Comparing the laws of England, Wales and Italy Relating to the Unilateral Modification for the Terms of Operational Contract during the COVID-19 Pandemic

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Accepted: 27 May 2021 / Published online: 5 June 2021
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Abstract

The study compares the mechanisms through which employers in England, Wales and Italy may be legally entitled to unilaterally vary the terms of their employment contracts due to the coronavirus pandemic and developing a taxonomy, through which a meaningful side-by-side comparison of these very different jurisdictions can be constructed. To attain the core purpose of this research, the study relied on the comparative legal research method. Despite the fundamental differences between the employment law regimes of the three countries; the mechanisms through which employers from these jurisdictions can vary the terms of their employment relationships in response to COVID-19 fall into one of these categories, force majeure mechanisms; flexibility mechanisms; hardship mechanisms or mechanisms facilitating bilateral variations tantamount to unilateral variations. The study concluded that there are fundamental differences between the employment law regimes that operate respectively in England and Wales and in Italy. England and Wales is a common law jurisdiction, whereas Italy is a civil law jurisdiction; Italy's labour market is significantly more tightly regulated than England's; in England and Wales, the employment contract regulates the employment relationship, whereas in Italy the individual employment.

Keywords Employment law · COVID-19 · Flexibility clause · Unilateral variation · Hardship clause

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Background

Due to the implications of the COVID-19, the current paper is primarily seeking to understand the circumstances under which an employer can *unilaterally* vary the terms of an employment contract in England, Wales as well as Italy. Thus, for a well understanding for the core aim of this research, the study tries to elaborate the implemented laws in England, Wales and Italy. For instance, relating to England and Wales the cornerstone of the common law of employment contract is the principle that parties of an employment contract are free to design their own agreements. For example, the contracting parties determine the type of work that will be undertaken by the employee, the respective obligations of the parties, the duration of the relationship, the employee's remuneration and the allocation of risks (Collins et al. 2012, 94). Where, the final agreement is documented by the express terms of the employment contract and, *generally*, it is these terms that are enforced if a dispute arises between the parties (Chandler 2003, 169). The courts remain reluctant to speculate about what might have been agreed between the parties should expresses the terms, which fail to adequately addressing the subject matter of a dispute (*Ali v Christian Salvesen Food Services Ltd* [1997] ICR 25; Emir 2020, 89). Additionally, judges generally prefer not to impose terms that do not exist because it would supposedly be reasonable to do so or it would improve the contract (*Liverpool City Council v Irwin* [1976] UKHL 1; Vettori 2016, 184).

However, there are certain circumstances wherein terms that do not *expressly* appear within the contract of employment may nevertheless be considered by the court to be *implied*. The principle of implication is typically applied in situations including business efficacy, customary practice, statute's requirement, common intention (Employment Rights Act 1996, the *Workplace (Health, Safety and Welfare) Regulations* 1992; *Bond and another v CAV Ltd* [1983] IRLR 360).

When there is a conflict between an express term and an implied term, then the express term will generally prevail (Cabrelli 2014, 162), save for certain terms implied by statute that the parties to an employment contract are not always free to exclude (e.g. the duty of an employer to take reasonable care to ensure the health and safety of his employees within the *Workplace (Health, Safety and Welfare) Regulations* 1992; *Johnstone v Bloomsbury Health Authority* [1992] QB 333; Chandler 2003, 169). Furthermore, under the employment law of England and Wales, an employer will only be entitled to unilaterally modify the terms of an existing and operational contract of employment related to the ensuing coronavirus disease 2019 (COVID-19) pandemic and/or its aftermath under circumstances like the employment contract in question contains an *express* clause permitting that modification, the employment contract in question is deemed by the courts to contain an *implied* clause permitting that modification, by virtue of one of the grounds described above, and some other legal rule or doctrine applies to permit that modification, in the absence of (or notwithstanding the existence of) any relevant express or implied terms. However, if none of these circumstances applies, then the only available option for the employer to vary the terms of an

employment contract could be through voluntary renegotiation with employees. However, such variations can only being enforceable once a new contract or codicil to an existing contract has been agreed upon and executed by all parties (Fudakowski, 2020). Moreover, since the present paper is also concerned with the circumstances under which an employer can *unilaterally* vary the terms of an employment contract in response to the COVID-19 pandemic in Italy; the study elaborated the implemented law of employment contract in Italy as well. In this regard, Italy is well known to have one of the most rigidly regulated labour markets in the world, especially in terms of the limits of atypical (bespoke) contractual agreements (Lodovici 2000, 271). In fact, there is no legal requirement in Italy for an individual contract of employment to be executed between an employer and employee (Maggi and Tozzolo 2006, 97). (This is subject to certain EU Regulations and Directives requiring, for example, all European employers to provide a minimum level of information to their employees within 30 days of commencement of the relationship (*Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship*)). Even when such an individual contract is executed, this contract does not regulate the employment relationship in the same way it does in England and Wales. Rather, the regulation of employment relations takes place at a number of external levels via the Italian Constitution (e.g. Article 36 on fair remuneration; Article 39 on the right to form a trade union and Article 40 on the right to strike), the Italian Civil Code (e.g. *Law No. 300/70—the Workers' Statute*) and collective contracts (Lena and Mattei 2002, 390; Berutto 2020). Consequently, the rights of employers to unilaterally vary the terms of their employment contracts, if any, are more likely to derive from statute rather than from the terms of the contracts themselves. Nevertheless, Italian law does have a number of mechanisms similar to those analysed in "[Express clauses](#)", *supra*, and these will be analysed in "[Force majeure mechanisms](#)", "[Flexibility clauses](#)", "[Hardship clauses](#)" sections, *infra*.

