COVID-19 BRIEFING NOTE

Commercial Disputes following the Coronavirus Pandemic

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This note examines certain trends, issues and flashpoints in commercial dispute resolution that now appear likely to result from the 2020 COVID-19 pandemic, government lockdowns and their economic impact.

INTRODUCTION

1. The COVID-19 pandemic and lockdowns enforced by governments around the world have led to radical changes in the way commercial disputes lawyers, courts and arbitrators have been practising. Much of the period since March 2020 has been characterised by a realignment towards remote practice in courts and tribunals and the internal reorganisation of legal practices and ways of working.

2. Several months on, it is time to take stock. As the impact of the pandemic becomes clearer, it is possible to discern some key trends over the medium term, and the issues that will form the focus of advice and contested proceedings. As Lord Neuberger has emphasised: "*the legal world has a duty to the rest of the world to prepare itself*"[1].

[1] Speaking on the BBC's *"Today"* programme on 27 April 2020

3. The immediate effect upon dispute resolution was stark: it has been reported that the number of claims issued in the Commercial Court and Chancery Division fell by half in the four weeks to 5 April 2020, compared with 2019.[2]

4. But this freeze has been widely attributed to decisions taken to delay the issue of non-essential claims as courts adjust, and to the instinct to pause while the immediate ramifications become clearer. As the economy begins to reopen, a flurry of newly issued claims may be expected,[3] which may cause greater delays. However, it is sensible to be cautious about predictions as to the scale and timing of any increase in counter-cyclical litigation.

5. Our choice of topics is based upon the changing needs our clients are facing. These have included both the acute need for advice and representation in disputes since the initial lockdown, and widely shared views as to the future.

6. We examine the following:

   a. Immediate impact: frustration, *force majeure*, material adverse change

   b. Supply chain disputes

   c. Business interruption: the ongoing controversy

   d. Business relationships: joint venture, partnership and agency disputes

   e. Corporate insolvency

   f. The growing importance of litigation funding

FRUSTRATION, *FORCE MAJEURE* AND MATERIAL ADVERSE CHANGE

7. In many commercial sectors (such as retail, hospitality, events, travel, communications and marketing), the effect of the pandemic was instant and obvious. Many businesses were forced to close premises almost overnight; stock was unneeded and unsold, orders went unfulfilled. The immediate question for those at the sharp end was: who will bear the costs?

[2] https://www.ft.com/content/4e1218a8-1a8c-4b52-b20c-afad17df9f11 (paywall)
[3] The 2008 recession is thought to have led to an initial reduction in claims, but an upward trend by 2010. https://iclg.com/cdr/litigation/swell-of-recession-based-cases-builds-in-londona

8. That question prompted a raft of early commentary examining the related concepts of frustration, *force majeure*, and material adverse change (**MAC**) clauses, all of which arise where a party's ability to comply with its contractual obligations is impacted by an unforeseen event beyond its control.

9. Early consideration of those topics focused on parties' abilities to extract themselves from agreements they could no longer honour. But as the impact ripples out, becoming further removed from its epicentre,[4] the issues arising are set to become more complex.

10. Urgency is a factor of legal (as well as commercial and fiscal) relevance in all these areas. It is important to identify the material event and its legal effect quickly; those seeking to invoke a *force majeure* clause will often need to comply with strict notice provisions, whilst those asserting that performance of a contract is frustrated may, even if successful, not be relieved from liability for any payments made or benefits accrued after the frustrating event. Therefore, in the early days of the pandemic, parties were forced to make decisions at breakneck speed about their ability to rely on these principles.

11. But the principles themselves are viewed restrictively by the Courts.[5] The burden on those seeking to show that they apply is a heavy one. For one party to escape their contractual responsibilities will almost inevitably result in the other being saddled with additional risk and cost as a result. So, as the dust settles and board members take stock, we expect the early decisions taken to invoke these principles to come under closer scrutiny by counterparties. The price for those who have made the wrong call may be very high indeed.

