The potential of the Covid-19 Crisis to cause legal disruption to Contracts and Contract Law

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Abstract

This paper explores whether the Covid-19 crisis has the potential to cause legal disruption to the legal regime for contracts. It first sketches features of the Covid-19 crisis and its effect on the economic and social context of contracts, before setting out a four-step methodology to categorise legal responses to the crisis. It then develops a specific conception of legal disruption, based on Christensen's theory of disruptive technology, which posits that legal disruption occurs once the pre-crisis legal regime for contracts (whether entirely or partially) is displaced by new provisions first targeted at the effects of the crisis. It concludes that the crisis has the potential to cause legal disruption but that this outcome is not inevitable.

Keywords

Contracts, Legal disruption, crisis, legal response

Setting the scene: Covid-19, disruption and what's different

The first half of 2020 has been unprecedented in the way the Covid-19 pandemic has changed economic and social activities: many businesses were forced to suspend their activities altogether or modify their operations in accordance with social distancing requirements; home-working and home-studying instantly replaced face-to-face activities, and video-conferencing became the alternative to face-to-face meetings. Consumers had to deal with multiple changes at once: many suffered a reduction or complete loss of their income; activities already booked and paid for (such as travel or concerts) were cancelled; and many everyday retail shops had to close for a long period of time. Social activities in cafes, bars and restaurants ceased altogether. Many businesses and consumers have been faced with the economic consequences

of the pandemic:[1] for businesses pressures came from preserving their cash-reserves in the face of business disruptions and demands from consumers for refunds; for consumers, recovering prepayments for services which would no longer be provided and having to maintain regular payments for rent, mortgages and loans became a challenge. Undoubtedly, the Covid-19 pandemic has caused a huge amount of disruption to daily life.

This paper focuses on a different kind of disruption: the disruptive effect of the Covid-19 pandemic on contracts and contract law. "Disruption" has become a popular, and perhaps over-used, term in recent times thanks to the impact of digital technology on contract law and other areas of law.[2] In this paper, I will use the term in quite a specific sense, based on the theory of disruptive technology developed by Clayton Christensen.[3] In this theory, the term "disruption" has a more narrow meaning than its ordinary dictionary definition, and I will explain below how this more precise notion of "disruption" can be translated into the contract law sphere to serve as a method for gauging the impact of any new development on existing legal regimes. I will say more about this below, but it is important to stress from the outset that the mere fact that something new has emerged which requires some kind of change to the legal regime does not mean that law has been "disrupted" in the sense that I will use it.

My starting point is a more general one: legal scholars and practitioners are all too familiar with the need to test the application of existing legal regimes to new situations – this much is routine work for lawyers. I use the term "legal regime" in this paper as an umbrella term for legal rules (whether based on legislation, civil codes or case-law), regulatory provisions which directly or indirectly relate to contracts, codes of conduct, and enforcement procedures.

Many legal regimes have features which are designed to have a built-in degree of flexibility which facilitates their application in a wide range of circumstances, so it is often a question of how relevant provisions of existing legal regimes should be interpreted and applied to new situations. However, sometimes, a new development is not easily covered by existing legal regimes. This can happen because its underlying principles or concepts, or its substantive provisions, do not cover such a new phenomenon. At this point, lawyers will work out where the gaps or shortcomings in the existing legal regime are, and identify possible ways of

[1] The OECD have described the economic impact as 'the most severe economic recession in nearly a century': OECD, 'The world economy on a tightrope' < http://www.oecd.org/economic-outlook/june-2020/> accessed 11 June 2020.

[2] Christian Twigg-Flesner, 'Disruptive Technology - Disrupted Law? How the Digital Revolution affects (Contract) Law' in Alberto De Franceschi (ed.), *European Contract Law and the Digital Single Market* (Intersentia, 2016).

[3] Clayton Christensen, *The innovators dilemma* (Harvard Business Review Press, 1997).

addressing these. Usually, this will lead to incremental reforms to the legal regime, perhaps with the addition of a small number of provisions to ensure that existing legal regimes are adapted to cover new developments.

Nowhere has this been more apparent in recent times than the impact of digital technology on new ways of transacting and the debates about how law needs to adapt. Numerous books and articles have been written about the digital revolution and its impact on both commercial and consumer contracts,[4] and some legislation at national, regional and international levels has been adopted.[5] Often, this retains a high degree of coherence with established legal regimes, often by relying on translation tools such as "functional equivalence"[6] and "technological neutrality".[7] Entirely new legal provisions which concern digital contracting specifically have rarely been introduced, and where they have, usually be analogy to established provisions. Whether retaining existing legal rules with little modification or supplementation is the best legal response to the digital revolution may be open to debate, but the steps taken thus far indicate how legal regimes are generally fairly adaptable to unforeseen and novel circumstances.