Moreover, the above discussion regarding employments contracts in England, Wales and Italy showed that although the contract agreements in England and Wales are designed by both the employers and employees; the courts still reluctant to speculate about what was agreed between these two parties, while in Italy the regulation of employment relations between the parties takes place at a number of external levels via the Italian Constitution. Additionally, under the employment law of England and Wales, an employer will only be entitled to unilaterally modify the terms of an existing and operational contract of employment related to the ensuing corona virus disease 2019 (COVID-19) pandemic; while in Italy the employment contracts are subject to certain EU Regulations and Directives requiring, where all European employers to provide a minimum level of information to their employees within 30 days of commencement of the relationship. Thus, since the review of the current literature revealed that there is a gap relating to the comparison of the implemented laws of England and Wales as well as Italy relating to the unilateral adjustment for the terms of operational contracts, the current study seeks to find-out the core difference among the laws of unilateral modification for the terms of operational contract that is adopted in England, Wales and Italy during the COVID-19 pandemic.

COVID-19 Pandemic and Employment's Law in England and Wales Law

Express Clauses

Given the *unprecedented* nature of the COVID-19 pandemic, it is unlikely that many existing employment contracts were drafted with this specific eventuality in mind (Taylor Vinters 2020). Therefore, this section is primarily concerned with those express clauses that may be construed as giving an employer the right to unilaterally vary a contract of employment either due to *circumstances* described within the contract that are similar in nature to the COVID-19 pandemic or due to *effects* that may be caused by a number of different circumstances, one of which happens to be the present pandemic.

One example of a circumstance-related clause is the 'force majeure' clause, which may alter the parties' liabilities when an extraordinary event, which is beyond the parties' control, prevents them from fulfilling their respective contractual obligations (McKendrick 2015, 256). Another is the more general clause is the 'flexibility clause', which permits a unilateral variation of contractual terms on specific pre-defined matters, such as the relocation of an employee to a different department (*BPCC Purnell Ltd v Webb* [1992] EAT/129/90; Upex, Benny, and Hardy 2009, 148) or a different geographical location (*High Table Ltd v Horst* [1997] EWCA Civ 2000; Bell 2006, 32). An example of an effects-related clause is the 'hardship clause', which provides that in the event of the occurrence of a pre-defined type of hardship (usually economic hardship), parties will follow a pre-defined procedure to renegotiate the terms of their contract in good faith (McKendrick 2015, 256).

Force Majeure Mechanisms

While parties to a contractual agreement are free to negotiate the precise wording of their force majeure clause (*Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] 2 Lloyd's Rep 668 at 675), in practice, it is more common for parties to select a 'boilerplate' provision—i.e. a standard form clause with general application (Cordero-Moss 2011, 204). Such clauses invariably provide a lengthy list of the kinds of event that the parties concede would give rise to a force majeure, along with one or more 'catch-all' phrases to capture events that were not foreseen but are nevertheless beyond the parties' control.

For example, the force majeure clause that formed the subject matter of the dispute in *Channel Island Ferries Ltd v Sealink UK Ltd* stated that 'The parties shall not be liable in the event of non-fulfilment of any obligation arising under this contract by reason of an Act of God, disease, strikes, lock-outs, fire and any accident or incident of any nature beyond the control of the relevant party' (*Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep. 323). This clause states four specific events that could give rise to a force majeure (namely, 'disease', 'strikes', 'lock-outs' and 'fire') and two different 'catch-all' phrases (namely, an 'Act of God') and '[...] any accident or incident of any nature beyond the control of the relevant party'. The

general view is that the scope of the ‘catch-all’ provisions are not limited in interpretation or meaning by the list of specific events that precede or follow them (*Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240). However, this was questioned by the ruling in the *Tandrin Aviation Holdings* case, in which the court refused to interpret the ‘catch-all’ phrase in the force majeure clause to include economic factors because none of the specific events preceding that ‘catch-all’ phrase concerned economic matters. While the force majeure clause from the *Channel Island Ferries* case specifically listed ‘disease’ as a force majeure event—which almost certainly renders moot the question of whether the COVID-19 pandemic would fall within the ambit of the two ‘catch-all’ phrases included in that particular clause—not all boilerplate force majeure clauses refer specifically to disease as a force majeure event. For example, the boilerplate provision proposed by Cordero-Moss, which is recommended for use in common law jurisdictions, although far lengthier than that employed in the *Channel Island Ferries* case, does not make reference to disease as a potential force majeure event (Cordero-Moss 2011, 204). Therefore, it is very common for boilerplate force majeure clauses to include both a reference to an ‘Act of God’ and also to ‘circumstances beyond the control of the parties’ (although there is very little standardisation on the wording of the latter ‘catch-all’ phrase). Whether or not a pandemic would be deemed a force majeure event, an Act of God or an uncontrollable external event within a contract that does not specifically include disease as a force majeure event has not been conclusively explored by courts. While there are some older English case law authorities that suggest that a disease can be equated to an Act of God, these cases did not involve pandemics (*Boast v Firth* [1868–69] L.R. 4 C.P. 1; *Condor v The Barron Knights* [1966] 1 WLR 87; *Ryan v Youngs* [1938] 1 All E.R. 522). Nevertheless, the prevailing view among experts is that a pandemic would be deemed a force majeure event under most, if not all, boilerplate force majeure clauses (Knowles 2012, 135). Notwithstanding this conclusion, there are still some residual complexities in using a force majeure clause to avoid or vary the terms of an employment contract.