Contractual Wording

12. As with most contractual disputes, the proper starting point is the precise wording of the agreement in question. If the pandemic is deemed a *force majeure* or MAC event under the contract, then that will usually (but not always)[6] oust frustration as an alternative avenue.[7]

[4] For example, where it is felt further up supply chains, as we discuss further below
[5] See, e.g. in relation to frustration *J Lauritzen AS v Wijsmuller BV ("The Super Servant Two")* [1990] 1 Lloyd's Rep 1 at p8
[6] If the *force majeure* clause only provides for obligations to be suspended, but the event fundamentally changes the nature of the contract, then it may still be frustrated: see *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119.
[7] This is important from a loss perspective, since in a *force majeure* situation the parties do not have the benefit of the Law Reform (Frustrated Contracts) Act 1943, so any money paid or benefits accrued before the event will not be recoverable unless the contractual agreement provides otherwise.

13. Specific wording which might cover the present situation is that of "outbreak", "epidemic", "disease", "quarantine", "pandemic", "government action" or "national emergency". But this terminology is generally uncommon;[8] more often than not, parties will instead have to fall back on broader "catch all" provisions (sometimes drafted as simply as "acts of God"). These may capture the present circumstances, but are naturally more open to challenge.[9]

14. Whatever the particular clause relied upon, it will be analysed according to orthodox principles of contractual interpretation. Thus, identifying whether the pandemic is capable of triggering a *force majeure* or MAC clause will necessarily be fact-specific, and will depend on an understanding of how the current situation has affected the particular bargain between the parties. Familiarity with the specific business and sector concerned will repay dividends in that exercise:[10] but, in short, there is no one-size-fits-all answer.

Type and Nature of Disruption

15. Regardless of whether the consequences of the pandemic were provided for in the contract, or whether it instead constitutes a frustrating event, much will depend on the extent to which it has disrupted the parties' contractual bargain. We anticipate litigation which particularly touches on the following:

16. **Impossibility and delay**. Arguments about the prevention or impairment of contractual performance offer much fertile ground for litigation: particularly where, for example, the impediment was temporary[11] or performance has merely been delayed.[12] The focus of many of these types of disputes is likely to be on the difference between (on the one hand) a genuine impossibility or impairment, and (on the other) a contract which has merely become more expensive or onerous to perform.[13] The circumstances in which commercial

[8] Although it might be more prevalent in specific industries or sectors; for example, businesses that operate in China and Hong Kong, or other regions severely affected by the SARS 2003 outbreak, are perhaps more likely to use it.
[9] And MAC clauses will often identify only the type of change required (e.g. a change in "financial condition") rather than a specific cause or event.
[10] Most particularly in relation to MAC clauses, which tend to be highly sector-specific.
[11] For example, where relying on a MAC clause, a temporary impairment may not be sufficient to significantly impact upon the ability to perform: *Grupo Hotelero Urvasco SA v Carey Value Added SL & anor* [2013] EWHC 1039 (Comm).
[12] Whether a delay is a frustrating event is a difficult question and will ultimately be a matter of fact and degree (see e.g. *Metropolitan Water Board* cited at fn 8 above)
[13] So, a delay causing inconvenience and hardship was not a frustrating event in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; nor was a business losing the use of warehouse premises for 18 months in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675

counterparties may properly be said to have shared a common interest which has been frustrated is also a difficult area which is likely to be revisited by the Courts in coming years.[14]

17. **Illegality**. If contractual performance depends on, for example, a business opening its premises, but to do so is an offence,[15] disputes may well arise concerning the effect of that illegality on commercial bargains. Where contractual obligations are to be performed abroad, the impact of foreign legislation will also likely be an important flashpoint: since contractual performance which becomes illegal under the law governing the place of performance will not be enforced in England.[16]

18. **Causation and corporate identity.** There will always be a need to examine in detail the specific events said to have causal significance, to identify whether they fall within the scope of any express contractual terms, or (alternatively) are frustrating events. Particular care is required where there are multiple potential causes.[17] The proper identity of corporate parties will also be important in this context: since, if causation can be traced to an act attributable the Claimant,[18] that is likely to be sufficient to defeat the majority of these types of claims.[19]

Practical Steps to Take

19. Businesses finding it difficult to comply with their contractual obligations would be wise to engage in a prompt dialogue with their counterparties. The terms of the agreement may provide for a right to delay or vary performance. Alternatively, a re-negotiation of terms may be possible, if the parties enjoy a good business relationship, or if both have struggled to meet their contractual obligations.

