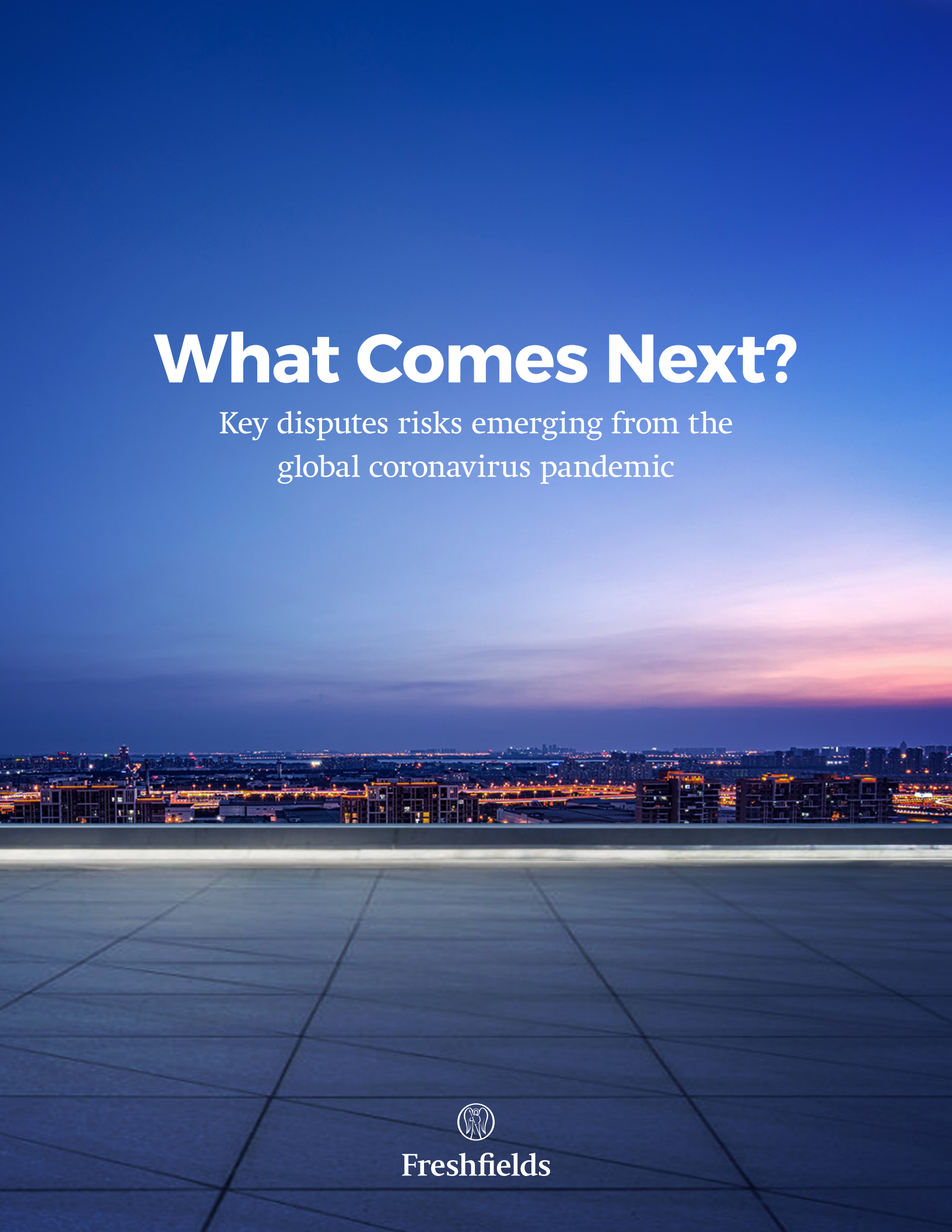

What Comes Next?

Key disputes risks emerging from the global coronavirus pandemic

Freshfields

As businesses around the world continue to grapple with the unprecedented challenges presented by COVID-19, it is not too early to ask an obvious question: what will our world look like in the "new normal" after the pandemic abates and people return to work?

From a disputes perspective the answer is already emerging. Plaintiffs did not stop filing cases when courts shut down, or claimants commencing arbitrations when institutions closed their facilities, and those cases offer a glimpse of what the future holds. We are seeing a number of trends developing, and history provides valuable lessons as to what we can expect.

To put all of this in perspective, Freshfields has asked its attorneys, and its clients, the simple question: in terms of disputes, what comes next? What follows are our observations.

Tim Harkness

Partner,
Dispute Resolution – Litigation

01

The disputes are just beginning – Lessons learned from past global dislocations

During these uncertain times, it is natural to look to past crises for guidance. More than a decade has passed since the collapse of Lehman Brothers in 2008, and the fallout from that provides helpful guidance as we look for the legal implications of our current situation. Many still recall the litigation that followed the Asian financial crisis of the late 1990s, the bursting of the dot.com bubble in 2000, and the Enron era of securities fraud litigation post-9/11. Each offers a glimpse of what is to come in three key ways.

First, a crisis of this magnitude will have a truly *global* impact. The 2008 financial crisis originated in subprime mortgages in the United States but soon spilled over to Europe and Asia, progressed into sovereign debt, and brought many economies to a screeching halt. Similarly, the coronavirus has already swept through all continents except Antarctica, locked down the world's biggest economies and buckled numerous industries. Companies should not be surprised if there are seismic changes to the way business is done as well as fundamental shifts in the legal and regulatory landscape. At the very least, just as we saw the emergence of a new global financial regulatory framework after 2008, we can expect to see new rules and regulations added to a beefed-up public health regime in the coming years.

Of course, the true impact of major economic events, even for individual organizations, can only be assessed after the dust settles. While we are starting to see trends in the types of claims being filed, the full scope of the legal consequences may take time to materialize.

What we know now is that some countries – and some sectors – have suffered more than others, although it is also true that some companies are thriving.

> While we are starting to see trends in the types of claims being filed, the full scope of the legal consequences may take time to materialize.

History teaches us that the long-term economic consequences of the pandemic will vary from country to country, and even city to city, based on how quickly social distancing and other public health interventions were implemented.

After the 1918 flu pandemic, US cities that instituted social distancing even 10 days earlier than other comparable cities ended up doing materially better economically in the five years after the disease abated. If that same pattern holds true this time, there may be materially different outcomes between regions, which may drive differences in litigation and arbitration patterns. The dispute profiles of companies with facilities, personnel or business relationships in various locations might be influenced by how different cities, regions and countries responded. Paying attention to these nuances might make predicting emerging litigation and arbitration patterns for specific organizations more accurate.

Second, the timing of crisis-related litigation will likely depend on the relative temporal proximity to the crisis.[1] In other words, some of the disputes may come in waves. In the immediate aftermath of the crash in 2008, financial institutions that suffered the biggest losses faced the first wave of corporate and securities lawsuits. This was followed by governmental investigations into the securitization market, and finally by other private civil litigation related to the mortgage market. We will likely observe similar waves of litigation stemming from COVID-19. Industries most directly affected by the pandemic, including airlines, restaurants and cruise lines, are already weathering swarms of legal disputes related to ticket cancellations, business closures and, above all, customers' contraction of the virus.

