The Impact of a New and Widespread Contagious Disease on Pre-Existing Contractual Obligations

Abstract

Past pandemics have done little to alter the common law of contract in Australia. Contractual obligations change during pandemics through decisions of the legislature and executive, not the judiciary: the impact of a pandemic on contracts is whatever governments decide. Policy flexibility rightly trumps doctrinal consistency in a crisis.

However, the limited relevance of contractual doctrine does not undermine the importance of contractual drafting. Force majeure clauses and pandemic insurance policies ("disease clauses") need to be carefully drafted. The fact that COVID-19 is new, widespread and contagious does not mean that these criteria should be used in future disease clauses.

Introduction

The practical impact of COVID-19 on many pre-existing contractual obligations has been, in layman's terms, to mess them up. The ways in which COVID-19 has messed up these obligations are many and varied. International and inter-state border closures have posed challenges for transportation and shipping contracts. The tourism industry faces the same legal constraints, along with a massive collapse in demand. Airlines have cancelled, refunded and rescheduled countless flights, and the less said about cruise ships, the better. Vast numbers of employment contracts have been terminated, even with the implementation of JobKeeper and other government programs seeking to keep people in their jobs. Many of those employees who retain their jobs have had their salaries and hours cut. They have been required or encouraged to work from home, many for the first time. Students at schools and universities

have similarly had to adapt to home classrooms and lessons by video-conference. The consequent economic crisis has caused businesses to struggle or to fail, leading them to default on their contractual obligations. It has caused financial hardship, affecting individuals' capacity to make rental and mortgage payments. These are just some of the ways in which the performance of contractual obligations has been impacted by COVID-19. But while the economic, commercial and public policy analysis of this devastation is valuable and interesting, the contract law analysis is banal. All of these impacts on contractual obligations could be resolved by the application of orthodox doctrines. I say this with a reasonable degree of confidence because COVID-19 is not the world's first pandemic. In Part I, I will explore the impact of past pandemics on the development of contract law at common law. I also consider some of the ways that legislation and regulation apply to contracts vis-à-vis pandemics. The extremely limited nature of both the case law and statute leads to the conclusion that, while pandemics are extraordinary events, their impacts on contractual obligations can be resolved by ordinary principles.

However, the limited effect of pandemics on contractual doctrine does not mean that COVID-19 should have a limited effect on contracts themselves. In Part II, I will consider aspects of how contracts should be drafted to account for diseases that have similar social effects on society as COVID-19. This will involve a rigorous examination of the phrase "new and widespread contagious diseases", which is simultaneously under- and over-inclusive. For ease of reference, I will use the terms "pandemic" and "epidemic" loosely in the first part of this essay, but they too will require further examination.

I: Contractual Approaches to Pandemics

Case law

"Unprecedented" is one of the defining words of 2020. From world leaders to office emails to Zoom calls with family and friends, we have heard again and again that our current situation is unprecedented. This might pose challenges for a legal system founded on precedent, if it were true, but it is not. The problem is not that there is no precedent for COVID-19, but that, up to this point, the precedents have been poorly remembered. The Spanish flu of 1918 – 1919 is estimated to have infected one-third of humanity, some 500 million people, and to have killed between 20 – 50 million people.[1] The same debates over border closures, school closures and masks were had then as now.[2] Yet there are no national holidays or minutes of silence for those who died, no prominent memorials, no blockbuster films or high-rating television dramas. Until recently, the last major global pandemic had largely slipped from collective memory.[3] The Spanish flu also appears to have slipped from the law reports, with little lasting impact on contract law. Searches of legal databases based on the terms "Spanish flu", "influenza", "pandemic" and "epidemic" returned no relevant results. The World Health Organisation lists two other influenza pandemics occurring in the 20th Century – the Asian flu

[1] Centers for Disease Prevention and Control, '1918 Pandemic (H1N1 Virus)' (Web Page, 20 March 2019) <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html#:~:text=It%20is%20estimated%20that%20about,occurring%20in%20the%20United%20States.>.

[2] See, for example, Becky Little, '"Mask Slackers" and "Deadly Spit": The 1918 Flu Campaigns to Shame People into Following the New Rules', *History Channel* (Web Page, 17 July 2020) <https://www.history.com/news/1918-pandemic-public-health-campaigns>; Bern Young and Elise Kinsella, 'The Deadly Spanish Flu and a Dramatic Border Closure Remembered One Hundred Years On', *ABC News* (Web Page, 5 February 2019) <https://www.abc.net.au/news/2019-02-05/the-deadly-spanish-flu-and-qld-nsw-border-closure-100-years-on/10781296>.

[3] Scott Hershberger, 'The 1918 Flu Faded in Our Collective Memory: We Might "Forget" the Coronavirus, Too' *The Scientific American* (online, 24 August 2020) <https://www.scientificamerican.com/article/the-1918-flu-faded-in-our-collective-memory-we-might-forget-the-coronavirus-too/>.

of 1957 – 1958, and the Hong Kong flu of 1968, each of which were estimated to have caused between 1 – 4 million deaths.[4] I had personally never heard of either of these diseases until this year, and I suspect I would not be alone in admitting that. Neither of these pandemics appear to have left any mark on contract law.

