract entered into by the Kurdistan Regional Government of Iraq and Westernzagros Limited.

The relevant part of that provision reads:

40.1 No delay, default, breach or omission of the **CONTRACTOR** in the execution of any of its obligations under this Contract shall be considered a failure to perform this Contract or be the subject of a dispute if such delay, default, breach or omission is due to a case of Force Majeure. In such event the **CONTRACTOR** shall promptly notify the **GOVERNMENT** in writing and take all reasonably appropriate measures to perform its obligations under this Contract to the extent possible [...] The Parties shall meet as soon as possible after the notification of Force Majeure with a view to using reasonable endeavours to mitigate the effects thereof.¹⁹

“Force Majeure” means any event that is unforeseeable, insurmountable and irresistible, not due to any error or omission by the **CONTRACTOR** but due to circumstances beyond its control, which prevents or impedes execution of all or part of its obligations under this Contract. Such events shall include the following:

- (a) war, whether declared or not, civil war, insurrection, riots, civil commotion, terrorism, any other hostile acts, whether internal or external;
- (b) strikes or other labour conflicts;
- (c) accidents or blowouts;
- (d) quarantine restrictions or epidemics;

¹⁸ The contract in the *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All ER (Comm) 34, 52-53 is an example. In that case, the contract required Tullow to take “reasonable endeavours” to mitigate the consequences of a *force majeure* event. The court ultimately found that Tullow could not rely on the *force majeure* clause in question because, *inter alia*, it had not used reasonable endeavours to mitigate the effects of a *force majeure* event (*i.e.*, a moratorium imposed by the Ghanaian government which prevented Tullow from drilling).

¹⁹ Production Sharing Contract for the Garmian Block (Kurdistan Region), entered into between the Kurdistan Regional Government of Iraq and Westernzagros Limited, 25 July 2011 (last accessed on 30 April 2021), Article 40, available at: <https://www.resourcecontracts.org/contract/ocds-591adf-9205170350/download/pdf>.

- (e) any act, event, happening or occurrence due to natural causes, in particular, but without limitation, floods, storms, cyclones, fires, lightning, or earthquakes;
- (f) environmental restrictions, which the **GOVERNMENT** has not notified to the **CONTRACTOR**;

[...]

40.3 The intention of the Parties is that Force Majeure shall receive the interpretation that complies most with prudent international petroleum industry practice. Force Majeure affecting a **CONTRACTOR** Entity or an Affiliated Company of a **CONTRACTOR** Entity shall be deemed Force Majeure affecting the **CONTRACTOR** if the consequence of such Force Majeure prevents the performance of any of the **CONTRACTOR**'s obligations under this Contract.

Every jurisdiction has its own approach to *force majeure*. So, aside from the specific wording of the relevant contract, the law governing the contract has a major influence on the interpretation of the clause in question. It also has a major say on whether *force majeure* can be invoked even in the absence of an express contractual provision. For example, in common law jurisdictions (e.g., England and the US) *force majeure* is viewed purely as a creature of contract. Thus, parties cannot raise *force majeure* claims absent an express contractual provision. By way of contrast, in civil law jurisdictions (e.g., France,²⁰ Spain²¹ and most Middle Eastern countries that follow a civil law approach)²² *force majeure* is viewed as a general legal concept that applies, by statute, even in the absence of an express contractual provision.

Force majeure clauses can have a variety of effects depending on their language. Some *force majeure* clauses might activate a right to terminate the contract. Others might simply excuse performance for a specific period of time. Nowadays, many *force majeure* clauses in long-term oil and gas contracts provide a two-stage approach in terms of the effects of a *force majeure* event. The first stage suspends or delays performance for specific period of time. The second stage triggers a right to terminate the contract if the event is permanent or continues

²⁰ French Civil Code, Article 1218 (“[i]n contractual matters, there is *force majeure* where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.” (unofficial translation)).

²¹ Spanish Civil Code, Article 1105 (“[a]part from the cases expressly mentioned in the law, and those in which the obligation so declares, nobody will be liable for those events that could not have been foreseen, or that, if foreseen, were unavoidable.” (unofficial translation)).

²² See, e.g., footnotes 31 to 36 below referring to Emirati Civil Code (Federal UAE Law No. 5 of 1985), Article 273; Lebanese Code of obligations and contracts, Article 341; Qatari Civil Code (Law No 22 of 2004), Article 256; Jordanian Civil Code (Law No 43 of 1976), Article 448; Iraqi Civil Code (Law No 40 of 1951), Article 211. See also, e.g., Bahraini Civil Code (Legislative Decree No. 19 of 2001), Article 165; Algerian Civil Code, Article 127; Libyan Civil Code, Article 218; Oman's Civil Transactions Law (RD 29/2013), Article 172.

after the expiration of the agreed period of time. Usually, if the event ceases before the expiration of that period, then the contract will resume without consequences.