One step further removed, signs of contractual disputes around supply chain disruptions are appearing, even though few such cases have been filed in court. Other derivative claims might take years to emerge, but different aspects of the crisis will be litigated and arbitrated in due course as the human and economic toll of the pandemic crystallizes.

Third, the law will develop and adapt, as it always has. The million-dollar questions right now are whether the pandemic qualifies as a *force majeure* event that excuses non-performance of contracts, or a material adverse change (MAC) that might allow a buyer to walk away from a deal. Past cases are arguably distinguishable – nothing like COVID-19 has ever happened, people will argue. However, if the 2008 crisis is any indicator, legal innovation by lawyers and courts will soon fill the gap. Before the financial crisis, courts did not have to apply legal principles of contracts and securities law to cases of mass mortgage defaults. But as early shareholder litigation resulted in victories for the financial institutions, a body of precedents was established that is widely believed to have deterred countless similar claims.

In the context of COVID-19, we expect that the *force majeure* and MAC issues the pandemic presents will quickly make their way through the courts in different jurisdictions – in fact, we have already begun to see the first of those cases.[2] Anyone facing litigation or arbitration will need to keep a watchful eye on developments around the world to make sure that they are up to date on what courts are deciding and litigants are arguing.

Not surprisingly, among the sectors that have suffered the greatest losses are commercial aerospace, airlines and travel, and oil and gas. Those that have seen the least drop in valuation include pharmaceuticals, consumer services, and healthcare supplies and distribution.

Sectors with the largest and smallest year-to-date average percentage decline in market capitalization
(as of April 13, 2020)[3]

Rank	Largest decline	Smallest decline
1.	Commercial aerospace	Pharmaceuticals
2.	Air and travel	Consumer services
3.	Oil and gas	Retail
4.	Banks	Healthcare supplies and distribution
5.	Insurance	Medical technology
6.	Automotive and assembly	High tech

In general, the harder-hit sectors will likely see more litigation and arbitration. We note there is also significant variability among and within the sectors that are facing difficulty. As the economy slowly recovers, some will rebound relatively quickly while others will continue to languish. Diverging recovery scenarios will impact the development of ongoing lawsuits – parties may decide to settle early when a business expects continued financial pain, while plaintiffs could decide to pursue deepened pockets post-rebound. We expect this unpredictability to be the greatest in industries with large *intra*-sector variability. The oil and gas industry, for example, has players whose market capitalization has dropped 15 percent year-to-date, and others that have slumped by more than 65 percent.[4] These businesses will likely carry very different litigation risk profiles, amplified by the uncertain trajectory back to normalcy.

Companies will need to assess their litigation and arbitration exposure in conjunction with ongoing developments in their industry, including the depth of the value drops, projected recovery scenarios and, of course, the types of legal claims made against their peers.

02

COVID-19 and why the next wave of disputes will be different than in past global crises

Just because there are historical analogues to the current economic disruption does not mean that the past will repeat itself in terms of disputes. Several factors distinguish the COVID-19 pandemic from the 2008 financial crash, for instance. These distinctions will affect the types of cases brought to court or arbitration, the make-up of the litigants and the length of any resulting proceeding.

First, unlike in 2008, the current crisis does not stem from the behavior of private actors. Ensuing disputes will be less focused on allegations of fraud or bad faith and instead will center around issues of allocation and assumption of risk. There likely will also be significantly less emphasis on criminal investigations and prosecutions, although fraud will still be a feature in future disputes. The economic crisis may, for example, reveal fraudulent activity that has gone undetected in more favorable economic conditions or, with companies under economic distress, may create the conditions for fraud and other corporate misconduct. Likewise, we can expect the civil disputes arising out of the pandemic to feature fewer claims that require proof of intent. Instead, the outcome of many cases will depend on the courts' interpretation of the contractual provisions as applied to no-fault situations.

Second, the current pandemic has severely limited the capacity of the judiciary to handle cases in ways that the 2008 financial crisis did not. Courts in many jurisdictions have postponed deadlines for hearings and filings, and have restricted the ability to file new cases. This will soon create a sizable backlog, as existing cases stall and a steady stream of new cases either continues to be filed or begins piling up waiting for the courts to reopen.

Considering that some lawsuits filed in the aftermath of the 2008 crisis are still ongoing, cases stemming from COVID-19 may take even longer to resolve. Companies that are now in the early stages of adversarial processes should prepare for longer legal battles from here on out.

Most arbitral institutions remain open to one degree or another – including through the use of virtual facilities – and have been well-positioned to adapt. Arbitral rules are often equipped with provisions that enable parties to opt for remote hearings where attendance in person is not essential.

Most arbitral institutions remain open to one degree or another – including through the use of virtual facilities – and have been well-positioned to adapt.

Third, the third-party funding industry has matured since 2008 all over the world, but especially in the United States, parts of Europe and Asia.[5] Many new providers are entering the market, including private equity firms and hedge funds, and existing players have progressively enlarged their capital bases. The increased availability of funding will provide much-needed ammunition to cash-strapped litigants, thereby fueling the waves of litigation or arbitration following on the heels of the pandemic (see Section 3-7 following). The third-party funders will in turn see opportunity in the crisis, a confluence of a rise in the number of potential claims and a chance to buy into attractive cases at a discount. This may contribute to more litigious plaintiffs and a generally more active disputes landscape than in the aftermath of the 2008 crash.[6]

03

The United States

The regional impact of COVID-19 on disputes

No slowdown in disputes

Although the exact human toll of COVID-19 in the United States will not be known for some time, we do know that its impact in terms of lives, jobs and business lost is already substantial.

The litigation response so far has had three hallmarks – a steady flow of cases, a change in their mix, and substantial virus-related fights about money.

First, despite many courts scaling back their work to only critical cases,[7] we have so far seen a steady stream of new suits filed in the federal courts. For example, approximately 1,700 cases were filed in the New York federal courts in March 2020, compared to around 1,900 in March 2019.[8] In other words, the work of the plaintiffs' bar continues unabated and undeterred by the economic downturn. Not surprisingly, however, the pace of decisions being issued has slowed. In the coming months, we expect a significant backlog on court dockets. The increased uncertainty and added expenses may exert greater pressure on litigating parties to settle – though, as mentioned above, the increasing availability of third-party litigation funding may reduce that effect.

> Between March 2019 and March 2020, legal activity has remained steady in spite of an unprecedented disruption of economic activity.

Second, the mix of new cases is changing. We have observed about 30 percent fewer intellectual property cases this year compared with last year, and the number of environmental cases has also fallen sharply. By contrast, antitrust, employment and insurance cases have increased, with the number of securities cases rising the most (by 74 percent).[9] These trends are driven in part by the new market dynamics of a pandemic-stricken world, and in part by the wave of COVID-19–related litigation that we are now beginning to see.