The Russian Flu of 1889-1892 did give rise to *Carlill v Carbolic Smoke Ball Company*, a seminal case in contract law.[5] The carbolic smokeball could be described as the hydroxychloroquine of its day, although history does not record any endorsements of the former by world leaders. However, the relevance of *Carlill* as a precedent is limited to general principles of offer, acceptance and unilateral contracts: an advertisement promising a reward for use of the smokeball constituted a binding unilateral offer that could be accepted by anyone who performed its terms. The judges sitting on the Court of Appeal may have been inclined to take a dim view of mere puffery in the context of what they called the "increasing epidemic" or the "prevailing epidemic" but there is no suggestion in the judgment that the outcome depended in any way on that context. The reasoning in *Carlill* is just as applicable to a poster offering a reward for a lost pet as it is to an advertisement for a cure to an epidemic. Beyond *Carlill*, I have not been able to find a single case in which a pandemic or epidemic had real relevance to the facts and that constituted a development in contract law.

The Application of Existing Approaches

One reason that pandemics may have had little influence on contract law is that existing doctrines have proved sufficient. Many of the contractual obligations messed up by COVID-19 have been messed up in the sense that it remains possible to perform them, but it is no longer commercially viable or desirable to do so. In many cases, parties have renegotiated contractual

[4] World Health Organisation, Regional Office for Europe, 'Past Pandemics', (Web Page) <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics>.
[5] [1893] 1 QB 256.

arrangements, as parties to a contract are free to do. In other cases, parties have determined that the consequences of breaching a contract are preferable to the burdens of ongoing performance and contracts have been terminated in that manner. Provisions for liquidated damages have sped up the process of dealing with these defaults – I speak from personal experience in this regard, having paid the appropriate break fee for terminating a residential tenancy before its term when I realised the challenges of working from home while living next to a construction site. Some contracts have been terminated by parties exercising an express contractual right to do so.[6] Sadly, many businesses have become insolvent or been wound up, with all of the consequences for their contracts which that entails.

COVID-19 has also messed up many contracts by rendering them impossible to perform. Frustration has, for many of us, been one of the dominant emotions of 2020, but it is also a significant contractual doctrine. A concise summary of the modern test for whether a contract has been frustrated can be found in *Davis Contractors Ltd v Fareham Urban District Council*:

> "Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do".[7]

The application of this test in a pandemic is somewhat more complicated than the other contractual responses to a pandemic. A key question is, what is the frustrating event? Is a

[6] See *Shevill v Builders Licensing Board* (1982) 149 CLR 620 for further analysis on the distinction between a right to terminate arising from breach of an essential term, as opposed to termination pursuant to an express contractual right to do so.
[7] [1956] AC 696, 729; affirmed in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

contract frustrated by the disease itself or by the various government responses to the disease? The answer to this question has major implications for the application of the doctrine.

Consider variations on the following example: in the carefree days of January 2020, when the main reason to wear a face mask was smoke from the bushfires, a choir organised a concert to be held on a Friday night in March.

a) The date is now 13 March 2020. Prime Minister Scott Morrison has announced that, contrary to his previous plans, he would not attend a football match over the weekend.[8] There is a sense of some unease in the air, but Friday night drinks are in full swing around the nation. There are no restrictions on the concert going ahead, but the venue chooses to cancel it out of concern for potential legal liability if staff and patrons become infected.

b) The date is 13 March 2020. The concert goes ahead, but a 70-year-old patron with asthma decides not to attend because he is concerned about the risk to his health. He asks the choir for a refund on his ticket.

c) The date is 13 March 2020. The soprano soloist is particularly concerned about the risk of contracting COVID-19 because she has a cousin who contracted the disease in Milan and ended up in intensive care. She refuses to perform and the concert is cancelled.

d) The date is 13 March 2020. The soprano soloist has contracted COVID-19 and is unable to perform. The concert is cancelled.[9]

e) The date is 27 March 2020. The concert cannot go ahead due to government restrictions.

[8] Katina Curtis, 'Scott Morrison will not attend the Cronulla Sharks over fears attendance would be misinterpreted', *7 News* (online, 13 March 2020) <https://7news.com.au/lifestyle/health-wellbeing/pm-warns-of-challenging-months-ahead-c-742482>.

[9] For the purposes of Examples (c) and (d), let us assume that there is no understudy, and that the soprano's contract makes no provision for illnesses.

It seems clear that the doctrine of frustration operates in Example (e) – performing or attending the contract was prohibited by governmental order, and this is clearly radically different from the contract as it was envisaged. The concert hall may not have burned down, as was the case in *Taylor v Caldwell*,[10] but the concert cannot go ahead. Example (d) seems equally clear: through no fault of her own, the soloist is not able to perform and the concert cannot go ahead as planned. With the benefit of hindsight, we can see that the decisions to cancel or not attend the concert in Examples (a)-(c) would have been prudent from a public health perspective, but can it be said that those contracts were frustrated? It is a finely balanced question, both on the law and the facts. The early phase of the pandemic in Australia involved rapid change from day-to-day. The answer may differ from 13 March, to 14 March, to 15 March, and so on.