[14] Following *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 921 (Ch), in which it was said that two commercial counterparties to a lease had never shared a common purpose (c.f. the leading "coronation" cases of *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493).
[15] Pursuant to Reg 3 and Sched 2 Health Protection (Coronavirus Business Closure) (England) Regulations 2020
[16] *Ralli Brothers v Campania Naviera Sota y Aznar* [1920] 2 KB 287
[17] See *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm), in which an attempt to rely upon a *force majeure* clause failed where there were multiple effective causes of the breach, even though one of those was accepted to be a *force majeure* event [75]. Famously, the Claimants' own internal allocation of resources is not likely to be a frustrating event (*J Lauritzen AS v Wijsmuller BV ("The Super Servant Two")* [1990] 1 Lloyd's Rep 1)
[18] As to which, see *Jetivia v Bilta* [2015] UKSC 23
[19] And this is precisely what occurred in *Canary Wharf v EMA* (cited at fn 13 above), in which the frustrating event was said to be the passing of particular legislation by the EU, but the Claimant (EMA) was itself an emanation of the EU, and accordingly any frustration would have been self-induced.

20. If a dispute does arise, it may well require disclosure and discussion of confidential information. Options which seek to mitigate any commercial damage this may cause (such as mediation, arbitration, and confidentiality club arrangements) should be considered.

21. Finally, parties entering into new commercial bargains following the outbreak of the pandemic would be well advised to consider these types of risk, and ensure that they are expressly provided for in any agreement reached. Since the rules described above have as their touchstone events which are unforeseen, they are unlikely to offer protection from obligations agreed after the risks associated with the present pandemic became known.

SUPPLY CHAIN DISPUTES

22. As we have noted above, COVID-19 has imposed severe strain on many supply chains. The immediate risks prompted the Government early on to issue a specialist guidance to public bodies to encourage them to ensure that their suppliers were paid as normal throughout.[20]

23. The disruption continues as the economic effects of the pandemic translate into the wider economy, and undertakings revisit the security of their supply arrangements. The present situation has illustrated in stark terms the underlying commercial and insolvency risks.

24. As with many industry professionals, we anticipate a significant increase in litigation relating to chains of supply in respect of suppliers who were unable to honour the terms of their agreements (either by virtue of delays or wholesale failures to deliver) and the contagion in certain sectors that this caused.

25. To meet these challenges, clients will need to be able to assess their options and act quickly to contain any damage and minimise risks. In practical terms, entities reliant upon particular chains of supply will need to consider the following, at a minimum:

a. Auditing and understanding risks and pressures on suppliers and encouraging early engagement if there are concerns as to, for example, the capacity of sub-suppliers to meet contractual requirements.

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf

b. Initiating monitoring procedures where necessary to give management a head start in reacting to any identified shocks.

c. Taking early advice on the meaning of the terms of supply contracts, in particular as to *force majeure* and MAC clauses, as above.

d. Considering contract variation in mutually advantageous ways and reasonable requests to suspend, amend or terminate contracts. Consider industry body guidance aimed at minimising the risk of disputes and other practical solutions that may obviate the need for legal recourse.

e. Be mindful that the current conditions may be manipulated for a supplier's own benefit, including demands for contractual variations which may be opportunistic and not be genuinely linked to prevailing market conditions.

BUSINESS INTERRUPTION: THE ONGOING CONTROVERSY

26. Many businesses which have suffered significant loss of income and/or increased costs as a result of the COVID-19 pandemic will look to their insurance policies for financial relief.

27. Whether such policies will respond to those losses has been the subject of much debate already. This summary is intended to set out the position as it currently stands and offer some initial insights on the issues in dispute.

Extent of Cover

28. Since business interruption insurance covers losses that are purely consequential in nature, the scope of such cover is (perhaps unsurprisingly) tightly circumscribed. As with all types of insurance, whether a policy is responsive will depend on its precise wording, both as to the scope of indemnity and any exclusions. Most such policies, however, only respond in respect of losses of income and/or increased costs caused either by (i) physical damage to insured property, or by (ii) the occurrence of one of a defined list of events set out in the policy.