> There has been a marked shift towards contracts and securities cases and a decline in IP and environmental cases.

Third, the COVID-19–related litigation so far relates to the one asset unaffected by plummeting valuations. Broadly speaking, these cases involve:

Fights about cash – We have already seen a marked increase in pre-dispute correspondence about the world's hottest commodity right now: cash. These are old-fashioned commercial disputes, sometimes invoking *force majeure* clauses, sometimes not. But they have a common theme: someone either wants to obtain or wants to retain cash. There is no surprise in any of this, of course, but companies need to be mindful that fights leading to litigation are breaking out widely in the market, making proper governance hygiene and careful attention to contractual details all the more important.

M&A disputes – As M&A activity has ground almost to a stop,[10] many remorseful would-be acquirors are looking for ways to avoid closing deals that were signed up prior to the crisis, while sellers are seeking to enforce deals struck pre-COVID. Recent examples include: Bed Bath & Beyond, which filed suit seeking an order to require 1-800-Flowers to complete its acquisition of a Bed Bath division, Personalization Mall; CorePower Yoga, which was sued by the owner of franchise yoga studios it had agreed to buy; and CMX Cinemas, which has been accused of using the pandemic "as a pretext for walking away from" a deal to acquire a competitor.[11]

Most recently, and perhaps most notably, an affiliate of Sycamore Partners filed suit in Delaware seeking a declaratory judgment that it was not required to close its acquisition of 55 percent of Victoria's Secret from L Brands in light of actions L Brands took in response to the pandemic and government orders requiring mass store closures. L Brands filed suit against Sycamore Partners the very next day seeking specific performance of their deal. Headlines are likely to continue to focus on MAC/material adverse effect (MAE) clauses, though the general exclusions that are typically found in a customary MAE definition will likely make it difficult for buyers to successfully assert an MAE has occurred given the industry-wide effects the pandemic has had to date. As in the Victoria's Secret deal, more focus may ultimately fall on parties' compliance with covenants: whether the remorseful buyer has used its reasonable best efforts to satisfy the closing conditions; whether the target has operated its business in the "ordinary course" notwithstanding the severe disruption caused by the pandemic; whether the buyer has acted unreasonably in withholding its consent to proposed responses to the pandemic suggested by the seller; and whether the buyer has effectively consented to such responses by its course of dealing with the seller. The form of relief may also be a battleground. On the one hand, sellers will almost universally seek specific performance to complete the deal. On the other, acquirors may prefer to pay damages to limit their overall cash outflow or use the dispute as a means to renegotiate the price in light of post-COVID expectations for the business. Disputes are also likely to arise over post-signing purchase price adjustments in private M&A transactions.

Consumer class actions – No business has been left untouched by COVID-19, and consumer lawsuits have quickly followed the disruptions and health risks caused by the outbreak. As can be expected from a virus that does not discriminate, consumers have filed lawsuits in divergent industries: passengers of the cruise ship *Grand Princess* have filed at least a dozen suits against the ship's operators for failing to inform them of the risk of infection aboard the vessel;[12] LA Fitness, 24 Hour Fitness and New York Sports Club have been sued for continuing to charge membership dues despite clubs being shut down; manufacturers of hand sanitizers have been accused of falsely claiming that their products can protect against the coronavirus; while a class action lawsuit has been filed alleging unlawful price-gouging on items such as toilet paper and hand sanitizers. Again, price sensitivity and a cash crunch among consumers seem to be a driving force behind many of these litigations. The breadth of the consumer actions we've seen so far indicates that litigation will continue to cut across wide sections of business and geographies.

> The cruise industry is one of the first to face claims with suits already filed against several operators for failing to inform passengers of the risk of infection.

Insurance litigation – Businesses themselves are also looking for a fight. A wave of lawsuits is expected against insurance companies over policies that cover business interruptions – supposedly those caused by pandemics as well. Businesses big and small have already sued the first group of insurers in multiple class actions suits.[13] There is a good chance that these lawsuits may later be consolidated into one large multi-district litigation; indeed, some plaintiff firms are entering joint prosecution agreements in anticipation of such a development.

Securities litigation – As in previous economic dislocations, we have seen – and may continue to see – some "stock-drop" lawsuits that focus on statements about or actions taken in connection with companies' readiness for or response to the outbreak. The 2008 crisis led to a spate of investor claims alleging misrepresentation and fraud on a large scale. But the pandemic is different. There are no allegations of systemic deception to drive claims in the same way. That said, we have already seen a handful of securities cases, though each addresses slightly different facts, disclosures and risk factors.

Online security and privacy proved to be the fault line for Zoom, the teleconferencing app provider whose stock prices soared only to plunge after concerns surfaced over security flaws and hacking.[14] The lawsuit against Inovio Pharmaceutical centered around the CEO's claims that the company had developed a vaccine for the coronavirus, which investors allege is false and led to devaluation of the company stock.[15] Understatement was the overarching theme in the case against Norwegian Cruise Lines, where the plaintiff claims that the company downplayed the impact of COVID-19 on its business when the risks were allegedly already evident.[16]

The 2008 crisis led to a spate of investor claims alleging misrepresentation and fraud on a large scale. But the pandemic is different. There are no allegations of systemic deception to drive claims in the same way.

One should expect an uptick in securities litigation as companies report first-quarter results and discuss the impact of the outbreak, and again once the market normalizes and plaintiffs can attempt to attribute stock drops to company-specific activity. It will of course be imperative, as always, for companies to carefully consider the narrative and ensure that disclosures are timely, accurate and adequate.

Employment claims – We may see a blitz of private litigation from employees covered by the new paid leave mandates under the Families First Coronavirus Response Act. We predict that the uncertainty over the breadth and applicability of the mandates will contribute to a dramatic increase in paid leave claims.[17] In addition, with unemployment soaring,[18] we also expect a general uptick in wrongful termination claims filed with the courts.

Bankruptcy – Another trend that we are starting to see and anticipate growing is the filing of bankruptcies. Banks are already gearing up for a deluge of defaults,[19] as are the bankruptcy courts.[20] The onslaught will most likely be a matter of when, not if. One reason for the lag may be that distressed debtors and their advisers are holding back on filing because they are fully aware of the current strain on the system – many are waiting to file in June, when the lockdown may be lifted.[21] Indeed, based on previous economic dislocations, we can expect bankruptcy filings to start increasing within the first three months of the economic downturn, and to peak about six to 18 months out.[22] It also stands to reason that signs of a recovering economy will help free cash from the hands of nervous buyers.

We expect distressed merger activity to pick up following the wave of bankruptcies, which may lead in turn to a new batch of M&A disputes. We will continue to monitor this movement of money as litigation will invariably follow.