The same is true of contracts: For many contracts, particularly commercial contracts, parties are expected to, and do, make provision for dealing with unforeseen circumstances which might arise during the lifetime of the contract. This can be done through specific terms dealing with matters such as currency-related price variations, or general terms on *force majeure* events or hardship affecting one of the parties.[8]

Fundamentally, the Covid-19 crisis could also be regarded as a type of "new development", albeit one of a rather different kind. There is an important difference between the Covid-19 crisis and, say, new technological developments. Many technological developments, including the digital revolution, concern the invention and adoption of new ways of doing things (such as conducting business and consumer transactions), or new objects of legal concern (e.g., the treatment of intangible assets, such as digitally stored information or data). The difference is

[4] E.g., Reiner Schulze and Dirk Staudenmeyer, *Digital Revolution – Challenges for Contract Law* (Nomos/Hart, 2016); Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia, 2016); Alberto De Franceschi and Reiner Schulze (eds.), *Digital Revolution – New Challenges for Law* (Beck/Nomos, 2019).

[5] E.g., chapter 3 of part 1 of the Consumer Rights Act 2015 on digital content (UK) or Directive (EU) 2019/770 on digital content and digital services (EU).

[6] I.e., ways of describing how a legal requirement adopted for the physical world can be met by digital technology.

[7] These concepts underpin the provisions of the UN Convention on the Use of Electronic Communications in International Contracts 2005, for instance.

[8] See e.g,. International Chamber of Commerce (ICC), 'ICC Force Majeure and Hardship Clauses' <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> accessed 11 June 2020.

that, from the perspective of Contract Law at least, the Covid-19 pandemic has not presented us with new ways of doing things as such (although lockdowns and social distancing are, of course, new forms of behaviour) but rather has transformed the background context within which contracts are concluded and performed (or rather, no longer performed). In other words, the "new development" in the Covid-19 pandemic is the drastic change to the economic and social context for contracts and contract law. The challenge this has created for contracts and contract law is whether existing legal regimes for contracts provide the tools for managing the impact of this crisis on all kinds of contracts, and, to the extent that they do not, to adjust the legal regime as necessary to mitigate the effects of the Covid-19 crisis. A particular difficulty in this regard is the need for rapid action, which leaves little, if any, room for deliberation over the detail of any changes to be introduced. There is one further difference: technological developments tend to be progressive and evolve gradually, albeit at varying pace.[9] The changes prompted by this tend to be long-lasting. The impact of the Covid-19 pandemic is likely to be relatively time-limited in its initial impact, and one would hope that even the aftermath of this pandemic will be relatively short-lived, and the economic and social context will improve significantly.

Despite these differences, the steps which are taken to develop a legal responses to the Covid-19 pandemic essentially mirror those that would be taken in respect of other new developments which affect existing legal regimes. However, on the one hand, the particular legal changes prompted by the Covid-19 pandemic are intended to operate for a short period of time, there is a possibility that the legal regimes for contracts (and, indeed, many other areas of law) could be disrupted in a lasting way. Whether this outcome is inevitable is the question I seek to explore in this paper. I will do so in two sections: first, I will chart the four steps of the legal response to the challenges created by the Covid-19 pandemic; secondly, I develop further my particular conception of "disruption" before explaining how Contract Law might be disrupted by the legal responses to the pandemic and beyond.

[9] Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change' [2007] *University of Illinois Journal of Law, Technology and Policy* 239.

Steps for developing a legal response to the Covid-19 crisis

In this part, I will set out what I regard as the 4 steps in which changes to the legal regime for contracts could be made as a result of the Covid-19 crisis. Before I do so, it is first necessary to explain how a crisis such as the Covid-19 pandemic differs from other new developments.

Features of a crisis and relevance for law

It is necessary to clarify what is meant by "crisis". According to the Oxford English Dictionary, "crisis" can have multiple meanings. In popular usage, it is defined as "A vitally important or decisive stage in the progress of anything; a turning-point; also, a state of affairs in which a decisive change for better or worse is imminent; now applied *esp.* to times of difficulty, insecurity, and suspense in politics or commerce".[10] In this sense, the COVID-19 pandemic is, indeed, a crisis in that it is a decisive stage in the progress of many aspects of daily live and it is certainly a time of difficulty and insecurity, as well as suspense in commerce. In a medical context, "crisis" refers to "the turning-point of a disease for better or worse", or "the point in the progress of a disease when an important development or change takes place which is decisive of recovery or death".[11] In either meanings, a crisis is a defining point in time at which there is a decisive change, where continuity is disrupted and a juncture materialises. The actions taken at this point may influence the ultimate direction that is taken – it can determine whether a patient will recover or die, or whether a difficult economic situation worsens or is turned around.

Although a crisis can be personal, in that it affects an individual person (e.g., due to an injury), the crisis caused by the COVID-19 pandemic does not merely affect individuals in discrete instances but has a simultaneous collective impact on large numbers of individuals and businesses alike. For present purposes, a crisis can therefore be understood as a severe event which affects a large number of persons (natural and legal) in such a way that it could significantly worsen their position. In particular, it is the effects or consequences of a crisis which are felt – the effects of a crisis constitute a major shift in the general context (rather than the specific context of, say, a particular contract) within which all activities occur, and determines how such activities can be carried out in the changed circumstances created by the crisis.

[10] *Oxford English Dictionary* online, entry for "crisis".
[11] *Ibid.*

Understood in this way, it is possible to distinguish a crisis and its effects on the one hand from novel or unexpected occurrences which are essentially of a discrete nature and which do not change the background context against which all activities (including contracts) occur, but instead have an more isolated and less far-reaching effect (although can still be quite dramatic for the parties to particular contracts affected). To this, one might add the occurrence of an unexpected event which affects multiple persons at once, but not on the same scale as a crisis. For instance, the cancellation of the coronation procession for Edward VII or the UK's decision to withdraw from the European Union were both events which affected multiple persons, and the contracts they had concluded,[12] but neither event would truly be described as a crisis. In contrast, the impacts of the first and second world-wars were far more severe and would both cross the crisis threshold.