One approach would be to say that the contract was not frustrated until the government restrictions were brought in. This has the advantage of clarity and consistency, as well as reflecting judicial deference to the political branches of government in areas in which they clearly have greater expertise and democratic legitimacy. However, it does not necessarily accord with the test of whether the thing contracted for is radically different in the circumstances. If the concert was unsafe by reason of the pandemic, then it was a radically different thing from that which was contracted for, regardless of whether the government had yet recognised it. The distinction between frustration by reason of a pandemic and frustration by reason of government restrictions finds some support in obiter of McTiernan J in *Scanlan's New Neon Ltd v Tooheys Ltd*.[11] Reflecting on the decision in *Taylor v Caldwell*, his Honour held:

> If the defendant gave the use of the hall to the plaintiffs, but they were prevented by unforeseen circumstances, such as a Governmental order, or an epidemic, from giving

[10] [1863] 122 ER 309.
[11] (1943) 67 CLR 169.

> the concert, the plaintiffs would have lost 'a benefit' which would appear to answer the description of that mentioned in the criterion adopted by the Full Court of New South Wales. But it could not be said that the contract was frustrated according to the rules in *Taylor v Caldwell*, or according to the modern doctrine of frustration, unless it was apparent from the terms of the contract and the surrounding circumstances that the parties when entering into the contract must have contemplated that the absence of Governmental interference or of an epidemic as a foundation of what they were to do to fulfil the contract.[12]

McTiernan J's hypothetical consideration of an epidemic may be of limited weight, but it supports the view that an epidemic or pandemic may, by itself, be sufficient reason to find that performance of a contract had become radically different from what was contracted for. His Honour enunciates the test in slightly different terms to those used in *Davis Contractors Ltd v Fareham Urban District Council*, but the outcome is the same.[13] A foundation of the contracts in Examples (a) – (c) was that they could safely proceed without endangering the lives and health of the performers and attendees. Whether or not the government had announced the restrictions, it would be clearly arguable that the contracts were frustrated by the pandemic alone.

I note for completeness that frustration is subject to three key limitations, which have some limited relevance here:

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[12] Ibid, 215. The actual outcome in *New Neon Ltd* was that a contract for billboard advertising was not frustrated by a governmental order banning the lighting of neon signs. The contract was substantially performed and the unlit neon signs still had substantial advertising value. The Court held that the lighting of the signs did not go to the basis on which the parties had contracted.

[13] See *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 357 which expressly affirmed that cases decided on earlier theories of frustration were not wrongly decided.

1. The parties must not have provided for the risk of the frustrating event in their contract.;[14]
2. The frustration must not be caused by an event which the parties could "reasonably be thought to have foreseen";[15] and
3. The frustrating event must have occurred without the fault of the party seeking to rely on the frustration.[16]

The first limitation is a key distinction between frustration and force majeure clauses, which are discussed below. The second limitation is similar in nature to the first, in that it goes to foresight. It seems unlikely that it would apply to COVID-19, despite warnings from Bill Gates as to the possible devastating effects of a respiratory pandemic back in 2015.[17] While there have been people who foresaw the possibility of this pandemic occurring at some point, it is hard to say that it was reasonably foreseeable as occurring at any given time. As to the third limitation, it seems doubtful that it will ever be invoked in the context of COVID-19.

The consequence of frustration at common law is that the contract comes to an end automatically and the loss lies where it falls: rights which have accrued unconditionally before the frustrating event remain in place while future performance of obligations is generally no longer required. This can sometimes be complex in practice, which the simplicity of Examples (a) – (e) does not convey.[18] The consequences of frustration have also been modified by statute in some, but not all Australian jurisdictions.[19]

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[14] Ibid.
[15] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 731.
[16] *Bank Limne Ltd v Arthur Capel & Co* [1919] AC 435, 452.
[17] TED, 'The Next Outbreak? We're Not Ready | Bill Gates', *YouTube* (Web Page), 4 April 2015 <https://www.youtube.com/watch?v=6Af6b_wyiwI>.
[18] See, for example, *Fibrosa Spolka Akcyjna v Fairbarin Lawson Combe Barbour* [1943] AC 32.
[19] See *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Fair Trading Act 1999* (Vic).

Yet while frustration may be arguable in a pandemic, there have been few reported cases of such arguments being made to this point. To some extent, this may reflect the delays between the alleged frustrating event, the commencement of litigation and the conclusion of litigation, as well as the fact that not all judgments are reported. However, I am writing this essay almost six months into a pandemic, and I have only been able to find one case in which COVID-19 has been alleged as a frustrating event.[20] Legal academics appear to outnumber litigants in their willingness to consider the doctrine of frustration in the context of COVID-19, with at least three articles published in the Australian Business Law Review alone.[21] The reality is that commercial, reputational and relational considerations have militated against strict adherence to contractual doctrine. When concerts were cancelled, performers, venues and attendees adopted a range of responses other than claiming the contract had been frustrated. Some attendees were given refunds. Others accepted an offer to apply their tickets to future concerts, to be held after the pandemic has passed. Others still decided to treat the purchase price of their now useless tickets as donations to the organisers, whose business model was set to be shattered by an indefinite ban on the provision of their main product. This reflects the general approach of many people during the pandemic: for all that COVID-19 has messed up pre-existing contractual obligations, many contracting parties are taking an understanding and collaborative approach to working their way through it.