In summary the key areas of activity we anticipate are:

- Fights about cash
- M&A Disputes
- Consumer class actions
- Insurance litigation
- Securities litigation
- Employment claims
- Bankruptcy

04
Europe
The regional impact of COVID-19 on disputes

The crisis has not, to date, led to a significant uptick in claims in most European jurisdictions. In many countries, courts have closed or have significantly scaled back their activities (e.g. Italy, Spain and France). But even in England and Wales, where the court system moved quickly to virtual hearings for civil proceedings, the number of new claims filed fell by 50 percent in the four weeks to April 5 compared with the same period in 2019. Overall, however, we expect an increase in disputes and largely similar trends in Europe as outlined in the United States in terms of the kinds of disputes that may arise, but there will be key differences in how this plays out in practice.

Consumer claims and collective redress – The landscape of consumer and collective redress has evolved considerably in the past 10 years, setting the scene for more European-style "class actions" than ever before. There are three key drivers for this.

First, there has been major development of collective redress mechanisms in Europe in recent years, driven by an emerging political agenda in favor of providing greater "access to justice." A change in the landscape of group action has emerged with new mechanisms to facilitate collective redress and a greater use of existing measures. In the UK, for example, opt-out collective actions were introduced under the Consumer Rights Act 2015 and are now being heavily used. All eyes are on the *Merricks v. Mastercard* appeal to be heard in May 2020. Regardless of the outcome, the door remains open for future UK class action-style claims, a number of which are currently stayed pending the outcome of the UK Supreme Court's decision. In Germany, a new formal mechanism for collective redress brought by consumer associations was introduced in 2018 to enable qualified entities to bring declaratory actions on behalf of consumers and have them dealt with swiftly.

In France, there has been a gradual growth in the sectors covered by its class action style mechanisms, following their introduction with the Consumer Act (the Loi Hamon) in October 2014 and extending initially to the healthcare sector and now to other areas, including environmental law, labor discrimination and personal data protection. There was a significant development in the Netherlands at the start of 2020 following which it is now possible to claim monetary damages for mass claims. In Italy, a new regime is due to come into force in November 2020 expanding the scope of the current one.

> There has been major development of collective redress mechanisms in Europe in recent years, driven by an emerging political agenda in favor of providing greater "access to justice."

Further developments in this area are expected and the crisis may create even greater impetus for change. As part of its New Deal for Consumers, trilogue negotiations have started between the European Parliament and Council, under the supervision of the Commission, to agree the final text of the proposed Directive on Representative Actions.[23] This could make it easier for plaintiffs from member states to bring group actions against companies.

Second, there has been sizeable growth in the claimant bar in Europe. Anticipating a rise in consumer claims resulting from the pandemic, consumer organizations and the claimant bar have started to publish content relating to the coronavirus, focusing particularly on employment law, health and safety, and personal injury (often with a focus on personal protective equipment).

Third, other developments from recent years may also contribute to an increase in claims following the crisis. For example, with many employees now working from home using a range of devices and networks, organizations may be more vulnerable to cyberattacks and data leaks. This could lead to claims by affected individuals based on a breach of GDPR[24] and related legislation. Unrelated to the coronavirus, but possibly a sign of things to come, a large UK supermarket recently faced more than 9,000 claimants in the UK Supreme Court, in the UK's first data leak group action. While the case was ultimately unsuccessful, the door is still open to these types of claims in the UK and other European jurisdictions.

The increasing scrutiny of nearly all aspects of corporate behavior and societal impact, the broadening stakeholder audiences, and legislative changes (e.g. the French Duty of Vigilance law) are creating an atmosphere ripe for class actions based on environment, sustainability and human rights issues. Unrelated to the crisis, there are currently cases going through the French and English courts alleging multinationals failed to take appropriate steps to protect against risks of modern slavery and other human rights violations in the supply chain. Companies' responses to the crisis will also be scrutinized through this lens, which could result in litigation for some.

Unrelated to the coronavirus, but possibly a sign of things to come, a large UK supermarket recently faced more than 9,000 claimants in the UK Supreme Court, in the UK's first data leak group action.

Third-party funding – The coronavirus pandemic will likely increase the demand for third-party funding from all types of claimant, including those bringing collective actions on behalf of consumers. This is another distinguishing feature of this crisis as the third-party funding market has grown over the past 10 years in Europe. However, faced with the novel situation of COVID-19 and defendants who may be in a not be able to pay out successful claims, funders may find it difficult to forecast risk.

Contractual disputes – The disruption caused to businesses by the COVID-19 outbreak is clear and widespread. Less clear, however, is to what extent it will also excuse non-performance of contractual obligations. In many jurisdictions, past jurisprudence offers little guidance because the situation is so unique. On long-term contracts, some parties will likely seek to renegotiate terms or even seek to terminate under hardship clauses or other statutory remedies. Some examples we are already seeing in Europe include commercial leases and sporting TV rights agreements across Europe. In some jurisdictions (e.g. Italy), the new legislation enacted to respond to the emergency preserved the existing legal framework. However, the flow of new cases may lead to changes led by courts or the legislature. In Italy, for example, recognition of an implied duty to renegotiate long-term contracts has already been proposed in draft legislation published in 2019 and the crisis may provide further impetus for such changes.[25]

Securities litigation – As noted above, companies with a listing in the United States could face the risk of securities litigation and claims have already been filed in US courts in connection with their response to the outbreak. While the greatest risk may be in the United States, European companies should still be mindful of the threat of securities litigation closer to home. The growth in collective redress mechanisms referred to above has increased the scope for investor claims in certain European jurisdictions.

Insolvencies – Although many European governments have responded to support businesses with bailout packages and the relaxation of insolvency laws, many sectors are still under pressure – in particular those that were struggling pre-crisis (e.g. bricks-and-mortar retail).

Courts across Europe have adopted differing approaches, which has had an impact on the immediate number of insolvencies. In England and Wales, where courts quickly went virtual, company insolvency numbers in Q1 2020 of 3,883 are comparable to the same period in the previous year. But The Insolvency Service has cautioned that these figures largely predate the emergence of and response to the COVID-19 pandemic – the year-on-year changes are likely to be very different when the Q2 figures are counted, with an increase expected. The UK government has announced plans to introduce new laws to help protect companies against creditor insolvency action, giving them breathing space to restructure or seek a rescue.[26] Italy, in contrast, has largely shut down its courts, meaning insolvency applications cannot be filed. Despite this, an uptick in insolvencies is expected and will aggravate the backlog in the Italian courts when they do open again. It also is expected that insolvency proceedings will last even longer than usual, and liquidation of assets may prove problematic and lengthy.

M&A disputes – Similar to the United States, we expect to see possible disputes over parties' satisfaction of the closing conditions (both in the context of MAC/MAE clauses and compliance with interim covenants), with sellers seeking specific performance and buyers looking to walk away. We anticipate many of these pre-closing disputes will lead to the underlying deal terms being renegotiated to get deals done. Again, possible post-closing suits over purchase price adjustments in private M&A transactions are also expected.