Importantly, most *force majeure* clauses set out a series of procedural requirements that must be met in order to trigger a valid *force majeure* claim. Those requirements might include: (i) serving a notice identifying the *force majeure* event (possibly within a specific period of time); (ii) meeting to discuss any actions to avoid or mitigate the *force majeure* event; and (iii) providing periodic information to the counterparty regarding the *force majeure* event. A failure to comply with such requirements can constitute a breach of contract or a waiver or limitation of rights.

3.1[b] Hardship clauses

Hardship clauses resemble *force majeure* clauses in that they also address unforeseen events which affect contractual performance. The main difference between the two is that hardship clauses deal with performance that has become significantly more burdensome rather than impossible.²³

Unlike *force majeure* clauses, hardship clauses “organise the revision of the contract whenever a change of circumstances significantly modifies the economy of the contract.”²⁴ Hardship clauses enable the disadvantaged party to trigger a negotiation phase in order to revise the contract and re-establish the contractual equilibrium.²⁵ They are therefore intended to apply to situations where the parties wish to continue the contract rather than suspend or terminate it.

Hardship clauses are usually structured in two parts.²⁶ The first part sets out the circumstances in which an event of hardship takes place. The way in which those circumstances are defined varies. For example, some hardship clauses define those circumstances in a generic manner. Others do so more specifically by reference to particular events. In either case, hardship clauses usually require the occurrence of an event that entails a “material” or “substantial” change in circumstances. They also require that the event be unforeseeable. It is worth noting

²³ See, e.g., Rimke, *Force majeure and hardship*, *supra* fn 17, pages 201–202; Harold Berman, *Excuse for Non-Performance in the Light of Contract Practices in International Trade*, in 63 COLUM. L. REV. (1985) 1413, page 1419.

²⁴ Rimke, *Force majeure and hardship*, *supra* fn 17, pages 201–202.

²⁵ See, e.g., Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: the Role of Contracts Drafters and Arbitration*, 36 VAND. J. TRANSNAT'L L. (2003) 1347, page 1352; Heinz Strohbach, *Force Majeure and Hardship Clauses in International Commercial Contracts and Arbitration: The East German Approach*, in 1 J. INT'L ARB. (1984) 39, page 41.

²⁶ However, bear in mind that the wording of hardship clauses differs between contracts, so each clause must be considered on its own terms and some of them might be structured in more than two parts. In addition to that, it is worth noting that—as with *force majeure* clauses—common law jurisdictions tend to treat hardship as creatures of contract; whereas, civil law jurisdictions usually offer some form of statutory hardship (e.g., *imprévision* in France, which is now expressly regulated by Article 1195 of the French Civil Code). Notably, the French approach to *imprévision* is followed by many legal systems including in the Middle East (see Section 3.2[c]below).

that mere economic loss is insufficient to constitute hardship since it is usually viewed as a foreseeable event.

The second part of hardship clauses deals with the legal consequences of hardship.²⁷ These typically entail revision of the contract, but may also include termination of the contract. In this sense, hardship clauses usually give the disadvantaged party the right to trigger a negotiation period aimed at re-establishing the contractual equilibrium. Failure to reach an agreement during that negotiation period gives either party the right to resort to a third party (e.g., an expert, an arbitral tribunal or a court) to have the contract revised or terminated.

An illustrative example of a hardship clause which follows this structure is as follows:

- (a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and [...] either party feels that such change is causing it to suffer substantial economic Hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism contained in Clauses 4, 5 and 6 of this Article are justified in the circumstances in fairness to the parties to offset or alleviate the said Hardship caused by such change.
- (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments [...] then the matter may forthwith be referred by either party for determination by experts [...].²⁸

3.1[c] Price revision clauses

Price revision clauses (PRCs) are common in gas and liquefied natural gas (LNG) sale and purchase agreements (GSPAs). Put simply, PRCs are contractual provisions that enable the revision of the contract either periodically or in the face of a material change in circumstances. The main purpose of PRCs is to ensure that the price of the commodity that is being traded under the relevant contract is adjusted to reflect certain market fluctuations.

PRCs should be distinguished from price indexation clauses. The latter are essentially mechanical and provide for the regular (e.g., quarterly or yearly)

²⁷ See, e.g., Rimke, *Force majeure and hardship*, *supra* fn 17, pages 227–228.

²⁸ Cited in Ewan McKendrick, *Contract Law* (Oxford University Press, 2nd ed., 2005), pages 439–440.

adjustment of the contract price by reference to movements in the value of one or more published indices. PRCs, by contrast, are intended to address situations where the price indexation formula no longer accurately reflects the economic circumstances which motivated the parties to enter into the contract. They normally entitle either party to trigger a negotiation period with a view to revising the price indexation formula in order accurately to reflect the changed circumstances. If negotiations do not result in an agreement, then either party can resort to a third party (usually an arbitral tribunal) to revise the price formula or (in exceptional cases) to terminate the contract.