This distinction is important in order to explore the implications of a crisis for law and potential changes to be made to the law compared it its pre-crisis form. When it comes to contracts, the discrete impact of unexpected circumstances on a specific contract should be manageable under current legal regimes.[13] The same should be true for multiple contracts affected in a similar way where the unexpected circumstances are such as to impact multiple contracts at once. However, with a crisis, the scale of the circumstances and the consequences which flow from this – whether directly or through action taken by governments in responding to the crisis itself – are such as to severely test the suitability of the current law in providing a suitable means of responding to these consequences.

Having considered why a crisis might pose particular challenges for law which do not arise to the same extent as a result of unexpected circumstances of lesser severity, I now turn to set out the steps that might be followed in considering whether, and how, existing law might have to be adapted in order to better manage the consequences of a crisis. When faced with a crisis which affects a huge number of contracts at once, it is possible to identify four steps to determine what the implications for the legal regime for contracts might be: first, the application of existing provisions is tested; secondly, insofar as existing provisions do not provide adequate solutions, or to the extent that those solutions would be unduly burdensome on one or both of the parties, new provisions are introduced; thirdly, provisions intended to

[12] See *Krell v Henry* [1903] 2 KB 740; *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 603 (both on frustration); *Griffith v Brymer* (1903) 19 TLR 434 (mistake).

[13] Some elements of current legal regimes may have their origins in earlier periods of crisis, e.g., the first or second world war.

have temporary effect have to be unravelled so as to revert to the original legal regime; and finally, a period of reflection to consider whether law reform of a lasting kind is appropriate.

Step 1: Establishing the limits of existing law

A first step will be to understand the impact of the crisis on contracts and contract law. As explained earlier, a crisis and its consequences significantly alter the context within which all activities, including contracts, take place. Among the consequences of the COVID-19 pandemic are the restriction or outright suspension of economic activity across many industry sectors, restrictions on travel and transport, cancellation of all events and activities involving groups of people, and a significant impact on the income of many individuals because they have been furloughed or lost their job altogether.

These consequences can affect contracts in various ways. The most common types of impact are:

(i) the performance of a contract may no longer be possible at all;

(ii) it may still be possible to perform the contract, but doing so would cause hardship, or be very onerous, for one of the parties;

(iii) performance would still be possible but purpose for which one or both parties concluded the contract has gone;

(iv) in the case of long-term or subscription contracts, there may be an impact on the ability of either or both parties to fulfil their contractual obligations for some of the contract duration, depending on the length of time the crisis and its consequences subsist;

(v) there will be a delay in performing the contract;

(vi) a party may not be able to perform all its obligations in full, e.g., due to limited supplies for multiple contracts;

(vii) a party may not have sufficient financial resources to pay for the other party's performance.

In respect of each of these situations (and there will be others), a first step will be to check whether the terms of an affected contract which address unforeseen circumstances and their

consequences for that contract provide an answer.[14] Contracts often make specific provision as to what should happen if the contract can no longer be performed as agreed and the parties may act in accordingly, and many standard form contracts will include a *force majeure* clause and/or a hardship clause, in particular. Such clauses spell out the kinds of events or circumstances triggering their application, often in considerable detail, and stipulate the impact this has on the parties' obligations to perform. Whether the Covid-19 pandemic and its consequences trigger a clause in a particular contract will depend on its wording – if the particular reason which one or both parties seek to rely on is not covered by the wording of the clause, it will not apply, and the parties have to fall back on the relevant rules on the impact of post-formation unforeseen circumstances under the applicable law.

In the absence of a relevant contract term, or where such a term does not cover the particular situation, the rules of the applicable law on post-formation unforeseen circumstances[15] have to be considered to determine, first, if the circumstances which have arisen are such that these rules are engaged, and secondly, what result(s) these rules mandate. The law governing a contract will usually provide rules of some kind or another to come to the aid of the parties to a contract which has been significantly affected by an unforeseen event beyond the control of the parties. However, the scope of such national rules varies. For instance, the doctrine of frustration in English law is quite narrow, and not available for instances of hardship alone.[16] French law on *force majeure* is only available when performance of a contract has become impossible,[17] although a separate provision on hardship provides an additional basis for dealing with instances when performance is not impossible but would be unduly onerous for one party.[18] Germany has its well-known provision on disruption to the circumstances forming the basis of the contract.[19] Many legal systems have versions of the *rebus sic stantibus* doctrine.[20] Consequences range from termination of the contract, to renegotiation, to temporary suspension of performance (where the impact of the contract is not permanent).