Employment claims – With strong labor laws in Europe, we expect a general increase in wrongful termination claims coming out of the predicted rise in unemployment. Employment litigation is already one of the most visible trends in France with union-backed claims against large companies that have remained open in relation to worker protection – in some cases leading companies to cease activities during this period. To mitigate job cuts, some jurisdictions (e.g. Italy) have placed temporary restrictions on the dismissal of employees. Currently, we are not seeing claims alleging violation or circumvention of these restrictions, but it is possible they will appear in the near future.

In summary the key areas of activity we anticipate are:

- Consumer claims and collective redress
- Third-party funding
- Contractual disputes
- Securities litigation
- Insolvencies
- M&A disputes
- Employment claims

05

The Middle East

The regional impact of COVID-19 on disputes

With nearly 100,000 current cases, Iran remains the epicenter of COVID-19 in the Middle East. However, the virus has spread in the wider region, affecting first region's main international business and transportation hubs such as Saudi Arabia, Qatar and the UAE.

This has led to numerous stimulus packages being launched by Middle Eastern governments over the past month. For example, in early April 2020, the central bank of the UAE implemented mitigating measures estimated at approximately $70bn to fight the economic impact of the pandemic in the country.[27] Similarly, in Saudi Arabia, the Health Ministry has already allocated almost $4bn to a support package to combat the spread of COVID-19, with another $8.5bn package having been approved for health facilities.[28] These economic measures were combined with strict curfews and lockdowns in most countries across the region.

> Combined with the recent dramatic drop in the price of oil, the economic repercussions of the COVID-19 crisis are likely to be severe particularly in the highly-dependant oil exporting nations in the Gulf.

Global supply chain issues are likely to cause disruption to major projects in the region. Retail, travel and hospitality sectors are also likely to be highly affected. As with other jurisdictions, a rise in insolvencies and bankruptcy actions is likely in the short-to-mid term. Combined with the recent dramatic drop in the price of oil, the economic repercussions of the COVID-19 crisis are likely to be severe particularly in the highly dependant oil exporting nations in the Gulf. Indeed, in February 2020, oil demand from China fell substantially, with consumption decreasing by 20 percent.[29] This is significant given that China is one of the region's main purchasers of oil and a major economic partner.

The restrictive measures that governments implemented across the region also affected the functioning of courts, though in some jurisdictions courts have tried to remain active as much as possible by relying on technology and digitalization. For example, in the UAE, the courts took advantage of the digital court system already available since 2017 by allowing certain court processes, including fee collection, registration, notification, submission of documents, attendance, publicity, pleading, witness hearing, examination, adjudication, challenge and enforcement processes, to be digitalized.[30] On March 30, 2020, the Abu Dhabi Courts issued an administrative decision providing that all court procedures, court hearings and notary public ratifications be done electronically through the Abu Dhabi courts electronic system. Following that decision, it was reported that the Abu Dhabi Commercial Court conducted 579 videoconference hearings since the activation of the remote work plan of the Abu Dhabi Judicial Department. Similarly, following a temporary postponement of court hearings from March 22, 2020 to April 16, 2020, the Dubai courts implemented a videoconference hearing system on April 19, 2020. The courts in UAE's special offshore jurisdictions (the Dubai International Financial Centre, the DIFC, and the Abu Dhabi Global Market, the ADGM) have also adopted videoconferencing to conduct hearings. In practice, the system works, particularly urgent cases such as obtaining injunctive relief or other forms of protective measures.

For international arbitrations conducted in the Middle East, digitalization and videoconferencing have allowed proceedings to continue. That said, where proceedings are administered by local arbitration centers, the restrictions on movement imposed by the COVID-19 pandemic have at times created hurdles. An example is mandatory service through hard copies that caused some regional arbitral institutions to encourage tribunals to consider staying proceedings to allow notification procedures to be undertaken in accordance with the respective rules after the lockdown has eased.

In the infrastructure and projects space, it is likely that parties may seek to resolve similar claims consistently, cheaply and by sharing the financial burden presented by the disruption. We, therefore, anticipate that parties will make renewed efforts to resolve claims by way of amicable settlements. Having said that, we have already seen employers making unjustified calls on performance bonds in order to secure additional liquidity in the short term. This presents a number of challenges in the current environment given the need to obtain urgent interim relief to prevent banks honoring such calls in circumstances where parties, counsel and institutions are all working remotely. We have, however, successfully obtained emergency relief preventing unjustified calls being made.

In the infrastructure and projects space, it is likely that parties may seek to resolve similar claims consistently, cheaply and by sharing the financial burden presented by the disruption.

In terms of claims, while we have yet to witness any significant increase, we expect this will only be a question of time, with contractual claims (including *force majeure* and change of circumstances allegations), joint venture disputes and disputes arising out of insolvencies being the most likely sources.

Contractual claims/performance issues – As in other parts of the world, performance of contracts is likely to be impacted by COVID-19 and the restrictions put in place by governments. In most civil law jurisdictions in the Middle East, the notion of *force majeure* is acknowledged by the applicable civil codes. However, whether COVID-19 would qualify as an event of *force majeure* would require the party alleging *force majeure* to establish that the pandemic rendered performance of the contract impossible. For example, the UAE Civil Code provides that if a *force majeure* event occurs rendering the performance of a contract impossible, the contract will be automatically canceled. Similar provisions exist in other jurisdictions such as Qatar and Saudi Arabia. In the UAE, courts are also able to reduce the obligations imposed by contracts where external factors have made the contractual obligations onerous or difficult but not impossible to perform. This is a discretionary power of the court.

Declarations of *force majeure* on the back of the COVID-19 outbreak have been a significant issue in the Middle East. For example, on March 22, 2020, the Iraqi government declared that the ongoing COVID-19 crisis constitutes an event of *force majeure* for "all projects and contracts" with retroactive effect from February 20, 2020.[31] It is reported that projects worth over $290bn are likely to be affected by the government's declaration.[32] This blanket declaration may have a significant impact on companies operating in Iraq, potentially triggering contractual *force majeure* provisions and/or those under the Iraqi Civil Code, regardless of whether parties are actually prevented from carrying out their obligations.

In contrast, in an effort to enable projects to continue, the UAE government has included the construction sector in its list of essential activities, meaning that construction works have been exempted from the movement restrictions in place in the UAE. Nevertheless, in major construction projects where international supply chains have been severely affected by the COVID-19 restrictions, contractors are both receiving *force majeure* notices from their suppliers and issuing notices themselves to their employers. Moreover, it is understood that employers in the UAE (particularly in the public sector) are actively seeking to adapt and reprice construction contracts in light of the new economic realities.[33]

We are also informed that certain government-held entities in Egypt have issued *force majeure* notices under power offtake agreements.