In practice, the wording of PRCs varies significantly. However, many PRCs share common features. These include: (i) a defined “trigger event”; (ii) a description of the factors or guidelines to be taken into account when adjusting the price; (iii) a procedure for arriving at the adjusted price; (iv) a list of the consequences if an agreement on price is not reached; and (v) provisions as to how the adjusted price is to apply under the contract.

It is uncontroversial that, where the parties have expressly included a PRC which gives a third party adjudicator the power to revise the contractual price, then that PRC is legally effective.²⁹ The main controversy in such disputes usually relates to the correct interpretation of the relevant clause and the extent of the power it confers on a third party to adjust the price.

A typical PRC can be found in a recent GSPA entered into between Naftogaz and Gazprom. The relevant provision of that GSPA read:

- 4.4. If either Party declares that the fuel and energy market conditions have changed significantly compared to what the Parties had reason to expect at the conclusion of this Contract, and if the contract price provided in Article 4.1 of this Contract does not reflect the level of market prices, then the Parties shall enter into negotiations regarding an adjustment of [Gazprom: proceed to negotiations to consider] the Contract Price in accordance with the provisions of this Contract.
 - 4.4.1. A request for price revision [Gazprom: to reconsider the price] shall be submitted in writing and shall be properly substantiated [Gazprom: duly justified] by the requesting Party]. Upon receipt of the above-mentioned request by the Party concerned, the Parties shall enter into negotiations within 20 days and, if an agreement is reached, sign the respective addendum to this Contract.
 - 4.4.2. If a written agreement on the revision of the Contract Price [Gazprom: to reconsider the contract price] cannot be reached within 3 (three) months

²⁹ For instance, in a recent SCC case between Naftogaz and Gazprom, the arbitral tribunal concluded that Naftogaz had a right to price revision under the relevant gas sales contract on the basis of an explicit PRC which enabled the adjudicator to review the price (*National Joint Stock Company Naftogaz of Ukraine v Public Joint Stock Company Gazprom*, SCC Arbitration No. V2014/078/080), Separate Award, 31 May 2017, page 775, paragraph 1, stating that “Naftogaz of Ukraine has the right to price revision in accordance Article 4.4. of the Contract”).

from the date of the beginning of negotiations, each of the Parties has a right to dispute the other Party's performance of the present Contract [Gazprom: has a right to challenge the actions of the other Party to perform this Contract] and to submit the matter to arbitration in accordance with Article 8 of the Contract for the passing of a final decision [Gazprom: for the adoption of a final resolution].³⁰

It is certainly arguable that the COVID-19 pandemic falls within the terms of this clause. On the one hand, there is little doubt that “energy market conditions have changed significantly” since the beginning of the COVID-19 pandemic. On the other hand, it is entirely possible that the contract price will no longer “reflect the level of market prices” following the economic effects of the COVID-19 pandemic.

3.2 EXTRA-CONTRACTUAL REMEDIES TO REVISE, SUSPEND AND/OR TERMINATE CONTRACTS ON THE BASIS OF SUPERVENING EVENTS SUCH AS THE COVID-19 PANDEMIC

3.2[a] *Extra-contractual force majeure and hardship*

As already explained, the legal systems of certain jurisdictions offer statutory *force majeure* and/or hardship. Consequently, the parties to long-term oil and gas contracts governed by the law of such jurisdiction might be entitled to raise extra-contractual *force majeure* and/or hardship claims. Most Middle Eastern legal systems—including, e.g., Egyptian law,³¹ Emirati law,³² Lebanese law,³³ Qatari

³⁰ *National Joint Stock Company Naftogaz of Ukraine v Public Joint Stock Company Gazprom*, SCC Arbitration No.V2014/078/080), Separate Award, 31 May 2017, page 702, paragraph 3510 (brackets in original Award).

³¹ See Egypt Civil Code (Civil Law of 1948), Article 165 (“[i]n the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the damage resulted from a cause beyond his control, such as unforeseen circumstances, *Force Majeure*, the fault of the victim or of a third party.” (unofficial translation)).

³² See Emirati Civil Code (Federal UAE Law No. 5 of 1985), Article 273 (“(1) In contracts binding on both parties, if force majeure supervenes making contractual performance impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled” (unofficial translation)); Emirati Civil Code, Article 287 (“If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, *force majeure*, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.” (unofficial translation)).

³³ See Lebanese Code of obligations and contracts, Article 341 (“the obligation is extinguished, if, after its formation, its object becomes impossible naturally or legally without the action or the fault of the debtor.” (unofficial translation)).

law,³⁴ Jordanian law³⁵ and Iraqi law³⁶—offer statutory *force majeure* and/or hardship.

The specific requirements of extra-contractual *force majeure* and hardship depend on the requirements set out by the domestic law governing the contract and the interpretation of such remedies by the relevant domestic courts. They therefore vary from one jurisdiction to another.