Another aspect of contract law, that shares some conceptual overlap with frustration, is a clause providing for force majeure. Article 7.1.7 of the International Institute for the

[20] *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd* [2020] QDC 184.
[21] A Godwin, 'The Contractual Impact of COVID-19 on Corporate and Financial Transactions' (2020) 48 *Australian Business Law Review* 116; J Buchan and R Nicholls, 'The Challenges of Navigating the COVID-19 Pandemic for Australia's Franchise Sector' (2020) 48 *Australian Business Law Review* 126; A Jane and J M Paterson, 'Frustratingly Unclear? The Interplay Between Common Law, Statute and the ACL in Assessing Consumer Rights in a Time of Crisis' (2020) 48 *Australian Business Law Review* 169.

Unification of Private Law (UNIDROIT) Principles addresses force majeure in the following terms:

> (1) 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.
>
> (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
>
> (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
>
> (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.[22]

Force majeure is not a doctrine of the common law of Australia, but parties may expressly provide for force majeure in drafting their contracts.[23] Courts will give effect to those clauses according to ordinary principles of contractual construction, and force majeure events are generally recognised as having four key characteristics:

1. Irresistible;
2. Unforeseeable;
3. External to the person claiming discharge; and

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[22] *UNIDROIT Principles of International Commercial Contracts 2016*, UNIDROIT Member States, May 2017. Available online at <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

[23] *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324 at [61].

4. Making performance impossible and not merely more onerous or difficult.[24]

These clauses have a number of advantages over the doctrine of frustration, stemming from the fact that they are within the control of the parties. The parties have greater flexibility in relation to the consequences of force majeure: the losses need not fall where they lie, but may be apportioned ahead of time. Alternatively, a force majeure clause might require the parties to renegotiate the contract in good faith or provide for alternative dispute resolution procedures. Force majeure clauses can also provide greater certainty as to the events which will trigger them, which I address in detail in Part II. Such clauses are not without risk, however: a party that incorrectly invoked a force majeure clause to justify non-performance may commit a repudiatory breach of the contract, exposing themselves to termination and damages. Plainly many of the force majeure provisions in Australian contracts will have been engaged by COVID-19, but these clauses could have been just as relevant in the event of a war or a natural disaster. This leads to the same conclusion as the case law: the impact of pandemics on contractual obligations is not a unique phenomenon and can be resolved by ordinary principles.

Legislation and Regulation

COVID-19 has seen governments around Australia intervene in contractual obligations both directly and indirectly. The moratorium on evictions restricts the right of landlords to terminate residential tenancy contracts for non-performance by the tenant.[25] Tenants' contractual obligations have been loosened, although not removed them entirely. The JobKeeper program does not prohibit employers from terminating the contracts of their employees, but it offers financial support to mitigate the financial necessity to do so during the pandemic-induced recession. Lockdowns, border closures both internal and external, restrictions on gatherings and restrictions on businesses have rendered various contractual

[24] Ibid.
[25] See, for example, the *Residential Tenancies Amendment (COVID-19) Regulation 2020* (NSW).

obligations impossible to perform and forced others online. Reasonable minds, and plenty of unreasonable minds, may differ as to the desirability of these measures, and each of them could well be the subject of its own separate essay. Any analysis of the merits of these policies here would be of limited value. The inclusion of these examples merely serves to illustrate that it is statute and regulation that directly responds to pandemics, not case law. This reflects a conventional understanding of the separation of powers: the legislature and executive are better able to respond to crises than the judiciary. Because they are not confined to resolving a dispute in an individual case, the political branches of government can act with greater speed to assist populations as a whole. They can commit resources on a significantly greater scale, and target them to where they are needed the most. Because they are not influenced by stare decisis, they can readily discard policies that are unfit for purpose, create new ones, then readily discard those when the time comes. The laws and spending programs responding to COVID-19 are all intended to be temporary, at least insofar as they impact contractual obligations.[26]

There is a significant body of legislation which is not directed specifically at pandemics, but nevertheless alters contractual arrangements in them. In a forthcoming paper, Ian Freckelton examines the legislative responses of various jurisdictions around the world to medical quackery that takes on particular importance in a pandemic.[27] He considers a long list of unsubstantiated prophylactics and treatments from around the world, including bleach, ultraviolet light, hydroxychloroquine, vodka, sweet wormwood, saltwater, cow urine and cow dung, turmeric, lemongrass and ginger.[28] Some snake oil treatments are clearly more appetising than others. Yet, as Freckelton sets out in some detail, the promotion of these treatments in

[26] There has been some debate as to whether the increase in unemployment benefits from NewStart to JobSeeker will be retained, but this is not relevant to contract law. The suggestion of industrial relations reform would have impacts for employment contracts, but proposals for reform remain nebulous at the time of writing.
[27] Ian Freckelton, 'COVID-19: Fear, Quackery, False Representations and the Law' (2020) *International Journal of Law and Psychiatry* (forthcoming).
[28] Ibid p. 13-15.

Australia falls afoul of the *Therapeutic Goods Act 1989* (Cth), which regulates the supply and advertising of medical products. *Carlill v Carbolic Smokeball Company* could have been decided without reference to principles of "offer" and "acceptance" had there been equivalent legislation in force at the time – neither the sale of the smokeball nor the puffery of the advertising would have been permitted under the regulatory framework. Celebrity chef Pete Evans' claim that his "BioCharger" device was not put to the test in proceedings for breach of contract, but was dealt with efficiently in April 2020 when he was fined $25,500 under Part 5-1 of the *Therapeutic Goods Act*.[29]

Consumer protection legislation, such as the *Australian Consumer Law*,[30] and the *Sale of Goods Acts*, could also play a role in countering misinformation around COVID-19 treatments. The prohibition on misleading or deceptive conduct applies to advertising designed to induce people to enter contracts for the purchase of quack cures and prophylactics.[31] Once the products are actually bought and sold, they are subject to the guarantees implied into contracts for the sale of goods that those goods are of an acceptable quality and fit for purpose.[32] However, this is largely redundant in light of the more specific regulatory framework for therapeutic goods. It is worth noting that neither the *Therapeutic Goods Act* nor the consumer protection legislation was passed as the result of a pandemic and they are not specifically directed at the problems caused by pandemics. It is also worth noting that this legislation does not go to altering pre-existing contractual obligations, but to regulating the types of contracts that may be entered into, and the manner in which they products may be advertised.

