



British Institute of
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BIICL publishes a Concept Note on the effects of the pandemic on commercial contracts and legal consideration in mitigating mass defaults

The law plays an important role in international commerce, and English law is commonly used even in contracts with no connection to the UK. Due to the Covid 19 crisis, courts and arbitral tribunals could face a wave of commercial cases, with businesses invoking their inability to meet their obligations. Most contracts have provisions dealing with unexpected events, and the law has principles to cover this – but no one anticipated a pandemic with the disruptive effect of Covid 19.

As the economy begins to reopen, the best policy approach is to encourage parties to negotiate rather than focus on their contractual rights, which in any event are going to be uncertain. According to Lord Phillips, former President of the Supreme Court, “parties should consider mediation, and conciliation should be encouraged at an early stage of legal proceedings”.

Speaking on the BBC's Today programme, Lord Neuberger, former President of the UK Supreme Court, introduced the breathing space project, saying that “the legal world has a duty to the rest of the world to prepare itself”. BIICL will contribute to this as a global exchange of ideas hub; details of forthcoming virtual conversations will follow.

As part of this, there should be careful consideration of how the substantive law applies in this novel situation. Sir William Blair, a former Judge of the London Commercial Court, stressed that “new thinking is going to be required if the law is to play its full part in getting international commerce back on its feet - within the principle of legal certainty, space need to be found for renegotiation, and if the contract is no longer viable, equitable solutions”.

In doing so it is important to look at how other legal systems deal with the same issues. This will provide the legal certainty which has underpinned international commerce, and will be needed to underpin the recovery. According to Sir David Edward, a former Judge of the European Court of Justice, “the law cannot insist that parties' contracts must continue as if nothing has happened, or simply declare that

frustration has brought them to an end. If commercial life is to go on, a rational and equitable solution must be found."

Professor Spyros Maniatis, Director of BIICL, views this as evidence that a new approach will be required, "this is not the time for zero sum games, protecting markets and supply chains will be critical".

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NOTES TO EDITORS:

1. The British Institute of International and Comparative Law (BIICL) provides informed, independent and practical legal ideas for a global community. Its high quality and respected work involves analysis and debate about contemporary issues on every continent, from its base in the heart of London's energetic and multicultural legal network.

2. This Concept Note arises out of a meeting on 7 April 2020 hosted by the British Institute of International and Comparative Law, attended by Lord Phillips of Worth Matravers, Lord Neuberger of Abbotsbury, Sir David Edward, Sir William Blair, Professor Spyros Maniatis, Professor Malik Dahlan and Keith Ruddock.

3. Lord Neuberger of Abbotsbury chairs the BIICL 60+ Appeal: Global challenges new perspectives. For more information please visit, www.biicl.org/60thappeal.

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