Given that most long-term oil and gas contracts have an international dimension (e.g., they are often concluded between parties of different nationalities, concern an international sale of commodities and include dispute resolution clauses providing for international arbitration), the requirements of extra-contractual *force majeure* and hardship do not rest exclusively on the domestic law governing the contract. That international dimension may require looking beyond the governing law to international trade usages or *lex mercatoria*.³⁷

Under most domestic legal systems, extra-contractual *force majeure* requires demonstrating at least three things. First, the existence of an event that is beyond the parties' control. Second, that the event was unforeseeable. Third, that the event was irresistible.³⁸

For example, Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts—which reflects the aim of the classic concept of *force majeure* as elaborated by most major legal systems—specifically incorporates these three requirements.³⁹ That provision reads:

³⁴ See Qatari Civil Code (Law No 22 of 2004), Article 256 (“[i]f the debtor does not perform the obligation specifically, or is delayed in its performance, he is obliged to compensate the damage caused to the creditor; unless it is proved that the non-performance or the delay was for an extraneous cause for which the debtor is not responsible.” (unofficial translation)).

³⁵ See Jordanian Civil Code (Law No 43 of 1976), Article 448 (“[a]n obligation shall be discharged if the debtor proves that the performance of such obligation has become impossible as a result of an external/foreign reason beyond its control.” (unofficial translation)).

³⁶ See Iraqi Civil Code (Law No 40 of 1951), Article 211 (“[a] person who has established that the injury had arisen from a cause beyond his control such as by an Act of God, an accident, a *force majeure*, the act of a third party or the default of the injured himself shall not be liable for damages unless there is a provision of law or an agreement otherwise.” (unofficial translation)); Article 425 (“[a]n obligation on debtor is extinguished if the debtor establishes that its performance has become impossible due to causes beyond the debtor's control.” (unofficial translation)).

³⁷ For example, some arbitral rules (e.g., Article 21(2) of the 2017 ICC Rules) expressly require arbitral tribunals to take into consideration, not only the provisions of the relevant contract and governing law, but also “any relevant trade usages.”

³⁸ See, e.g., Article 1218 of the French Civil Code (“[i]n contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.” (unofficial translation)).

³⁹ The UNIDROIT Principles aim to elaborate a regulatory system that can apply universally and restate the general principles of contract law of all the major legal systems of the world. See Michael Joachim Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Principles for International Commercial Contracts*, 40 AM. J. INT'L L. (1992) 617.

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.⁴⁰

For its part, extra-contractual hardship normally requires showing the existence of an event that has altered the equilibrium of the contract in a way that makes contractual performance excessively burdensome. The hardship event also has to be unforeseeable and beyond the parties' control.⁴¹

In this sense, Article 6.2.2 of the UNIDROIT Principles—which also reflects the general aim of the classic concept of hardship—reads:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.⁴²

3.2[b] Extra-contractual price revision

Extra-contractual price revision is particularly relevant in the context of long-term LNG contracts and GSPAs which do not include a PRC. The question that often arises under such contracts is whether the parties have an extra-contractual right to revise the contract in the event of a material change in circumstances. As with *force majeure* and hardship, the answer to that question largely depends on the law governing the contract.

⁴⁰ UNIDROIT Principles of International Commercial Contracts, International Institute for the Unification of Private Law (UNIDROIT), 2006, Article 7.1.7. Another notable example is the standard ICC *force majeure* clause that was revised in March 2020 as a result of the COVID-19 pandemic. See “ICC Force Majeure and Hardship Clauses”, ICC, March 2020 (last accessed on 30 April 2021), available at: <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>.

⁴¹ See, e.g., Clive M. Schmitthoff, *Hardship Clauses* (1980) THE JOURNAL OF BUSINESS LAW 82, page 85.

⁴² UNIDROIT Principles of International Commercial Contracts, International Institute for the Unification of Private Law (UNIDROIT), 2006, Article 6.2.2. Another notable example is the standard ICC hardship clause that was revised in March 2020 as a result of the COVID-19 pandemic. See “ICC Force Majeure and Hardship Clauses”, ICC, March 2020 (last accessed on 30 April 2021), available at: <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>.

Under most legal systems, enabling adjudicators to interfere with a contract in order to recalibrate the economic equilibrium originally struck by the parties creates an obvious conflict with the fundamental principle of *pacta sunt servanda*. However, there are precedents with LNG contracts and GSPAs—albeit limited and only in certain jurisdictions—acknowledging either a duty to renegotiate the contract or a right to interfere with the contract in order to adjust the price. Both international arbitration tribunals⁴³ and domestic courts⁴⁴ have previously relied on various legal principles and theories (e.g., hardship and the theory of “*imprévision*” described in Section 3.2[c] below) to find exceptions to the principle of *pacta sunt servanda* and acknowledge the possibility of revising contracts. Based on those legal principles and theories, it can in some circumstances be argued that parties have the right to revise the contractual price extra-contractually.