[29] Therapeutic Goods Administration, 'Pete Evans' Company Fined for Alleged COVID-19 Advertising Breaches' (Web Page, 24 April 2020) <https://www.tga.gov.au/media-release/pete-evans-company-fined-alleged-covid-19-advertising-breaches>.
[30] *Competition and Consumer Act 2010* (Cth) sch. 2.
[31] Ibid s. 18.
[32] Ibid ss. 54-55; *Sale of Goods Act 1923* (NSW) s. 19.

The combination of the near total absence of case law on contracts in past pandemics, the fact that relevant permanent legislation is not targeted specifically at pandemics, and the temporary nature of legislative and regulatory interference with contractual obligations during COVID-19 leads to the conclusion that there is no body of pandemic doctrine. The impact of a pandemic on contractual obligations is either to be resolved by ordinary principles, or it will depend entirely on government interventions, which parties cannot predict and cannot contract out of.

II: Contractual Drafting for Pandemics

COVID-19 was not the world's first pandemic, but nor will it be its last. Contractual doctrine may not change as a result of a pandemic, but it seems likely that contracts themselves will. Pandemic insurance may become widespread in the industries worst affected by COVID-19. These policies can be extremely valuable, as the All England Lawn Tennis Club found this to its benefit in April 2020, when it received a pay out of approximately A$226 million.[33] The AELTC's unusual foresight allowed it to make an ex gratia payment to all players who would have qualified for Wimbledon, even though the tournament itself was cancelled.[34] The premiums for such policies seem likely to rise following COVID-19 as insurance companies readjust their assessments of the likelihood and costs of pandemics. As the policies become more popular, insurance companies may need to keep larger reserves available to pay out the policies that would all be triggered by the same event. COVID-19 is also likely to see a growth in the use of force majeure clauses, and an emphasis on making sure that pandemics are caught

[33] Andrew Reid, 'The $226 Million Masterstroke Behind Wimbledon's Shock Cancellation', *Yahoo Sport* (online, 9 April 2020) <https://au.sports.yahoo.com/tennis-wimbledon-pandemic-insurance-all-england-club-set-for-payout-225927721.html>.
[34] Matt Bonesteel, 'Wimbledon to Pay Players Who Would Have Qualified for the Cancelled Tournament', *The Washington Post* (online, 11 July 2020) <https://www.washingtonpost.com/sports/2020/07/10/wimbledon-pay-players-who-would-have-qualified-canceled-tournament/>.

by their terms. Such clauses can have major commercial benefits or, at least, can play a major role in mitigating commercial losses. As previously noted, force majeure is not a general doctrine in Australian law but clauses that incorporate it are construed according to ordinary principles.

A great deal therefore rests on the drafting of pandemic insurance policies and force majeure clauses (which I collectively describe as "disease clauses"). A force majeure clause could be drafted in generic terms, providing merely that it is triggered by events, causes or circumstances beyond a party's reasonable control. I would think, however, that the appetite for such generic clauses is likely to be reduced following COVID-19, as parties seek the reassurance of specifically addressing the risks attached to diseases. If a more specific approach is taken, would basing a disease clause on the occurrence of a "new and widespread contagious disease" be the best drafting? In the case of COVID-19, the answer is that it is clearly adequate, as the virus meets all of those criteria. However, such a clause would be both under-inclusive and over-inclusive as it relates to other diseases. It would miss disease outbreaks that the contracting parties would likely expect to catch, and catch diseases that the parties would expect not to catch. Each of the terms "new", "widespread", and "contagious", should be examined closely. The words "epidemic" and "pandemic" should also be considered as alternatives, as should other criteria that could be included. Finally, a question arises as to what contractual obligations should be considered "pre-existing" for the purpose of disease clauses.

New

One possible intellectual basis for treating new diseases differently to existing diseases is that knowledge of existing diseases can be imputed to the parties. However, this would lead to deeply unsatisfactory results. Smallpox was not a "new" disease when it decimated the

Aboriginal population around Sydney in 1789.[35] That example may have limited application in today's globalised world, but it shows the potential imprecision of the word "new". A better example may be Ebola, which was first identified in 1976.[36] If the West African epidemic of 2014 – 2016 had become a global pandemic, as was widely feared,[37] would it have been desirable to reject claims for pandemic insurance or deny the enforcement of force majeure clauses on the basis that it was not a "new" disease? Surely not. The disease was not new, but the outbreak of it was. The fact that COVID-19 is a novel coronavirus should not lead us to assume that all future pandemics will involve new diseases. The inclusion of the word "new" does not any value to disease clauses, except to narrow them in ways that may lead to unintended consequences for the contracting parties.