29. In relation to the first of these, it is certainly possible that contamination of premises with SARS-CoV-2[21] would constitute such damage.[22] But in the present circumstances, this may

[21] The virus which causes COVID-19.
[22] It has been established that contamination of property may amount to physical damage in cases involving, for example, hydrochloric acid (*Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395, 398-399) and contamination by radioactive material (*Blue Circle Industries plc v. Ministry of Defence* [1999] Ch 289).

only be arguable where a known outbreak occurred at the insured's premises; and the period of indemnity is in any event likely to last only as long as any decontamination exercise.

30. Insureds are therefore perhaps more likely to explore the second of these avenues. Many business interruption policies will contain clauses extending cover in specified circumstances. Examples include those which apply: (i) where access to the insured premises is restricted ("denial of access clauses"), (ii) in cases of public emergencies ("public emergency clauses"), and (iii) where there has been an outbreak of infectious disease ("infectious disease clauses").

31. Many denial of access clauses and public emergency clauses will require closure at the order of a public authority. Closures required under the Health Protection (Coronavirus, Business Closure) (England) Regulations SI 2020/327 and/or the Health Protection (Coronavirus, Restrictions) England Regulations SI 2020/350 are likely to be sufficient (depending upon the policy wording); in other cases, the position will be less straightforward.

32. Infectious disease clauses commonly define the diseases in respect of which cover extends. It would be surprising to find COVID-19 expressly listed in any such definition.[23] SARS, on the other hand, is often included,[24] and such a definition may provide cover in respect of losses caused by COVID-19. However, given that the WHO has said that "*[t]he clinical symptoms and signs of disease caused by SARS-CoV are non-specific*",[25] ultimately the question of whether the present pandemic would be covered by a definition that includes SARS is likely to depend on expert evidence.

Combination of Causes

33. Many policies contain wording requiring any loss of income to be measured by the difference between the income received during the indemnity period, and the income which would have been received had the triggering event not occurred. In these cases, insurers may seek to argue that the restrictions on individual liberty imposed during "lockdown"[26] and/or general societal changes would have reduced or extinguished the income that would otherwise have

[23] Since it was only as recently as 11 February 2020 that the World Health Organisation ("WHO") named the pandemic virus "*severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)*" and the disease it causes "*coronavirus disease (Covid-19)*". See https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it
[24] Following the 2003 outbreak of the SARS-CoV virus.
[25] *WHO guidelines for the global surveillance of severe acute respiratory syndrome (SARS)*, para. 2.2.
[26] Under Regulations 6 and 9 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

been received during the indemnity period. Even if the policy contains no such wording, insurers may seek to rely on general principles of causation in any coverage dispute.

34. These arguments raise complicated questions of law concerning concurrent causes of loss, at least some of which have been the subject of judicial consideration in *Orient Express Hotels v Generali*.[27] But that decision related only to the wording of the particular policy in question, and only to the physical damage to property clause in that policy[28]. Further, it was an appeal against an arbitral award under s. 69 Arbitration Act 1996 based on a ground which had not been not raised before the arbitrators;[29] the threshold was, accordingly, a very high one. Thus, for now, the application of these arguments more widely remains uncertain.

FCA test case

35. On 9 June 2020, the Financial Conduct Authority ("**FCA**") commenced proceedings seeking a declaration to resolve contractual uncertainty in business interruption insurance cover. The test case now proceeds under the Financial Markets Test Case Scheme in Practice Direction 51M CPR and (presently) eight insurers have joined the action[30]. The trial is taking place over 8 days (commenced 20 July 2020). Butcher J and Flaux LJ will construe around 20 common policy wordings on the basis of assumed facts. Their decision will also have wider application;[31] since the order sought includes declarations concerning (i) the causation issues raised in *Orient Express Hotels* and (ii) the applicable test for causation where a range of commonly found expressions are used.[32]

What next?