3.2[c] The theory of “imprévision” under civil law systems

The theory of *imprévision* was originally envisaged as a French administrative law concept. It was aimed at ensuring the non-interruption of public services

⁴³ For instance, certain arbitral tribunals have relied on the principle of good faith to relax the *pacta sunt servanda* principle (see, e.g., ICC case No 2508/1976; ICC case No 9994/2001). Others have acknowledged that the theory of “*imprévision*” may constitute an exception to the *pacta sunt servanda* principle in long-term contracts (see, e.g., ICC Case No 2291/1975). Some have gone further, proclaiming and enforcing a supposed “duty to re-negotiate” the relevant contract in good faith to overcome unforeseen difficulties in the performance of the contract (see, e.g., ICC Case No 6219/1990; ICC Case No 9994/2001; ICC Case No 2291/1975). More rarely, tribunals have recognised a right in themselves to equitably modify the contract directly when faced with a situation of hardship or an unforeseen change in circumstances. However, they have placed a high onus on the circumstances that will qualify as permitting such an intervention (see, e.g., ICC Case No 9479/1999, ICC bulletin 67-70 (2001); ICC Case No. 4145/1983, in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 1987 - Volume XII*, Kluwer Law International 1987, p. 110).

⁴⁴ The application of such principles by domestic courts varies among legal systems. Some tend to be more conservative when interfering with the parties’ contractual will. Others take a more liberal approach. For example, the courts of both the US and France tend to refuse to interfere with contracts with no PRCs. However, they will, in rare circumstances, grant relief to the party finding itself on the losing side of an uneconomic contract, by strongly encouraging the parties to revise the contract and “superintending” the negotiation process (even in the absence of an explicit contractual requirement to do so). More exceptionally, courts will revise or terminate the contract directly. In the US, courts have relied on the Uniform Commercial Code’s exception to “*pacta sunt servanda*” contained in Section 2-615 which excuses contractual performance on the basis of the doctrine of “impracticability” (see Section 3.2[d] below). On that ground, some US courts have either ordered the parties to renegotiate their contract or have directly modified the contract. For its part, French law recognises the theory of “*imprévision*” (as well as “*bouleversement économique*”), which implies changed circumstances. The French Supreme Court recently held that a change in the economic circumstances affecting the balance of the contract and “*privant de toute contrepartie réelle l’engagement de la partie qui en pâtit*” could render the contract void. Lastly, in the UK, the High Court has recognised a general duty of good faith underlying the performance of contracts, which may be used in a similar manner to deal with uneconomical long term agreements (see, e.g., the High Court’s recognition of an implied duty of good faith underlying contracts in the case of *Yam Seng Pte Limited v International Trade Corporation Limited*, [2013] EWHC 111 (QB)).

wherever there was a drastic change in circumstances affecting a public contract. Nowadays, its application has been extended to private contracts as well.⁴⁵

The theory of *imprévision* (which is often equated with the notion of “hardship”)⁴⁶ is generally regarded as an exception to the *pacta sunt servanda* principle. Put simply, it enables the renegotiation of a contract on the basis of an unforeseen change in circumstances that makes contractual performance excessively onerous. An illustrative formulation of the theory of *imprévision* is expressed in Article 1195 of the French Civil Code, which reads:

If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract.⁴⁷

Notably, in most Middle Eastern legal systems the approach to onerous performance resulting from unforeseen events is similar to the French theory of *imprévision*.⁴⁸ In fact, most Civil Codes in Arab Middle Eastern countries contain a provision similar to Article 147(2) of the Egyptian Civil Code which, in essence, is a formulation of the French theory of *imprévision*. That provision reads:

If exceptional events of a general nature occur which were not capable of being foreseen, and the occurrence of which renders performance of a contractual obligation oppressive, albeit not impossible, for the obligor as it threatens him with exorbitant loss, it shall be permissible for the judge, in accordance with the circumstances, and after weighing up the interests of the two parties, to bring the oppressive obligation back to what is reasonable, if justice so requires. Any agreement to the contrary shall be null.⁴⁹

Based on that type of provision, the courts of several Middle Eastern States have acknowledged the power to interfere with contracts to correct contractual

⁴⁵ With the enactment of *Ordonnance No 2016-131* dated 10 February 2016, France implemented an important reform to the law of contracts. Among other things, it introduced Article 1195 of the French Civil Code which now contemplates expressly the theory of *imprévision* (see footnote 47 below).

⁴⁶ Klaus Peter Berger and Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, in Vol. 6 (2019-2020) *McGILL JOURNAL OF DISPUTE RESOLUTION* 79, page 88.

⁴⁷ French Civil Code, Article 1195 (unofficial translation).

⁴⁸ Nayla Comair-Obeid, *Salient Issues in Arbitration from an Arab Middle Eastern Perspective*, THE ARBITRATION BRIEF 4, No 1 (2014) 52-74, page 69 (“[t]he Middle East approach is similar to the French theory of *imprévision*, which is initially limited to administrative contracts under French law, but it is now generally applied to all contracts throughout the Middle East in the countries that make a specific reference to this theory in their legislation”).