Widespread

The question of whether a disease is widespread depends to a large extent on the scale at which the spread is measured. Globally, there can be no doubt that COVID-19 is widespread, with confirmed global cases recently passing 25 million at the time of writing.[38] It would be stretching the definition of "widespread", however, to apply it to COVID-19 in New Zealand, given that the country went 102 days without community transmission.[39] Yet contracts in New

[35] National Museum Australia, 'Smallpox Epidemic' (Web Page, 21 April 2020) <https://www.nma.gov.au/defining-moments/resources/smallpox-epidemic>.
[36] Centers for Disease Control and Prevention, 'What is Ebola Virus Disease?' (Web Page, 5 November 2019) <https://www.cdc.gov/vhf/ebola/about.html#:~:text=Ebola%20virus%20was%20first%20discovered,outbreaks%20in%20several%20African%20countries.>.
[37] See, by way of background, Suerie Moon et al, 'Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola' (2015) 386 *The Lancet* 2204.

[38] Center for Systems Science and Engineering (CSSE), 'COVID-19 Dashboard', *John Hopkins University* (Web Page, 30 August 2020) <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.
[39] Charlotte Graham-Macleay, 'New Zealand Records First New Local COVID-19 Case in 102 Days', *The Guardian Australia* (online, 11 August 2020)

Zealand have no doubt been disrupted by COVID-19 all the same. During Australia's recent "second wave", the disease was more widespread than it had been, but this obscures the fact that the second wave broke almost entirely on the shores of Victoria and, to a much lesser extent, New South Wales. The disease did not become widespread in the other States and Territories,[40] but contractual relationships in those jurisdictions were still affected. Even within States, there has been considerable variation. Parts of the city of Melbourne have, at various times, been subject to different governmental restrictions than other parts of the city, and at other times the city as a whole has been subject to different restrictions than the rest of the State. From an early stage in the pandemic, rural and regional communities made arguments that amounted to the view that "widespread" in Australia's cities did not necessarily mean "widespread" for them.[41] Contracting parties considering the effect of a disease on their agreement could choose the scale at which they wished to measure the spread of the disease. Much will depend on the context in which the parties are operating. However, for general purposes, I consider that it would be prudent for disease clauses to be based on two factors:

1. The disease having some reasonable degree of prevalence somewhere in the world; and
2. The disease having a demonstrated capacity to become widespread.

This is a little wordier than "widespread", but it takes account of the various scales at which the spread of a disease can be measured.

<https://www.theguardian.com/world/2020/aug/11/new-zealand-records-first-new-covid-19-cases-in-102-days>.

[40] Australian Government, Department of Health, 'Coronavirus (COVID-19) Current Situation and Case Numbers' (Web Page, 31 August 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>.

[41] See, for example, Candace Sutton, '135 areas where lockdown could lift first', *Daily Mercury* (online, 17 April 2020) <https://www.dailymercury.com.au/news/135-areas-where-lockdown-could-lift-first/3996729/>.

Contagious

"Contagious" is an easier term to define. In the context of diseases, the Oxford English Dictionary defines it as "communicable or infectious by contact".[42] The Macquarie Dictionary and Thesaurus defines it as "communicable to other individuals by physical contact, as a disease".[43] Physical contact is a key element of both definitions, which is consistent with the word's etymology from the Latin, "contagio", meaning "a touching, contact".[44] COVID-19 is clearly contagious, as reflected in the focus on handwashing and deep cleaning, the encouragement of social distancing of at least 1.5 metres, and the development of the profoundly awkward "elbow bump" in lieu of the handshake. However, not all diseases need be contagious in order to become epidemics. Malaria is perhaps the most obvious example of a non-contagious epidemic, given that the disease is transmitted by mosquitoes. "Infectious" or "communicable" might be better words to capture all possible diseases.

Pandemic vs. Epidemic

To this point, I have used the words "pandemic" and "epidemic" somewhat loosely, but greater precision would be desirable if they were used in a contract. The classical definitions provide that an epidemic is a widespread outbreak of an infectious disease in a given community, while a pandemic is classically defined as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people".[45] Heath Kelly at the Victorian Infectious Diseases Reference Laboratory criticises this definition of "pandemic" as overly broad:

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[42] Oxford English Dictionary, 'Contagious' (Web Page) <oed.com/view/Entry/400036?redirectedFrom=contagious#eid>.
[43] Macquarie Dictionary and Thesaurus, 'Contagious' (Web Page) <macquariedictionary.com.au/features/word/search?search_word_type=Dictionary&word=ccontagious>.
[44] S A Handford and Mary Herberg, *Pocket Latin Dictionary* (Langenscheidt, 1966) 86.
[45] Heath Kelly, 'The Classical Definition of a Pandemic Is Not Elusive' (2011) 89 *Bulletin of the World Health Organisation* 540.

> "The classical definition includes nothing about population immunity, virology or disease severity. By this definition, pandemics can be said to occur annually in each of the temperate southern and northern hemispheres, given that seasonal epidemics cross international boundaries and affect a large number of people. However, seasonal epidemics are not considered pandemics".[46]

Kelly's argument seems obviously correct for the purpose of contractual law – it seems impossible that seasonal flu would justify the invocation of a force majeure clause or a demand for insurance to be paid out. The severity of the disease and the levels of population immunity to it should clearly be factored into disease clauses.