The performance of contracts in the Middle East is further affected by the decline in oil prices. For example, at the beginning of April 2020, IOC (one of India's top oil firms) declared *force majeure* on oil purchases from Saudi Arabia, Iraq, Kuwait and the UAE.[34] While parties are still looking to find commercial solutions to contractual performance issues rather than start proceedings, the rapid increase in *force majeure* declarations will no doubt lead to disputes.

We are also informed that certain government-held entities in Egypt have issued *force majeure* notices under power offtake agreements.

Joint ventures/shareholders' disputes – Joint ventures are a specific feature of business in the Middle East (particularly in the Gulf region). This is typically a result of the legal requirement in some jurisdictions (including Saudi Arabia, Qatar and the UAE) for international companies to have a local partner to operate. With the present economic shutdown, many joint ventures face imminent liquidity challenges and partner disagreements are more likely to arise. This is likely to create deadlock situations and formal disputes between joint venture partners.

Insolvency – As in other parts of the world, insolvencies and bankruptcies are likely to follow in the aftermath of the COVID-19 pandemic in the Middle East. Some jurisdictions (including Saudi Arabia and the UAE) have recently modernized their insolvency legislation. That said, compared to insolvency regimes in most European countries, those in the Middle East remain largely untested.

For example, in the UAE, a new regime governing insolvencies of UAE-domiciled companies was introduced in December 2016.[35] It does not apply to companies established in the special offshore jurisdictions such as the DIFC or the ADGM. The 2016 law was followed by a new insolvency regime for individuals or natural persons in late 2019.[36] A new insolvency law was introduced in the DIFC in June 2019.[37] Under the 2016 law, a company will be insolvent if it ceases to make payments of due debts for a period of 30 consecutive business days, or has assets insufficient to cover its current liabilities. No amendments have been introduced in the context of the COVID-19 pandemic and the laws remain largely untested in practice. That said, in mid-March 2020, the UAE government introduced a scheme aimed to provide temporary relief from the payments of principal and interest on outstanding loans for all private sector companies affected by COVID-19 (the "Targeted Economic Support Scheme"). The scheme includes an AED 50bn ($13.5bn) fund distributed through 0 percent interest collateralized loans for banks operating in the UAE to encourage banks to lend more freely to corporate customers.

The position in Saudi Arabia is analogous. While a modern insolvency and bankruptcy regime was introduced in 2018, the legislation remains relatively untested in practice. Again, no amendments have been introduced to the legal framework as a result of the COVID-19 outbreak, though the government of Saudi Arabia has taken immediate measures to address the unprecedented financial consequences of the pandemic, including exemptions and postponement of some government dues. These measures are intended to provide liquidity to the private sector in order to enable the businesses to continue. For example, the central bank is requiring lenders to offer concessional loans to companies struggling with COVID-19's impact so they would not have to reduce their workforces.

In summary the key areas of activity we anticipate are:

- Contractual claims/performance issues
- Joint ventures/shareholders' disputes
- Insolvency

06
Asia

The regional impact of COVID-19 on disputes

As yet there has been no significant uptick in claims in most Asian jurisdictions. Courts in many Asian countries, including Hong Kong and India, have been closed to almost all new claims, which is likely to delay litigation proceedings significantly.

Courts in Singapore and China are operating electronically, and in South Korea the courts have postponed non-urgent proceedings and reduced trial deliberations. In Japan – where official court filings require the use of a personalized stamp known as a hanko that must be applied by counsel or, in some cases, by a corporate executive, making electronic filings all but impossible in some cases – the courts remain open and are accepting new cases, although some proceedings have been postponed.

Most Indian courts have implemented measures to conduct virtual hearings for urgent cases and have extended interim orders in existing cases.[38] The Indian Supreme Court has suspended the limitation period applicable to all cases across the country, effective March 15, 2020.[39] The eventual return to regular functioning is likely to result in a large number of cases being filed at once, creating further backlog in a country that already has 30m pending cases.[40]

Third-party funding – As far as third-party funding is concerned, there are limits in most of Asia. For example, in Hong Kong, third-party funding is only available in arbitration, and although Japan has no specific legislation in place, the assumption there is also that third-party funding is not available for domestic litigation. In Singapore, third-party funding is allowed for international arbitration and arbitration-related matters, as well as for insolvency, but it remains unclear whether it can be applied in the commercial litigation context without running afoul of champerty and maintenance rules.

As a result, it is unlikely that there will be a surge in multi-plaintiff litigation or funded court claims in the region – although as to the latter, third-party funders have been very active in Asia in the arbitration space for the last several years and we would expect that activity to increase.

Class actions and consumer claims – In general, Asian jurisdictions lack the robust consumer protection regimes of the EU or the well-developed class action procedures of the United States, and as a result typically do not have an active plaintiff bar. An important exception is Australia, where in 2018 and 2019 the Federal Court and Supreme Courts agreed on joint protocols to facilitate the efficient handling of class action proceedings and increase cooperation between the two institutions.[41] This ready availability of class actions may make Australian courts more attractive for regional disputes coming out of the COVID-19 crisis. Indeed, employees at Qantas are reportedly already considering bringing a class action based on COVID-19-related illnesses.[42] That said, some other Asian jurisdictions do have statutory procedures allowing for multiple litigations where claims are based on the same facts and legal issues – including Japan, which allows the joining of actions that sometimes involves hundreds of plaintiffs;[43] and South Korea, which has a limited class action procedure in the context of securities transactions and allows consumer groups to bring legal actions on behalf of multiple individuals claiming harm. Such mechanisms are likely to be used more often in the wake of the COVID-19 crisis, potentially resulting in increasingly common multi-plaintiff actions in certain Asian court systems.

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Insolvency/bankruptcy – As with other jurisdictions, a rise in insolvencies and bankruptcy actions in Asia is likely over the next 12 to 18 months and possibly beyond. Years of low-interest loans in the region have encouraged entities to take on trillions of dollars of debt. According to Moody's, between the 2008 financial crisis and 2019, corporate debt in the region doubled to $32tn and is now resulting in defaults on loans across a number of industries.[44]

There are reports that the initial lockdown in China hastened the relocation of manufacturing capacity to other countries in the region,[45] although it is generally accepted that companies have found it hard to move their supply chains completely out of China during this period. That said, Japan has just announced a government subsidy for a consumer products maker, a manufacturer of face masks, to shift production from China in an effort to shore up its supply chains. The effort is part of an overall government program that has set aside ¥240bn (approximately $2.2bn) to assist companies in reorganizing their supply chains.[46]

Overseas creditors of Chinese companies should pay attention to Chinese insolvency proceedings; in 2020, both the Hong Kong and New York courts found that foreign creditors could not enforce against overseas assets but had to take part in onshore insolvency proceedings.[47] As COVID-19-related bankruptcy/insolvency filings pick up pace, it remains to be seen whether the Chinese courts will take a reciprocal approach to recognizing overseas bankruptcies.