⁴⁹ Law No. 43 of the 1976 Civil Code, cited in Comair-Obeid, *Salient Issues in Arbitration*, *supra* fn 48, page 69. See also Comair-Obeid, *Salient Issues in Arbitration*, footnote 74, citing Bahrain Civil Code, Article 130; Syrian Civil Code, Article 148(2); Iraqi Civil Code, Article 146; Libyan Civil Code, Article 147(2); Kuwaiti Civil Code, Article 198; Qatari Code of Civil and Commercial Procedure (Law No 13 of 1990), Article 171(2); Emirati Code of Civil Procedure (Law No 11 of 1992), Article 249; Jordani Civil Code (1 January 1977), Article 205.

imbalances caused by unforeseeable events. To name but one example, the Syrian Court of Cassation has stated that:

Though it is an established law that contracts should be respected considering them to be the law between the parties to it, such must be restricted to the requirements of justice and fairness. Thus, if, during the course of execution, circumstances that were not contemplated by the parties at the time of conclusion of the contract occur, and such circumstances cause an imbalance to the contract, then it shall be unfair to respect the contract in such circumstances. And it shall be just and fair to help or rescue the debtor from destruction and to take into consideration what was not contemplated by the parties.⁵⁰

Aside from a domestic level, it is worth noting that arbitral tribunals have widely recognised the application of the theory of *imprévision* to international contracts as part of *lex mercatoria*.⁵¹

3.2[d] The doctrines of frustration and impracticability under common law systems

The doctrine of frustration is an English law concept⁵² which enables a party to discharge a contract when a supervening event “renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.”⁵³

Frustration is generally regarded as a concept “with very narrow limits” and which applies only in very rare circumstances.⁵⁴ The legal test to substantiate a frustration claim is high. As a matter of English jurisprudence, there are relatively few reported cases where the doctrine of frustration has actually been upheld.

On the other hand, the doctrine of impracticability is a US law concept that was developed to deal with the exacting rule that contracts must be performed

⁵⁰ Syrian Court of Cassation, Second Chamber, Decision No. 420, case no. 546 (April (2000)), cited in Comair-Obeid, *Salient Issues in Arbitration*, *supra* fn 48, page 70.

⁵¹ See, e.g., ICC Case No. 4761/1987.

⁵² Despite originating in English law (through the famous *Taylor v Caldwell* (1863) 3 B & S 826), the doctrine of frustration nowadays applies in most common law jurisdictions, including the US, Australia, India and Pakistan.

⁵³ Joseph Chitty and Hugh G. Beale, *Chitty on Contracts* (Sweet & Maxwell, 31st ed., vol. I, 2012), page 1635. See also, e.g., *National Carriers Ltd v Panalpina (Northern) Ltd*, 1981 A.C. 675 (noting that frustration takes place when there “supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances.”).

⁵⁴ Chitty and Beale, *Chitty on Contracts*, *supra* fn 53, page 1639 citing, *inter alia*, *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 459.

unless this is absolutely impossible. In short, the doctrine of impracticability excuses contractual performance where performance, though not impossible, involves “excessive and unreasonable difficulty or expense”.⁵⁵

Under US law, the doctrine of commercial “impracticability” is expressed in Section 2-615 of the Uniform Commercial Code. The relevant part of that Section reads:

Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

The impracticability test contains the following three elements: (i) the existence of a “contingency”; (ii) the contingency must have made performance “impracticable”; and (iii) the non-occurrence of that contingency was a basic assumption upon which the contract was made.⁵⁶

The US doctrine of impracticability sets a lower bar than the doctrine of frustration. Unlike frustration, impracticability does not require showing that contractual performance has been made impossible or that there has been a dramatic transformation of the original obligation. There is precedent from US courts where the relevant court either directly modified the contract⁵⁷ or ordered the parties to renegotiate it⁵⁸ on the basis of the doctrine of impracticability.

⁵⁵ See, e.g., *Schmeltzer v. Gregory*, 72 Cal. Rptr. 194, 198 (Ct. App. 1968).

⁵⁶ See, e.g., *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781, 786 (7th Cir. 1985). Some scholars add the following two requirements: (i) that the impracticability must have resulted without the fault of the party seeking to be excused; and (ii) that a party must not have assumed a greater obligation than the law imposes (see, e.g., Allan Farnsworth, *Farnsworth on Contracts* (Aspen Publishers, 4th ed., 2004), page 625).

⁵⁷ For example, in *Aluminum Co. of America (ALCOA) v. Essex Group, Inc.*, the court ultimately modified the price of the contract. In that case, Alcoa concluded a 20-year contract with Essex to supply aluminium. The price for the aluminium was based upon a formula that would allow a portion of the price to escalate in accordance with the Wholesale Price Index (WPI). An oil crisis raised the cost of production far beyond the presumption of the index. In light of that, the court held that: “[a] remedy modifying the price term of the contract in light of the circumstances which upset the price formula will better preserve the purposes and expectations of the parties than any other remedy. Such a remedy is essential to avoid injustice in this case” (see *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980)).