In the context of the Covid-19 pandemic, the application of existing legal regimes in the very different social and economic context which has resulted leads to the key question of whether

[14] For English law, see Hugh Beale and Christian Twigg-Flesner, 'Covid-19 and English Contract Law' *in this volume.*
[15] As between legal systems, these rules differ in both their scope and the type of rule (frustration, force majeure, hardship, disruption to the basis of the bargain, impediment etc), so this generic term is used here.
[16] See Hugh Beale and Christian Twigg-Flesner, 'Covid-19 and English Contract Law' *in this volume*.
[17] Art.1218 of the French Civil Code.
[18] Art.1195 of the French Civil Code.
[19] Article 313 of the German Civil Code (BGB) ("*Störung der Geschäftsgrundlage*").
[20] E.g., Crotia: Obligations Act, Arts.369-372; Switzerland: Code of Obligations, Art.119.

existing law still works in these new circumstances. Thus, it will have to be examined whether an existing legal regime covers the particular impact of the crisis on each contract *and* that the results the law points to are appropriate in the circumstances. This will inform an assessment of whether an existing legal regime is sufficiently robust / suitable for covering all of the ways in which a contract might be affected, and whether it provides an appropriate solution. It is important to consider both of these aspects separately. Whilst the former is a precondition for the latter, it may be that the results or solutions provided for in law are not appropriate in the circumstances even where the provisions are triggered by the crisis. For instance, the English doctrine of frustration, where it applies, leads to the result that the contract in question is immediately and automatically brought to an end. However, this all-or-nothing approach may not be what either party wants.

In short, this first step will involve testing whether the consequences of the crisis can be resolved adequately through the application of existing legal rules, or whether their application reveals or reinforces shortcomings in the law which necessitate further action. The former result suggests that existing law suffices to deal with the consequences of the crisis and no further specific action is required. The latter, however, will mean that further action is required.

Step 2: Specific steps to manage the crisis

Specifically, with regard to contracts, the question will be whether any changes to the existing legal regime for contracts are required, and if so, which. One can immediately think of a number of points of attack: (i) the conditions for triggering rules on dealing with changed circumstances, i.e., the events and consequences which must occur as well as other conditions such as a lack of foreseeability or absence of risk allocation to one of the contracting parties; (ii) the effect of engaging those rules: are the parties automatically discharged from their obligations, are they obliged to renegotiate the contract, or something else?

As noted above, existing legal doctrines dealing with the impact of unforeseen circumstances beyond the control of the parties to a contract are generally well-established features of national contract law, and have been deployed for a long time. Of course, elements of these doctrines are undoubtedly open to critique, e.g., with regard to their scope of application or the consequences for a contract they provide. I pointed out earlier that the extent to which any provision of a legal regime is sufficiently flexible and future-proof can be debated, and this will apply in the same way to the specific legal provisions dealing with the impact of unforeseen circumstances on existing contracts, whether about the interpretation of the relevant provision

or the adequacy of the consequences provided for once those provisions have been engaged. In the normal course of things, the features of a particular legal regime tend to be the focus of a steady stream of scholarly writings, and may also occasionally catch the eye of law reform bodies or Parliaments, and law reform proposals might be considered. However, it is rare for reform to legal regimes for contracts to be high-priority issue. Occasionally, a case will come before a court which raises a new question about the way in which the law currently operates, whether that be a question about the scope of the specific elements of the law or questions unresolved by the law as it stands. Sometimes, this might prompt a reform initiative,[21] but more often than not, it ends up as part of the general narrative about the area of law concerned.

This means that there may be existing discussions about potential reforms to the legal regime for contracts in a particular jurisdiction, and the fact that testing the application of the current legal regime to situations affected by the Covid-19 pandemic could prompt a call for such reform debates to be reinvigorated – after all, there may ready-made reform proposals sitting on a metaphorical shelf, waiting to be dusted off and turned into law. However, whilst this may be a tempting response, there are good reasons not to expedite the implementation of existing reform proposals in these circumstances.

Instead, the fact that existing legal regimes are inadequate for the circumstances created by the Covid-19 crisis might make targeted action to address specific issues caused by the crisis more appropriate. Deciding on what course of action to take requires consideration of several questions: first, it must be determined what sort of action is required to address the gaps in the existing legal regime which are causing concern in the context of the crisis, i.e., the substantive changes that are needed in order to ensure that an adequate solution for the impact of the crisis on contracts is provided. It might be feared that such targeted measures could undermine, or even reverse, express risk allocations made under a contract, and affect any insurance cover obtained by the contracting parties to cover the risks assumed by them. Furthermore, it might prompt an objection that legal certainty could be undermined by significantly changing the legal regime which existed when a contract was entered into. It might also affect the potential for parties to reach an amicable and negotiated resolution by renegotiating the terms of the contract in a way that suits their commercial relationship.

[21] A good example is the enactment of the Law Reform (Frustrated Contracts) Act 1943 to provide clarity regarding the restitutionary obligations after a contract has been frustrated, partly prompted by the House of Lords decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. See *Hansard*, vol.128, columns 136-151 for the illuminating second reading debate in the House of Lords.