36. Any insurer or insured with an interest in the outcome of a claim under a business interruption insurance policy ought to follow developments in the FCA test case. The

[27] *Orient Express Hotels v Generali* [2010] EWHC 1186, in which an insurer declined cover under a physical damage to property clause for loss of income resulting from damage to a hotel in New Orleans due to hurricanes Katrina and Rita, on the basis that the insured had suffered no loss of income, since the same loss of income would have been suffered in any event due to the damage to the surrounding area.
[28] Despite the insurer's arguments, the insured was able to recover under a public emergency clause (see [14] and [16]).
[29] *Orient Express Hotels* (cited above), per Hamblen J at [37].
[30] Arch, Argenta, Ecclesiastical, Hiscox, MS Amlin, QBE, Royal & Sun Alliance, and Zurich.
[31] Thus far, the FCA has been told of approximately 8,500 claims under policy wording likely to be affected by the test case. The value of those claims has been calculated at approximately £1.2bn.
[32] These include: "*resulting from*", "*which results in*", "*as a result of*", "*caused by*", "*following*", "*arising from*", "*due to*", "*as a consequence of*", "*in consequence of*" or "*in consequence*", "*because of*", "*directly resulting from*" and "*resulting solely and directly from*".

controversy is unlikely however to end there, given the large sums at stake for the industry.[33] Insureds are organised and working together with significant numbers of action groups having already formed, and further litigation seems inevitable. Brokers are unlikely to be immune from associated claims either: if findings are made favourable to insurers, brokers may well face claims from disgruntled insureds.

BUSINESS RELATIONSHIPS

37. All of this makes plain that business relationships of many kinds will find themselves under additional strain. Those that suffer will not be limited to those who simply trade or engage at arms' length; the last economic downturn saw a noticeable increase in inward-facing disputes concerning the collapse of partnerships, joint ventures, and agency relationships, as projects failed and risks taken in more prosperous years came home to roost.

38. Like many others, we are seeing a similar uptick in these types of cases – whether resulting from the termination of arrangements, from defaults, or from parties seeking to exercise or enforce existing contractual rights.

39. Of particular interest is the way in which disputes involving longer term contractual arrangements are framed. In those characterised as 'relational contracts', parties may be subject to implied terms of good faith and fair dealing when exercising certain contractual rights (including, potentially, the giving of notice of termination of those arrangements). A review of the accepted characteristics or indicia of such contracts[34] (which include a long-term relationship, a commitment to collaborate, and a contract which requires a high degree of communication, co-operation and performance based on mutual trust and confidence, as well as a degree of significant investment) suggests that many partnership, JV and agency arrangements may be subject to a requirement of good faith and fair dealing.

40. Further, although these principles have been a recognised feature of English law since at least *Yam Seng*[35], they were recently reconsidered in detail and clarified in the *Post Office Group*

[33] And, given that progression to the Supreme Court seems a distinct possibility, a final answer may still be some time away
[34] See *Post Office (No 3)* at [725]
[35] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

Litigation[36]. As a result, we foresee that good faith and fair dealing are likely to feature prominently in future disputes concerning these types of business relationships.

CORPORATE INSOLVENCY

41. The extreme pressure on businesses caused by the pandemic has caused many firms to cease trading altogether.[37] Employer contributions under the HMRC Coronavirus Job Retention Scheme are due to commence shortly (August 2020) and the scheme will cease in October.[38]

42. Both these pressures, coupled with growing uncertainly, may push many companies into insolvency. The full economic effects have yet to come to pass, but the risk of severe economic consequences has warranted the fast tracking of a moratorium on creditor enforcement action. The Corporate Insolvency and Governance Bill, which is expected to pass into law at or around the date of this briefing, will introduce an extendable 20-day moratorium on creditor actions to give viable businesses an opportunity to restructure.

43. The intention is to allow the company to trade for a short period with an insolvency practitioner in a monitoring role to overseeing its affairs in order to hold off creditor action. The moratorium will be subject to the view of the monitor IP as to the continued viability of the company. It is thought this will introduce some breathing space for companies to readjust to the easing of lockdown and the withdrawal of the various schemes of HMG support.