⁵⁸ For example, In *Florida Power & Light Co. v. Westinghouse Electric Corp.*, which concerned long-term contracts to remove irradiated fuel from plants, the judge “urged” the parties to make “an intensive attempt to reach an agreement” (see *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 517 F. Supp. 440 (E.D. Va. 1981)).

4 STRATEGIC AND TACTICAL CONSIDERATIONS WHEN DECIDING WHETHER TO SUSPEND, REVISE AND/OR TERMINATE A CONTRACT ON THE BASIS OF THE COVID-19 PANDEMIC

4.1 REVIEWING THE CONTRACT, ASCERTAINING THE APPLICABLE LAW AND UNDERSTANDING HOW IT INTERACTS WITH THE AVAILABLE LEGAL REMEDIES

Every long-term oil and gas contract has its own set of rules and particularities. Being familiar with them is vital in order to make an informed decision to revise, suspend and/or terminate a contract. Hence, the starting point when making such a decision should always be a careful review of the contract in question.

In addition, every legal system has its own approach to each of the legal remedies described above. Therefore, understanding the applicable law is crucial to understanding which contractual and/or extra-contractual remedies are available and how those remedies actually operate.⁵⁹

4.2 IS REVISING, SUSPENDING AND/OR TERMINATING A CONTRACT ACTUALLY WORTHWHILE?

The decision whether to revise, suspend or terminate a contract should be weighed carefully in light of its potential consequences, detrimental or otherwise. Immediate economic effects are not the only relevant consideration. For example, exiting a contract (or even asking a counterparty to revise it) could result in the loss of a strategic partnership or a potential long-term supplier or customer. It could also entail a loss of reputation or prejudice in the event of a market turnaround. Further, it could trigger lengthy and expensive legal proceedings.

The COVID-19 pandemic has put the entire oil industry in a state of flux requiring a greater degree of flexibility from all participants to ensure continuity. As with most crises, negotiated outcomes (where possible) will generally bring the best opportunity to achieve a mutually beneficial situation for both sides.⁶⁰ This is perhaps one of the reasons why the primary strategy of a majority of pipeline

⁵⁹ As explained in Section 3.1[a] above, a party to a contract governed by the law of a jurisdiction that follows a common law approach to *force majeure* will not be able to invoke *force majeure* unless the contract expressly contains a specific provision to that effect. Whereas, a party to a contract with *no force majeure* clause, but governed by the law of a jurisdiction that follows a statutory approach to *force majeure* (e.g., Egyptian law, Emirati law and Lebanese law), might still be entitled to invoke *force majeure*.

⁶⁰ Of course, the economic situation of a company plays a major role when deciding whether to delay, revise or exit a contract. For distressed companies, the benefits of exiting a contract can be a matter of immediate survival and the long-term consequences mentioned above may be less important. Non-distressed companies, on the other hand, may be able to take a more long-term outlook.

operators during the COVID-19 pandemic has been to halt or delay some of their projects rather than abandoning them entirely.

Parties involved in back-to-back or interconnected contracts will need to consider the impact on every related contract of revising, suspending and/or terminating one of the relevant contracts. Some related contracts may be governed by different laws. Thus, different rules may apply in relation to *force majeure*, hardship and/or PRCs. It is important to analyse the effect of invoking a legal remedy under one contract where related contracts treat the same legal remedy differently.

4.3 ASSUMING THERE IS *FORCE MAJEURE*, HARDSHIP AND/OR A PRC, IDENTIFYING AND UNDERSTANDING THE SPECIFIC REQUIREMENTS FOR THE OPERATION OF THE RELEVANT CLAUSE

A failure to invoke correctly *force majeure*, hardship and/or a PRC pursuant to the specific requirements of the relevant clause may result in a breach of contract that can lead to the termination of the contract. Consequently, it is imperative to identify and analyse the operative requirements of those clauses prior to invoking them.

The first practical recommendation in assessing the operative requirements of *force majeure*, hardship and/or PRCs is to determine whether the COVID-19 pandemic qualifies as a trigger event. That exercise will largely depend on the specific language of the clause and the interpretation of similar provisions developed by the courts of the jurisdiction of the applicable law. In the context of *force majeure* clauses, the term “pandemics” usually is not expressly listed as a *force majeure* event. However, most clauses contain broad language that includes any unforeseen event that is beyond the parties’ control.⁶¹ It seems safe to conclude that the effects of the COVID-19 pandemic (or the pandemic itself) can be regarded as an unforeseen event that is beyond the parties’ control. In addition, some clauses contain language which expressly refers to some of the measures adopted in response to the COVID-19 pandemic (e.g., lockdowns, shutdowns and/or labour shortages). The existence of a trigger event under a hardship clause or PRC is normally easier to establish. This typically requires showing the existence of a material change in circumstances.