Secondly, the appropriate mechanism for introducing such changes needs to be identified. Lawyers might instinctively look at new legal rules, i.e., changes made through legislation. However, this is not necessarily the only available route; for instances, changes could instead be made to codes of conduct operated by trade associations, or by changing regulatory rules, principles or guidance notes, e.g., in respect of credit agreements. A combination of different mechanisms might be appropriate.[22]

Thirdly, and crucially, a decision will have to be made as to whether such changes are going to be of a temporary nature and be confined to the duration of the crisis, its impacts, and the immediate aftermath (recovery phase), or whether the changes that will be made are going to be unlimited as to duration and therefore remain in place after the crisis and the recovery period has ended. A time-limited response has the advantage that it can be adopted more rapidly and in all likelihood without too many objections, because such changes would be understood to be there to provide an immediate solution to the specifics of the crisis (e.g., impact on tenancies and eviction proceedings). A response which is intended to operate on a permanent basis would require much more careful development and therefore require much more time and care, as its effects would be lasting. However, there may not be any time for more careful development – even if there are existing reform proposals, because these will probably not have been designed with the severe circumstances created by the crisis in mind. Using a crisis as the impetus for pushing through significant reforms to the law, rather than providing a temporary patch for the duration of the crisis, increases the risk that rules drafted under pressure may transpire to be unworkable or so poorly drafted that they create more problems that they solve. So a time-limited response as an immediate reaction would be more appropriate to get through the period of crisis.

Step 3: Unravelling temporary adjustments

The third step is one which would not normally be relevant when dealing with reforms to the legal regime for contracts in response to new developments such as new technology or business models. It is however integral to the way legal regimes are adapted in response to the Covid-19 crisis. Reaching step 3 means that the moment will have come to unravel the temporary

[22] In the UK, for instance, payment holidays in respect of credit agreements and mortgages were introduced by amending Financial Conduct Authority Guidance rather than substantive laws, which has had the unfortunate consequence that obligations on creditors under the Consumer Credit Act 1974 to issue consumer debtors with notices of arrears after two missed instalments still had to be adhered to.

changes which were made in response to the crisis. As temporary changes expire or are repealed, the pre-crisis legal regime applies once again. This will usually be done because the context in which those changes were introduced in the first place is no longer acute – for instance, businesses may be able to open up again (even if only in a limited way), so economic, and, eventually, social, activities can resume. There may still be limitations to what is possible for a period of time, but the severe strictness which characterised the lockdowns in many countries will have eased when step 3 becomes relevant.

However, simply stopping the application of temporary measures without any thought given to the immediate aftermath can create new problems. For example, in many countries, moratoria were introduced which allowed debtors under credit agreements a period of time during which no instalments had to be paid ("payment holidays"), and tenants of rental properties were protected from eviction for non-payment of rent.[23] Once these moratoria expire, there will be concerns for those debtors who might still not yet be in a financial position to make regular payments again, and who may suddenly face the prospect of being in default on their repayments and at risk of eviction. This could put a huge amount of pressure on the court system, for instance.

It will therefore be essential to make transitional "recovery" arrangements to prevent the sudden disappearance of the measures which were introduced at the height of the crisis. This could involve a more gradual removal of measures such as moratoria and provision for rescheduling debts and rental payments. It must be recognised that the economic impact on individuals and businesses will not end with the resumption of economic activity but may continue for some time yet (particularly as unemployment might increase once government support schemes expire). It may be that financial support for individuals can be provided through the welfare system to provide some alleviation, but this might not suffice to address the added problem of outstanding payments which have accumulated during the moratorium period.

[23] See Covid-19 Consumer Law Research Group, 'Consumer law and policy relating to change of circumstances due to the COVID-19 pandemic' (2020) 43 Journal of Consumer Policy 000 (forthcoming) for a comparative discussion of these.

Step 4: Reflections on state of the law and need for lasting reforms

It may be thought that, once the crisis has subsided and the economic and social context is able to return to conditions comparable to those before the crisis arose, it will be possible to revert to the pre-crisis legal regimes and carry on as before. However, this is not inevitable. Changes were made to the law during the crisis because existing legal rules were found wanting when faced with the rapid and dramatic shift in the economic and social context caused by the steps taken to tackle the crisis. These shortcomings would remain there was no further consideration of reform after the crisis is over.

Once things have calmed down again, there should be an opportunity for reflecting on the state of the law and whether the shortcomings which were identified should be tackled on a lasting basis. Whilst the urgency of this crisis may have gone, and therefore the need for reform be less pressing, this does not mean that law reform should be put off. Instead, the fact that temporary changes were felt necessary should be a reason for taking a more rigorous look at the law and to think about what changes could be made to reduce the need for temporary interventions, should another severe crisis emerge. One might object that the unusual conditions of a crisis are not a good diagnostic environment for identifying aspects of the law in need of reform because such extreme circumstances are unlikely to arise frequently in the future. That may be some force in this suggestion, but the counterargument is that the mere fact that we experienced this crisis should provide the impetus for considering reforms to seek a greater extent of future-proofing. This would contribute to increased legal certainty and thereby allow contracting parties to plan ahead better, particularly with regard to mutual risk allocation under their contracts.

Moreover, the experiences of the crisis might not have revealed shortcomings in the substantive legal rules, but also in the underlying principles and assumptions on which these rules are based. To use the English common as an example: it is generally well-known for a non-interventionist stance and will not easily interfere in contracts, once concluded. The doctrine of frustration is narrow, and there is generally no basis for intervening in cases of financial hardship. Aside from the nascent recognition of relational contracts, there is no general duty to act in accordance with good faith. Yet, during the crisis, measures were taken which *de facto* compensated for the lack of hardship rules, and even the government sought to exhort contracting parties to act in a way which sounds not far away from what would be expected if

there were a general duty to act in good faith.[24] Whilst I am not expecting a sudden change of heart in the underlying principles of English Contract Law,[25] there might nevertheless be renewed interest in reducing the strictness of the law in this regard, even if, in this particular instance, radical reform may be unlikely.