The question of when a disease crosses the threshold from epidemic to pandemic is also the subject of some uncertainty. One approach that contracting parties could take would be to condition their force majeure clauses or insurance policies on a declaration of an epidemic or pandemic by an impartial, external authority. Judges seeking to construe the terms may equally be tempted to take such an approach out of deference to expertise. The World Health Organisation ("the WHO") is the international organisation with the relevant expertise and jurisdiction. Article 2(g) of its Constitution provides that its functions include "to stimulate and advance work to eradicate epidemic, endemic and other diseases".[47] Article 28(i) details the functions of the board of the WHO, which include:

> "To take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake

[46] Ibid.
[47] 'Constitution of the World Health Organisation' (Web Page, October 2006) <https://www.who.int/governance/eb/who_constitution_en.pdf>.

studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General".[48]

However, the steps that the WHO has taken to achieve these lofty goals have been extensively criticised, in the context of pandemics. Peter Doshi notes that the WHO altered its definition of "pandemic" in the context of H1N1 influenza in 2009 (also known as swine flu).[49] He notes that, from 2003 – 2009, the WHO used the following definition: "An influenza pandemic occurs when a new influenza virus appears against which the human population has no immunity, resulting in several simultaneous epidemics worldwide with enormous numbers of deaths and illness". However, on 4 May 2009, the definition was altered to remove the reference to "enormous numbers of deaths and illness".[50] The WHO's website includes an even looser definition of "pandemic" from 24 February 2010, describing it as "the worldwide spread of a new disease".[51]

Having watered down the definition, the WHO declared H1N1 to be a pandemic on 11 June 2009.[52] The Council of Europe was critical of the WHO's shifting of the definition in a report authored by rapporteur Paul Flynn.[53] The report notes that China, Great Britain, Japan and a dozen other countries urged the WHO not to alter the definition of pandemic, on the basis that it could cause "worldwide panic and confusion".[54] The report concludes that the declaration of the pandemic "was only possible because the description of pandemic alert

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[48] Ibid.
[49] Peter Doshi, 'The Elusive Definition of Pandemic Influenza' (2011) 89 *Bulletin of the World Health Organisation* 532.
[50] Ibid.
[51] World Health Organisation, 'What Is a Pandemic?' (Webt Page, 24 February 2010), <https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/>.
[52] Doshi, above n 49.
[53] Paul Flynn, 'The Handling of the H1N1 Pandemic: More Transparency Needed', *Council of Europe* (Web Page, 7 June 2010) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12463&lang=en>.
[54] Ibid [56].

phases was modified by WHO",[55] a suggestion which appears difficult to refute given the timing of the modification and the fact that the severity of swine flu did not lead to widespread disruption of the sort we are currently experiencing. The WHO's motivation in amending the definition has been the subject of suspicion, with concerns raised as to whether the WHO acted appropriately and independently of the pharmaceutical industry.[56]

In the face of these criticisms, a spokesperson for the WHO defended the change on the basis that the old definition had been in error, and that whether a disease amounts to a pandemic "has nothing to do with the severity of the illnesses or the number of deaths".[57] It would be strange to import this blasé approach to the consequences of a disease into a contract. Parties would presumably only want to disrupt their contractual arrangements by force majeure clauses for events that actually impact on the performance of their obligations. Insurance companies would be reluctant to pay out policies for diseases with minimal practical impacts. To return to a previous example, Wimbledon was not cancelled in 2009, even though it occurred just weeks after the pandemic declaration by the WHO. The All England Lawn Tennis Club did not make a claim on its pandemic insurance (which it already had in place) and the very idea seems absurd.

The WHO has come in for criticism in the context of COVID-19 for the opposite reason – its reluctance to declare a pandemic. On 27 February 2020, Prime Minister Morrison said, "While the World Health Organisation is yet to declare the nature of the coronavirus and its move towards a pandemic phase, we believe the risk of a global pandemic is very much upon us".[58] It took the WHO a further two weeks to declare COVID-19 a pandemic, which it did on

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[55] Ibid [7].
[56] Ibid; Doshi, above n 49; Deborah Cohen and Phillip Carter, 'WHO and the Pandemic Flu "Conspiracies"', (2010) 340 *The Bureau of Investigative Journalism* 2912.
[57] Flynn, above n 53, [26].
[58] Eryk Bagshaw, 'Australia Ready for a Coronavirus Pandemic and Sustained Outbreak', *Sydney Morning Herald* (online), 27 February 2020,

11 March 2020.[59] In making the announcement, the Director General of the WHO, Dr Tedros Adhanom Ghebreyesus said:

> "Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death. Describing the situation as a pandemic does not change WHO's assessment of the threat posed by the virus. It doesn't change what WHO is doing, and it doesn't change what countries should do".[60]

This is a confusing quote. In one breath, Dr Ghebreyesus attributes great power to the word "pandemic", while in another he characterises it as effectively meaningless. Assuming that we can take Dr Ghebreyesus' words at face value, it is difficult to see why a pandemic declaration by the WHO should affect contractual obligations, when he claims that it has no effect on the WHO's actions, or on what the WHO recommends countries do. To recap: in the last 11 years, the Council of Europe has criticised the WHO for being too keen to declare a pandemic in circumstances that arguably did not justify it, while Australia has achieved relative success in responding to an actual pandemic by recognising the severity of the situation while the WHO delayed. The Director General of the WHO himself has undermined the importance of the word "pandemic". The use of the word "pandemic" in disease clauses therefore seems to be unacceptably imprecise.