The second practical recommendation is to assess carefully the impact of the relevant event(s) on the possibility of performance. As explained in Section 3.1[a] above, the threshold to trigger a *force majeure* clause typically requires showing that performance was “prevented”, “precluded” or “impeded”—in other words, that it

⁶¹ See Section 3.1[a] above.

was made impossible. However, some clauses might contain less stringent language (e.g., by reference to terms such as “delay” or “hinder”) which might lower that threshold. In the context of hardship clauses and PRCs, the bar is usually lower. It is often tied to the existence of an excessively onerous performance or any other specific economic impact on performance.

The third practical recommendation is to verify whether a causal link between the failure to perform and the COVID-19 pandemic (or related measures) can be established. In the COVID-19 context, establishing the causation element may prove difficult given the multiple ongoing factors that might not be directly attributable to the pandemic. For example, if a supplier had been facing financial difficulties prior to the COVID-19 pandemic, it might be difficult to prove that the COVID-19 pandemic was the “sole cause” of the supplier’s non-performance.⁶²

The fourth practical recommendation is to identify any procedural steps that must be complied with in order to invoke the clause in question. A failure to do so will likely entail a breach of contract or a waiver or limitation of rights (e.g., when the clause is not invoked in a timely manner). The latter is a particularly relevant consideration where the exact point in time of a trigger event is difficult to discern. Whenever that is the case, it might be worth notifying the other party of the trigger event at the earliest possible opportunity and then following up with periodic communications in order to avoid a waiver or limitation of rights.

4.4 KEEPING A DOCUMENTARY RECORD TO SUPPORT THE CLAIM

Parties seeking to invoke *force majeure*, hardship and/or a PRC should make sure that they keep a record of documentary evidence in support of their claims. Depending on the type of claim, parties also may want to create paper trails that would help them substantiate and improve their claims in the eventuality of a potential dispute.

For example, a party seeking to rely on a *force majeure* clause would be well advised to keep records evidencing: (i) the effects that the COVID-19 pandemic has had on contractual performance; (ii) the steps that it has taken to mitigate any effects arising from the COVID-19 pandemic; and (iii) the fulfilment of any relevant procedural requirements.

⁶² Domestic courts dealing with *force majeure* clauses have recognised the requirement. For example, under English law, the court in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All ER (Comm) 34, 52–53 stated that “a *force majeure* event must be sole cause of the failure to perform an obligation.”

4.5 TAKING REASONABLE MEASURES TO MITIGATE THE EFFECTS OF THE COVID-19 PANDEMIC (OR ITS EFFECTS)

Parties seeking to rely on a *force majeure*, hardship and/or PRCs should strongly consider adopting reasonable measures to mitigate the effects of the COVID-19 pandemic. As already explained, that is particularly the case when the contract expressly establishes a duty to take reasonable steps to mitigate or avoid the event in question. However, even if the contract does not contain an express mitigation requirement, most jurisdictions (including in the Middle East) require contractual parties, for example, to act in good faith or to take reasonable steps to mitigate the effects of an event that affects contractual performance.

It is worth noting that the reasonableness of a particular mitigation measure is considered in light of the burdens that it causes. The type of questions that oil and gas companies might want to ask themselves when considering their mitigation measures include whether they have the possibility of using alternative suppliers; whether they can reasonably delay the performance of certain obligations (e.g., payment obligations); and whether they can reroute deliveries to alternative locations.

4.6 DETERMINING WHETHER THERE ARE ANY EXTRA-CONTRACTUAL REMEDIES AVAILABLE

If the contract does not provide any of the contractual remedies described above (or others), then it is important to analyse whether there are any extra-contractual remedies available under the law governing the contract. For example, a party to a contract with no *force majeure* clause and governed by English law might still be entitled to claim that its contract has been frustrated by the effects of the COVID-19 pandemic.

5 CONCLUSION

The COVID-19 pandemic has had serious consequences for oil and gas companies operating in the Middle East. Many of those companies have entered into contracts under which contractual and/or extra-contractual legal remedies are available that may enable them to renegotiate or terminate their contracts.

The ability to rely on such legal remedies is largely dependent on the specific wording of the contract and its governing law. Contracts governed by the laws of jurisdictions where the notions of *force majeure* and hardship are well recognised will normally offer greater flexibility. Most Middle Eastern States appear to fall within that category. Nonetheless, the standard to invoke such remedies is high and

a failure to invoke them properly might entail a breach of contract which could have costly consequences.

Amid the COVID-19 pandemic and bearing in mind the legal remedies described above, oil and gas companies in the Middle East should consider whether to negotiate balanced solutions to the contractual imbalances caused by the COVID-19 pandemic or whether to abandon their contracts. These questions cannot be answered in the abstract. From a practical perspective, it is important to note that the COVID-19 pandemic has placed the entire oil and gas industry in a state of flux and uncertainty that calls for a greater degree of flexibility from all participants in order to ensure the industry's continuity. As with most crises, negotiated outcomes (where possible) seem to offer the best chance of achieving mutually beneficial solutions. The real question is whether—and for how long—parties to long-term oil and gas contracts in the Middle East can share the pain of onerous performance caused by the COVID-19 pandemic. Only time will be able to answer.