There is, of course, no guarantee that there will be much appetite for law reform once matters have calmed and the crisis has gone. Instead, the daily routine and political priorities will take over,[26] and whatever happened during the period of crisis will remain confined to that context. I doubt, however, that there will not be any long-term effects on contracts and contract law. At the very least, I expect that there will be at least some litigation reaching the courts eventually which will involve questions regarding the substance of existing legal rules and may result in some development or change – particularly in the common law where Contract Law is still predominantly case-based. I would hope, however, that there will be an effort to consider whether English contract law requires wider reform, not least because there appear to be fewer opportunities for the Court of Appeal and the Supreme Court to consider some aspects of Contract Law on a regular basis.[27] However, if this does not happen, then the crisis will merely have constituted an interruption to the normal operation of contracts and Contract Law. If reforms were to be introduced, however, then this could have a disruptive effect. In order to explain what I mean by this, I now turn to elaborate how I use the notion of disruption in the context of law.

Legal Disruption and the Covid-19 crisis

I mentioned earlier that the word "disruption" has, perhaps, been overused recently, particularly in the context of how digital technology has disrupted business, law and regulation through enabling new digital business models and products.[28] Nevertheless, I regard the notion of

[24] Cabinet Office *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency* <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency> accessed 11 June 2020.

[25] See further, Hugh Beale and Christian Twigg-Flesner, 'Covid-19 and English Contract Law' *in this volume*.

[26] For the UK and EU, there is still the difficult issue of finalising the new trading relationship following the UK's withdrawal from the EU, of course.

[27] It took for more than two decades for the Supreme Court to be presented with an opportunity to consider the approach to consideration in the Court of Appeal's ruling in *Williams v Roffey Bros.* [1991] 1 QB 1, only for the case to be decided on different grounds: *MWB Business Exchange Centres Ltd v Rock Advertising* [2018] UKSC 24.

[28] See e.g., Michael J Copps, 'Disruptive Technology…Disruptive Regulation' [2005] *Michigan State Law Review* 309; Roger Brownsword, *Law, Technology and Society* (Routledge, 2019) 182-190.

"disruption" has a useful guide for determining the effect of reform on any legal regime, including that for contracts. Importantly, not every instance of law reform is disruptive, even if it results in significant changes.

I start with the idea of "disruptive technology", developed by Clayton Christensen.[29] His perspective is on the impact of technological developments on incumbent businesses, rather than on legal disruption. He distinguishes between "sustaining technology" and "disruptive technology". In short, sustaining technology result from gradual improvements of established technologies. Businesses involved in making established technologies serve an existing market and customer-base, and adopting sustaining technology allows such business to continue to do so. The focus of such businesses is on maintaining that existing base and growing that, rather than branching out into other fields.

In contrast, "disruptive technology" is more than just a gradual improvement of existing technology but rather an innovative development. Initially, there may be no demand for such technology, and it may not have the reliability and maturity of established technologies. Among existing customers in established markets, there will be little, if any, interest in this new technology. So how does such technology become "disruptive"? Christensen argues that a new market for innovative technology will emerge, often because such technology appeals to an under-served or altogether new customer base. As new customers adopt and apply this technology, they effectively create a new market. Katyal noted that disruptive technology can "tap unforeseen markets, create products to solve problems consumers don't know they have, and ultimately to change the face of the industry".[30] This can lead to a disruptive effect when innovative technology which initially founds its own market spreads into existing markets for established technologies. Customers in established markets switch to innovative technology, leading to a decline in demand for products based on established technology, eventually pushing established businesses out of their market. Furthermore, it is important to appreciate that disruptive technology and the associated market disruption is different from increased competition in established markets by a competitor utilising innovative technology.[31]

This short account of Christensen's theory of disruptive innovation suffices as the basis for the particular notion of disruption I will employ in the context of law. There are two interconnected levels of legal disruption. The first level of disruption arises when a new development demands

[29] Clayton Christensen, *The innovators dilemma* (Harvard Business Review Press, 1997).
[30] Neal Katyal, 'Disruptive Technologies and the Law' (2014) 102 Georgetown Law Journal 1685.
[31] Clayton M. Christensen, Michael Raynor and Rory McDonald, 'What is Disruptive Innovation?' (2015) *Harvard Business Review* 44.

that an adjustment of some kind is made to existing legal regimes. This will be necessary when existing legal regimes are either insufficient to address a new development, or where there are no relevant provision in such legal regimes at all. In the four-step model developed in the previous section, this will be the case where the outcome of step 1, i.e., the application of existing provisions to the crisis (or any new development for that matter) has revealed that there are gaps or other shortcomings. This will lead to the adoption of new legal provisions within that legal regime to address the gaps/shortcomings thus identified (step 2 in the model above). However, the mere fact that additional provisions are required does not entail a disruptive effect of itself. Often, it is possible to address gaps/shortcomings by modifying existing provisions or by adding new provisions which follow existing patterns by analogy.