In Hong Kong, meanwhile, COVID-19 was not the start of the economic downturn. Locally based companies, notably in the retail and travel sectors, saw significant drops in revenue in the latter half of 2019 as a result of the anti-extradition bill protests,[48] which caused a fall in visitors from mainland China.[49] Protest activity died down in Q1, but the arrests in April of a number of activists, combined with the fact that the Hong Kong government appeared to have brought the virus under control by the middle of the same month, led to speculation that the protests could restart, which may threaten Hong Kong's status as a global financial center and its ability to recover from the economic impact of COVID-19.

Retail investors in the region also have suffered huge losses as a result of plummeting oil prices. In South Korea, Seoul's Financial Supervisory Service issued its highest alert level in relation to oil-linked derivatives, as thousands of retail investors lost their total principal investments on exchange-traded notes due to oil prices crashing more than 50 percent. The Hong Kong Securities and Futures Commission has also issued a circular to the managers of exchange-traded funds and to intermediaries in relation to the volatility in the crude oil futures markets,[50] and in China, it is estimated that retail investors who had purchased an oil-linked structured product suffered losses of at least 9bn yuan.[51]

In Japan, the state of emergency declared in March was not accompanied by the strict lockdown measures seen in other countries, and as a result many businesses have continued to operate. Japanese corporates often have a significant amount of cash on hand, which at the urging of the government and their shareholders they had been seeking to invest but which now provides a firewall against the current crisis. Some are even considering providing loans to their subcontractors and suppliers to protect projects and supply chains. Nonetheless, the Japanese government's ask that certain businesses close, coupled with a drop in tourism, has had an impact on the economy, with more than 50 companies – mostly in the hotel, restaurant and retail sectors – filing for bankruptcy by mid-April.[52]

In South Korea, despite the government's widely praised response to COVID-19, the risk of insolvency is similar to that of the rest of Asia. The country saw its first major failing at the beginning of April, when Hospitality & Tourism Company (HTC), which runs more than 30 hotels, resorts and other properties, filed for court protection in the face of a heavy debt obligation it could not meet.[53] Other tourist-reliant businesses are expected to follow, with the government launching a multibillion-dollar rescue package to support small- and medium-sized companies as well as individuals endangered by the crisis.

In Singapore, the government has taken action to address the looming threat of mass insolvencies, increasing the monetary threshold required to petition for an insolvency of a business from S$10,000 to S$100,000 (approximately $7,000 to $70,000) and extending the time period to satisfy or set aside a statutory demand from 21 days to six months.

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Likewise, the Indian government has temporarily increased the threshold for initiating a bankruptcy to approximately $130,000. It has also announced that the mandatory lockdown period will be excluded from any time limits imposed by the usual corporate insolvency and liquidation processes.[55]

Furthermore, the Indian government has approved a law prohibiting creditors from initiating new claims for a period of time.[56]

Meanwhile in Australia, the federal government temporarily softened insolvency laws by relieving directors of their duty to prevent a company from trading while insolvent; increasing the amount required to issue a statutory demand from $2,000 to $20,000; and increasing the period to comply with a statutory demand from 21 days to six months. Companies may benefit from this regime on the basis that their debts are incurred through the ordinary course of business (as opposed to fraud or dishonesty), thus encouraging directors to trade despite the economically challenging climate.[57] Despite this, large corporates such as Virgin Australia have entered into administration after going insolvent during the pandemic.[58]

Contractual Claims – While declarations of *force majeure* have been a significant issue for corporates across the region, there has not yet been a flood of related claims (indeed in Japan, some companies are reporting fewer claims than they saw following the 2011 earthquake). In many jurisdictions, businesses are both receiving *force majeure* notices from their suppliers and issuing notices themselves to their counterparties, and as a result are working to amicably resolve contractual performance issues rather than turning to arbitration or litigation. Even so, the rapid increase in *force majeure* declarations will no doubt lead to disputes. Many courts across the region – unlike those in the UK and United States – can look to precedents (albeit limited) that arose following the SARS epidemic, although the claims from that experience were far more limited than are likely to arise from COVID-19.

In Australia, as in other common law jurisdictions, *force majeure* is a creature of contract and will need to be assessed on a case-by-case basis. The most recent need to rely on *force majeure* clauses came as a result of the 2019–2020 bushfires, which caused mass devastation and left companies unable to perform their obligations (e.g. telecommunications network Telstra successfully claimed *force majeure* after the bushfires prevented it from safely carrying out the implementation of its Migration Plan).[59] Whether or not a party can benefit from *force majeure* in light of the coronavirus will depend on the construction of the contract, but given Australia's large commodity export industry[60] we anticipate that many parties will try to invoke these clauses.

By contrast, in China, the government has issued thousands of "certificates" declaring that failures of performance are excused by *force majeure*.[61] The value of these certificates outside the courts in China – where they may well be decisive – is likely to be limited. A similar position has been taken by the Indian Ministries of Finance and Shipping.

> If disputes arise in complex supply chains, the interaction between the operation of the doctrine under a civil law system, such as in China, and in common law jurisdictions, such as in Hong Kong, will come into play.

If disputes arise in complex supply chains, the interaction between the operation of the doctrine under a civil law system, such as in China, and in common law jurisdictions, such as in Hong Kong, will come into play. This may make disputes more likely where contracts are not perfectly back-to-back – for instance where some are governed by a civil law jurisdiction and others in the chain by common law, which differ in their approach to *force majeure* and may also offer other distinct doctrines potentially applicable to the COVID-19 crisis such as change in circumstances or frustration arguments.

This disconnect is likely to increase the number and complexity of disputes arising along supply chains throughout Asia.

M&A disputes – We anticipate Asia will see similar trends as in the United States and Europe, with possible disputes concerning parties' satisfaction of the closing conditions (both in the context of MAC/MAE clauses and compliance with interim covenants).[62] The prevalence of arbitration clauses in the region means that there is likely a lacuna of publicly available jurisprudence on these issues, which may make disputes more difficult to settle amicably and thus increase the likelihood of a wave of arbitrations.

In summary the key areas of activity we anticipate are:

- Third-party funding
- Class actions and consumer claims
- Insolvency/bankruptcy
- Contractual Claims
- M&A disputes

07
Disputes involving states

Alongside the points above, which cover the types of claims companies may face or may want to bring against their contractual counterparties, there are other factors arising across regions involving state action that are likely to drive disputes in the months and years to come.

Public procurement – The pandemic has raised unprecedented public health challenges. In response, public bodies in all regions have needed to procure goods, services and works with extreme urgency. In many countries, tenders are being launched subject to simplified procedures that are likely to give rise to challenges and disputes.

Challenges against state action – Many governments and national health authorities have taken regulatory action affecting, restricting and closing down businesses. This has led to (temporary) loss of workforce and production capabilities, additional costs and loss of earnings. Many businesses have been reluctant to challenge these decisions in the acute phase of the pandemic; this may change if partial relaxations are considered discriminatory or unfair. In the United States, we have already seen multiple lawsuits challenging our governmental restrictions.