The use of the word "pandemic" also ignores the possibility that an epidemic could be sufficiently disruptive that the parties could reasonably want it to trigger. It may seem unlikely

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<https://www.smh.com.au/politics/federal/australia-to-declare-coronavirus-pandemic-20200227-p5452c.html>.

[59] Sarah Boseley, 'WHO declares coronavirus pandemic', *The Guardian Australia* (online, 11 March 2020), <https://www.theguardian.com/world/2020/mar/11/who-declares-coronavirus-pandemic>.

[60] World Health Organisation, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020' (Web page, 11 March 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

that Australia could experience an epidemic without it developing into a pandemic, given the amount of incoming and outgoing international travel. Yet even if it is unlikely, it is certainly a possibility. The globalised nature of our economy also means that it is commonplace for contracts to extend beyond Australia's borders, including to countries and regions more likely to undergo a non-pandemic epidemic. To return to a previous example, flights from Australia to West Africa would have been heavily impacted by the Ebola epidemic, even if the epidemic never reached Australia's shores. The word "pandemic" should therefore be used with caution in disease clauses, as it may be narrower in scope than the parties intend, and may invite reference to an external authority with a problematic recent record in using it. "Serious epidemic" may be preferable, capturing the possibility of significant diseases, whether or not they are global, and inserting some reference to the severity of the disease.

Means of Transmission

Even after considering and refining the value of each of these criteria, there is still at least one disease from the last century that seems out of place in this analysis: HIV/AIDS. It was new, widespread and demonstrably capable of becoming widespread, contagious, infectious, a pandemic and an epidemic. Population immunity was low and disease severity was high. Yet for all this, and without downplaying the impact of HIV/AIDS in the slightest, it is hard to imagine Wimbledon receiving a pandemic insurance pay out or a contract being cancelled for force majeure following an outbreak of HIV/AIDS. A party to a contract contracting HIV/AIDS may amount to force majeure or justify insurance payments (which are more likely to be matters of health and income protection insurance) but the existence of the pandemic itself would not justify the triggering of a properly drafted disease clause. This is because the various means of transmission for HIV/AIDS involve the exchange of bodily fluids that does not ordinarily occur during the performance of a contract. Just as severity and population immunity should be taken into account, so should the means of transmission, so

that disease clauses are only triggered by diseases that are actually related to the performance of the contract.

Pre-existing

COVID-19 first appeared in December 2019, but it took some months for its global impact to become apparent. During that time, contracts continued to be entered into. The notion that this analysis should be limited to "pre-existing" contractual obligations is premised on the notion that once COVID-19 existed, parties could take it into account when forming contracts. This involves the drawing of an artificially bright line between pre-existing and new contracts at the moment the disease came into existence. Should a pandemic insurance policy be disregarded because it was entered into during January or February 2020, on the basis that COVID-19 existed before the contract? Should parties be unable to trigger force majeure clauses in contracts formed during that period? At the time, COVID-19 seemed to be only a force mineure. The question is, at what point in time does the disease relevantly exist, such that contractual obligations can pre-exist it? There is a wide range of possibilities, including but not limited to:

- The first recorded case of the disease globally;
- The N^{th} recorded case of the disease globally;
- The first recorded case of the disease in the country in which the contract is to be performed;
- The N^{th} recorded case of the disease in the country in which the contract is to be performed;
- The first recorded case of human-to-human transmission;
- The N^{th} recorded case of human-to-human transmission;
- The first recorded case of community transmission in the relevant country;
- The N^{th} recorded case of community transmission in the relevant country;

- The first recorded death from the disease;
- The Nth recorded death from the disease;
- When governments announced, or implemented, various policies to respond to the disease.

There is no set answer, and it will depend, as it always does, on the process of construing the contract to ascertain the objective intention of the parties:

> "That is the intention that a reasonable person, with the knowledge of the words and actions of the parties communicated to each other, *and the knowledge that the parties had of the surrounding circumstances*, would conclude that the parties had, concerning the subject matter of the alleged contract" (emphasis added).[61]

Individual parties may have become aware of COVID-19 at different times, but there must come a point at which the knowledge can be imputed to the parties to any and all contracts. I will not venture so far as to specify the date on which that occurred, but it cannot be until it was widely known in the community that the disease existed and that it was foreseeable that it could have a serious impact on the performance of the contract. It would be contrary to principle to treat contracts entered into in the early days of COVID-19 as pre-existing it.

Conclusion

The unifying theme of this essay is that COVID-19 is neither the first nor the last major communicable disease that will disrupt the performance of contractual obligations. New diseases may arise, or existing diseases may breakout again. These diseases may be geographically confined or they may have global reach. Some will be epidemics and some will be pandemics. Their means of transmission and their severity will vary. The next pandemic may look very different to COVID-19. The lessons that contracting parties (and governments)

[61] *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65 at [262].

learn for pandemic preparedness should therefore not be overly confined to COVID-19. Contract law itself is unlikely to learn any lessons from COVID-19, so if parties are unsatisfied with the possible application of existing doctrines to their arrangements, it is up to them to draft their contracts accordingly. Past pandemics may be poorly remembered, but the broader lessons of this one should not be lightly forgotten.

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