For example, the EU recently adopted its Directive on Digital Content and Digital Services (2019/770/EU) which created a conformity requirement for digital content/services which mirrors that already in place for goods.[32] The UK took a similar approach in the Consumer Rights Act 2015.[33] The new provisions extend a familiar approach to a new(ish) development in a way which maintains a high degree of consistency in this area of law. Roger Brownsword characterises such an approach as "coherentism". He argues that a "coherentist" approach is instinctively preferred by lawyers and regulators, because it seeks continuity through ensuring that the legal regime for existing and new products remains coherent. An additional benefit of such an approach is that it also ensures, as much as possible, that legal certainty is maintained.

Such an approach may not always be appropriate. Indeed, as the legal changes introduced during the Covid-19 pandemic show, sometimes a targeted intervention will be necessary which does not necessarily preserve coherence in the way that extensions of existing legal regimes with analogous provisions would. Such targeted interventions can be more tailored to the particular problem which needs to be tackled – in the case of the Covid-19 pandemic, the problem was the changed economic context and the difficulties for borrowers and tenants to keep up their regular instalment payments. The targeted solution in many countries was the introduction of moratoria on payment obligations. This approach is what Brownsword would call "regulatory instrumentalism".[34] This concept refers to a regulatory approach with a

[32] Note that the conformity requirement for goods was updated in Directive 2019/771/EU, too. The conformity requirements in both directives are aligned: see Christian Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services' in Esther Arroyo Amayuelas and Sergio Cámara Lapuente (eds.), *El Derecho privado en el nuevo paradigma digital* (Marcial Pons, 2020).
[33] See part 1, chapter 3 of the Consumer Rights Act 2015.
[34] See also Edward L. Rubin, 'From Coherence to Effectiveness' in Rob van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds.) *Rethinking Legal Scholarship* (Cambridge University Press, 2017).

preference for achieving whatever (regulatory) objective is pursued, rather than one which seeks to maintain coherence with existing legal rules and principles.[35] In effect, this is a problem-specific and targeted approach which leaves existing legal regimes mostly unaffected, although it may mean that the way in which this is done will differ considerably from what a coherentist approach might have done.

Crucially, the fact that a targeted approach was chosen will often be indicative of the fact that a coherent development of the law would not have provided an adequate solution to the particular problem. This is where the first level of disruption is engaged: the problem-focused development of new legal and regulatory provisions can be disruptive because it does not seek to maintain coherence and consistency with existing legal regimes. However, these new targeted provisions are confined to the specific problem they seek to address without affecting the continued application of existing legal rules to circumstances falling outside the scope of the new rules.

This means that the disruptive effect of the crisis on existing legal regimes at level 1 is limited. If I draw an analogy with Christensen's theory, level 1 disruption can be compared to the creation of a new market for innovative technology which is the first stepping-stone towards the disruption of established markets. At this stage, the fact that a new market for an as-yet underserved customer-base has been created does not yet affect established markets and established businesses. In a similar way, new legal provisions addressing specific new problems or developments are initially confined to this context, and existing legal regimes continue to apply to everything else.

I now turn to explain the second level of disruption. Once this level is engaged, it is possible to speak of true legal disruption. The outcome of level 1 disruption is that there will be parallel legal regimes: the existing legal regime and the specific regime tackling particular problems in a targeted manner. Just as the existence of two separate markets does not constitute disruption in Christensen's theory, level 1 disruption is not yet true legal disruption. According to Christensen, disruption occurs once new technology captures the customer base of established markets and attracts this to the newly-created market, resulting in the reduction and eventual disappearance of the established market. In transplanting this to the legal context, I argue that legal disruption occurs when legal rules which were initially confined to a specific identified issue start to be applied beyond their original target. Eventually, this could have the effect of

[35] See e.g., Roger Brownsword, 'After Brexit: Regulatory-instrumentalism, Coherentism and the English Law of Contract' (2017) 34 *Journal of Contract Law* 139-164.

eroding the scope of existing legal regimes and result in extending specific rules far beyond their intended target. Such a broadening of the reach of new provisions could be achieved most obviously by clear legislative reform to that effect. However, it can also happen in more subtle ways. Targeted interventions may have employed concepts or principles which differ from those underpinning existing regimes. These concepts or principles may subsequently become the basis for developments in the existing law, or in the regulatory framework which can additionally govern many contracts. In the context of the common law, for instances, it is conceivable that the concepts and principles underpinning targeted legal rules are recognised in a way that can prompt a shift in the way existing legal rules are understood and developed. This development would occur at step 4 of the model outlined above, when law reform is considered because of the experiences gathered during the crisis itself. Where such reform results in provisions initially adopted in the context of a particular crisis becoming a permanent feature of the law, and therefore applicable in circumstances different from the crisis itself, the crisis will have caused legal disruption.