Likewise, it's possible government moves to protect domestic businesses from foreign acquirers could also lead to claims. In Japan, for example, it has been reported that the government plans to include pharmaceutical and medical equipment makers on the list of companies considered critical to national security, thereby preventing foreign investors from acquiring them.[63] In Europe, several member states – including Germany and Spain – have also taken steps to safeguard domestic companies weakened by the pandemic.[64] Other jurisdictions have gone further. For example, the Indian government – in an effort to curb opportunistic takeovers during the crisis – amended its foreign direct investment policy to require that all investments from China, Bangladesh, Pakistan, Nepal, Myanmar, Bhutan and Afghanistan (i.e. countries that share a border with India) must obtain prior approval from the Indian government.[65] Many believe that the move is particularly aimed at preventing hostile takeovers by Chinese companies and, in response, the Chinese government has accused India of violating World Trade Organization rules by indulging in discriminatory practices.[66] Indian courts are likely to see a number of new disputes challenging the validity of this policy. Overall, the likelihood of investment treaty claims by existing affected investors cannot be ruled out.

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So, what comes next?

Looking across the world at these emerging trends, there are a few key lessons.

First, those trying to predict and manage litigation risk need to be mindful of the changing economic motivation of litigants. Third-party funding will change the landscape faster than it already was before the pandemic, and the financial position of some companies should be expected to drive their behavior.

Second, courts and procedures are going to change. Whether that's in the form of remote hearings in some courts and in arbitration, the increased reliance on mass claims and class actions in Europe, or courts encouraging greater use of mediation, the changes we expected before COVID-19 are only going to accelerate. General counsel will need to assess how their companies will be affected by this rapid evolution of dispute resolution.

Third, the unprecedented economic impact of the coronavirus may disrupt the way disputes are resolved and the arguments deployed. Some methods and legal theories could be sidelined as others emerge. Just as governments have resorted to unprecedented economic stimulus packages, so too may private parties think of entirely new ways to mediate disputes.

Fourth, although not a current focus, fraud will still be a feature on future disputes. The economic crisis may reveal activity that has gone undetected in more favorable economic conditions or, with companies under economic distress, may create the conditions for fraud and other corporate misconduct. This will also lead to investigations and related disputes.

Fifth, the scale of losses is yet to be determined; much depends on how quickly the economy reopens, which businesses survive, whether there is a second wave and the impact on the financial markets as the situation continues to evolve.

Freshfields is committed to using its global perspective to inform its clients about the changing legal landscape, and we expect that we will be revisit this analysis as the months progress.

Contacts

UNITED STATES

Tim Harkness

Partner – Dispute Resolution – Litigation, New York

T +1 212 230 4610
E timothy.harkness@freshfields.com

Meredith Kotler

Partner – Dispute Resolution – Litigation, New York

T +1 212 277 4007
E meredith.kotler@freshfields.com

Noiana Marigo

Partner – Dispute Resolution – Litigation, New York

T +1 212 284 4969
E noiana.marigo@freshfields.com

Linda H. Martin

Partner – Dispute Resolution – Litigation, New York

T +1 212 277 4017
E linda.martin@freshfields.com

David Livshiz

Counsel – Dispute Resolution – Litigation, New York

T +1 212 284 4979
E david.livshiz@freshfields.com

EUROPE

Fabrizio Arossa

Partner – Dispute Resolution – Litigation, Rome

T +39 06 695 33310
E fabrizio.arossa@freshfields.com

Nathalie Colin

Partner – Dispute Resolution, Brussels

T +32 2 504 7079
E nathalie.colin@freshfields.com

Martina de Lind van Wijngaarden

Partner – Dispute Resolution, Frankfurt

T +49 69 27 30 87 29
E martina.wijngaarden@freshfields.com

Stephan Denk

Partner – Dispute Resolution – Environment, Planning and Regulatory, Vienna

T +43 1 515 15 123
E stephan.denk@freshfields.com

Andrew Hart

Partner – Dispute Resolution, London

T +44 20 7832 7302
E andrew.hart@freshfields.com

Jonathan Isted

Partner – Dispute Resolution, London

T +44 20 7832 7320
E jonathan.isted@freshfields.com

EUROPE (continued)

Dimitri Lecat

Partner – Dispute Resolution – Litigation, Paris

T +33 1 44 56 55 14
E dimitri.lecat@freshfields.com

Oliver Marsden

Partner – Dispute Resolution, London

T +44 20 7785 2219
E oliver.marsden@freshfields.com

Craig Montgomery

Partner – Dispute Resolution, London

T +44 20 7716 4888
E craig.montgomery@freshfields.com

Raphael Murillo

Partner – Dispute Resolution, Madrid

T +34 91 700 3740
E rafael.murillo@freshfields.com

Simon Orton

Partner – Dispute Resolution, London

T +44 20 7832 7671
E simon.orton@freshfields.com

Sarah Parkes

Partner – Dispute Resolution, London

T +44 20 7832 7630
E sarah.parkes@freshfields.com

Michael Rohls

Partner – Dispute Resolution, Munich

T +49 89 20 70 22 20
E michael.rohls@freshfields.com

Noah Rubins QC

Partner – Dispute Resolution. Paris

T +33 1 44 56 29 12
E noah.rubins@freshfields.com

Jeroen van Hezewijk

Partner – Dispute Resolution, Amsterdam

T +31 20 485 7656
E jeroen.vanhezewijk@freshfields.com

Federico Mercuri

Associate – Dispute Resolution, Rome

T +39 06 695 33386
E federico.mercuri@freshfields.com

MENA

Erin MIller Rankin

Partner – Dispute Resolution, Dubai and Singapore

T +971 4 509 9139 (Dubai)
+65 6908 0785 (Singapore)
E erin.millerrankin@freshfields.com

Sami Tannous

Partner – Dispute Resolution, Dubai

T +971 4 509 9254
E sami.tannous@freshfields.com

Amani Khalifa

Counsel – Dispute Resolution, Dubai

T +971 4 509 9171
E amani.khalifa@freshfields.com

Matei Purice

Senior Associate – Dispute Resolution, Dubai

T +971 4 509 9267
E matei.purice@freshfields.com

ASIA

John Choong

Partner – Dispute Resolution, Hong Kong

T +852 2913 2642
E john.choong@freshfields.com

Georgia Dawson

Asia Regional Managing Partner – Dispute Resolution, Singapore

T +65 6908 0789
E georgia.dawson@freshfields.com

Nicholas Lingard

Partner – Dispute Resolution, Singapore

T +65 6908 0796
E nicholas.lingard@freshfields.com

William Robinson

Partner – Dispute Resolution, Hong Kong

T +852 2846 3336
E william.robinson@freshfields.com

Joaquin Terceno

Counsel – Dispute Resolution, Tokyo

T +81 3 3584 8475
E joaquin.terceno@freshfields.com

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