44. Nevertheless, present conditions will inevitably result in an increase in corporate insolvency events and insolvency related litigation. We expect:-

a. An increase in applications concerning statutory demands, the presentation of petitions and other insolvency arrangements.

b. Associated insolvency claims including misfeasance claims, claims relating to statutory offences under the Insolvency Act 1986 including wrongful trading and fraudulent trading.

c. Disqualification of directors (in both the civil and criminal contexts).

[36] See *Bates & Ors v Post Office Ltd (Common Issues no 3)* [2019] EWHC 606 (QB) at [702]-[769].
[37] Under the provisions of the Coronavirus Act 2020 and the Health Protection (Coronavirus) Regulations 2020
[38] https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme

45. Clients would be well advised to consider the prospect of recoveries being made before initiating actions against businesses at this time.

THE GROWING IMPORTANCE OF LITIGATION FUNDING

46. In view of widespread agreement as to the economic consequences of the pandemic, businesses across a range of sectors are likely to feel not only the impact of reduced demand but also the consequent strain on liquidity.

47. It is not difficult to anticipate that legal budgets will come under pressure, as reduced cash flow increases the need for internal justification and a focus on the likelihood of recovery. Conversely, many businesses will be under increased pressure to realise assets, by seeking to enforce strict contractual obligations or historic debts. Monetising claims in order to generate capital can be a long process, requiring commitment of significant funds.

48. The now-familiar litigation funding model[39] is likely to be increasingly attractive to those businesses lacking liquidity to pursue litigation or arbitration, but who feel most keenly the fiscal need to do so. In particular, because funding is traditionally provided on a non-recourse basis, and combined with ATE insurance, it offers a useful tool with which to mitigate litigation risks. The price of certainty – a proportion of the recovery made – is more likely to be tolerable to companies seeking to limit these exposures.

49. Thus, funding – already in the ascendency in larger commercial disputes over the last decade – is thought likely to see greater demand in the near future. It is however possible that the economic downturn may well squeeze investment into the funding market, leaving funders themselves with less to invest. Thus, whilst there is likely to be an increased appetite for funding, it is possible this may be met by more selective investment criteria.[40]

Funding costs

50. The position as to the recoverability of the costs of litigation funding itself shifted significantly in recent years with respect to arbitration, following the widely-reported decision in *Essar*

[39] By which the legal costs of claimants in litigation or arbitration are financed, in exchange for (i) a fixed percentage share of the damages recovered, (ii) a multiple of the funding provided, or (iii) a combination of the two

[40] https://litigationfinancejournal.com/key-takeaways-from-the-lfj-webinar-on-covid-19s-impact-on-the-litigation-funding-industry/

Oilfield Services Ltd.[41] In that case, an arbitrator's power to award *"other costs"* under s. 59(1)(c) Arbitration Act 1996 was held to include a power to award the costs of funding, in part on the basis that funding was the only realistic option for the funded party.

51. Though the facts of the case were stark, following the pandemic, many parties under economic strain caused by actionable defaults will have legitimate grounds on which to argue that funding was the only realistic course available to them. Moreover, such pressures may (in a suitable case) prompt parties to reopen the debate as to whether funding costs are to be regarded as '*costs of and incidental to… proceedings*' for the purposes of section 51(1) Senior Courts Act 1981 or otherwise may be awarded.[42]

52. Accordingly, the near future may see further pressure either for regulatory reform, or for the scope of existing powers to be tested in this respect.

CONCLUSIONS

53. The foregoing provides an overview of what we consider to be emerging trends and issues likely to be the focus of commercial disputes following the pandemic.

54. We routinely advise and represent clients in disputes connected with each of these matters. Members of Henderson Chambers' commercial disputes team will continue to respond to the needs of businesses across the spectrum of market sectors and to engage with solicitors, funders, and other commercial actors on all of the issues discussed in this note.

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20 July 2020

[41] *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)
[42] That section is subject to any other enactment and to rules of Court, which presently define 'costs' in a way that is not exhaustive (r 44.1(1) CPR), though amendments made to the Courts and Legal Services Act 1990 (s. 58B(8)) for sums due under certain funding agreements to be awarded as costs have not been brought into force.