To sum up: legal disruption occurs primarily where changes made to the law, initially adopted to tackle the specific circumstances of a crisis and thus tailored to those circumstances, are subsequently retained and continue to apply after the crisis has faded, and in circumstances which are not connected to the crisis. Such legal disruption may occur to legal rules specifically, by changing the doctrinal elements of the law. However, it can also occur in other ways, e.g., by recognising and deploying new underpinning principles. For instance, Iain Ramsay has argued[36] that the introduction of moratoria and enforcement restriction in respect of consumer credit agreements, combined with existing rules (under the Consumer Credit Act 1974) on rescheduling instalment payments once a debtor has defaulted on their repayment obligations, could be indicative of an emerging principle of "social force majeure".[37] It has even been suggested that the crisis might prompt the emergence of a "societal force majeure" notion which recognises that severe changes in the economic context can affect both suppliers and customers at the same time and that any changes to the legal regime for consumer contracts need to reflect this.[38] Were such emerging principles to be recognised, they could shape the

[36] Iain Ramsay, 'Contract Law, social force majeure and adjusting consumer credit contracts' <https://creditdebtandinsolvency.wordpress.com/2020/04/18/contract-law-social-force-majeure-and-adjusting-consumer-credit-contracts/> accessed 11 June 2020.

[37] Thomas Wilhelmsson '"Social force majeure" — A new concept in Nordic consumer law' (1990) 13 Journal of Consumer Policy 1; Thomas Wilhelmsson, *Critical Studies in Private Law* (Kluwer, 1992) 180-216.

[38] Covid-19 Consumer Law Research Group, 'Consumer law and policy relating to change of circumstances due to the COVID-19 pandemic' (2020) 43 Journal of Consumer Policy 000 (forthcoming).

future development of legal regimes in a particular way that would not have occurred otherwise.

Legal Disruption: why it matters

In the preceding two sections, I have endeavoured to identify the potential for a crisis such as that caused by the Covid-19 pandemic to cause legal disruption, based on a narrow conception of the notion of disruption. My essential point is that a crisis, such as that caused by the Covid-19 pandemic, has the potential to cause legal disruption, but that this is not the inevitable outcome. As long as any changes made to a legal regime are limited to the period of crisis, and its immediate aftermath, it would not be appropriate to speak of legal disruption. At best, this is an *interruption* to an established legal regime without a lasting effect.

Understanding when legal disruption occurs matters for a number of reasons: first, it can provide some reassurance about the appropriateness of short-term, targeted changes in the law to alleviate the impact of a major crisis despite concerns about undermining legal certainty and contractual risk-allocation. A time-limited change would not cause legal disruption.

Secondly, it helps to identify the point at which long-term effects with a disruptive potential could arise. As explained, this would be the case where lasting reform to a legal regime is undertaken which makes some or all of the temporary changes in that legal regime a permanent feature and therefore not limited to the period of crisis. It will also be the case where the temporary changes during the crisis are indicative of underpinning principles or assumptions which differ from those which have shaped the legal environment before the crisis arose, and such crisis-inspired principles or assumptions continue to influence the development of the law well beyond the crisis and its aftermath.

Thirdly, it does not regard legal disruption as inherently negative – quite the opposite. My conception of legal disruption is essentially value-neutral, in that it does not ascribe a positive nor a negative view of the occurrence of legal disruption. Rather, it seeks to provide the criteria needed to recognise legal disruption where it occurs. It may be negative if not managed well, but can equally be positive in driving through significant reforms which might be seen as a welcome development.

Fourthly, being able to distinguish legal disruption from incremental legal reform can increase awareness among contracting parties of the significant changes which have occurred, and thus support legal certainty and provide an opportunity for contracting parties to adjust their contract

terms in light of the new legal regime. Finally, legal disruption occurs not simply because additions are made to the legal environment which depart significantly from its existing make-up; as long as these additions are confined to the specific context of a crisis, the general legal environment remains unaffected. Legal disruption happens once the targeted changes made to deal with the crisis become a lasting element of the legal environment and thereby displace the pre-crisis elements.

Conclusion

The question I have attempted to address in this paper is whether the Covid-19 pandemic and its consequences should be characterised as having caused disruption to the law. I have argued that when it comes to determining the impact of the crisis on the legal regime for contracts, there is no fundamental difference between a crisis such as the Covid-19 pandemic and any other significant development which requires some kind of adjustment to the legal regime. Indeed, the steps of analysis are broadly the same: test the adequacy of the existing legal environment, consider which changes are required, and, ultimately, decide whether these are temporary or lasting. Legal disruption occurs where changes initially made to address the specific concerns which have arisen in the context of a crisis become lasting changes to the legal environment, and subsequently apply to circumstances not linked to the crisis. Where such changes displace elements of the pre-existing legal environment, legal disruption has occurred.

Does this mean that the Covid-19 pandemic has caused legal disruption? As I am writing this still during a period of "eased lockdown" in the UK (June 2020), my answer to this question has to be "not yet". Do I think that, based on what I have said in this paper, the crisis has the potential for legal disruption? Yes, I do, although I do not regard this as an inevitable outcome. However, were it to be the outcome, even if only in some respects, then I would not necessarily regard this as a bad thing – some legal disruption can ultimately be a positive development of any given legal regime.

I hope this paper has clarified why the Covid-19 crisis will not invariably lead to legal disruption. At the same time, an analysis of how existing legal regimes for contracts operate in a crisis and the temporary changes that were made should be seen as an indicator that lasting reforms of that legal regime might be necessary even after the crisis has subsided. Whilst such reform may or may not result in legal disruption as I have characterised it, the fact that there

could be legal disruption as a long-term outcome of the Covid-19 crisis should not be cause for resisting such reforms.