First, in the vast majority of cases, it will not be the pandemic itself that causes an employer to wish to avoid their contractual obligations but, rather, the government’s regulatory response to the pandemic (Norton Rose Fulbright 2020). In the case of COVID-19, it might be difficult to find one individual force majeure event that directly caused an employer’s non-performance, given that so many different regulations have been enacted by the government in response to this crisis (e.g. *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020*) and each of these regulations may have played a significant role in the inability of an employer to discharge their contractual obligations (Robertson, Lynch, and Horowitz 2020). Second, whether the COVID-19 pandemic would be deemed unforeseeable and truly beyond the control of the parties has also been considered. Third, under English law, a force majeure clause, if successfully invoked, can only be used by an employer to excuse non-performance of a contractual obligation, rather than to modify the terms of the overall contract. This is one of the most significant differences between the legislation in England and Wales and the law of Italy on force majeure. However, according to the *Italian Civil Code*, an employer may be able to bring about the modification of the terms of their employment contract where one

or more requirements cannot be met due to a force majeure event (Vinter and Price 2006, 146). This will be discussed in detail in the following chapter of this paper. Finally, for whatever reason, force majeure clauses are not typically found within contracts of employment in England and Wales. Sarah Bohen, a leading employment barrister, notes that ‘it is very rare—although not impossible—for a force majeure clause to be expressly incorporated into a contract of employment’ (Bohen, n.d.). This means that the force majeure mechanism is unlikely to be a useful tool for a significant number of employers hoping to avoid their contractual obligations due to COVID-19.

Flexibility Clauses

A flexibility clause is a clause that allows an employer to make unilateral changes to their employment contract (Lockton and Brown 2009, 56). Such clauses usually specify the terms the employer is entitled to modify—e.g. the workplace location or the employee’s duties (Ashtiany et al. 2006, 94). A properly drafted flexibility clause must be free from ambiguity or uncertainty, as any ambiguities may be interpreted against the person seeking to rely upon that clause, who is in most cases the employer (*Bainbridge v Circuit Foil (UK) Ltd* [1997] ICR 541).

The lesson for employers here is that they should be as specific and as unambiguous as possible when drafting their flexibility clauses. This implies that the risk that a unilateral variation made while relying on such a clause will be treated as a breach of contract in future litigation (Collins et al. 2019, 180). However, in practice, this rigid insistence on specificity does somewhat limit the usefulness of such clauses as a way to future-proof employment contracts against unforeseen eventualities such as the COVID-19 pandemic (Collins 2010, 108). These limitations are further compounded by the fact that, in practice, courts have adopted a highly restrictive approach towards the enforcement of flexibility clauses. It is now settled law that flexibility clauses entitle employers to make only minor or non-fundamental changes to their contracts (*United Association for the Protection of Trade Ltd v Kilburn and others* (17th September 1985) EAT/787/84). This is because all employment contracts in England and Wales are automatically deemed to include an implied term stating that the employer will not, without proper and reasonable cause, take any action that would damage the relationship of ‘mutual trust and confidence’ that exists between the employer and an employee. A fundamental contractual change, whether or not it appears to be authorised by a flexibility clause, is likely damage that relationship, thus breaching that implied term (Boyle 2007; *Woods v WM Car Services Peterborough Limited* [1981] ICR 666; *Stevens v University of Birmingham* [2015] EWHC 2300; *IBM v Dalgleish and Others* [2017] EWCA Civ 1212).

For example, in the case of *BPCC Purnell Ltd v Webb* [1992] EAT/129/90, the court held that a flexibility clause granting the employer the right to move the claimant employee to a different department within the company might inevitably result in that employee working different shift patterns and receiving a different level of remuneration. However, the fact that the claimant ended up receiving a 26% reduction in salary was deemed too fundamental a change to be acceptable and, as a

result, the employer's actions were deemed to be a breach of the duty to preserve mutual trust and confidence (Incomes Data Services 2011, 64). While this implied duty of employers only affects fundamental contractual changes, where the line will be drawn by the courts in each case is still unclear—i.e. how fundamental a change must be for it to be deemed a breach of mutual trust and confidence (Lockton and Brown 2009, 56). Consequently, there is a great deal of legal uncertainty for employers wishing to rely upon flexibility clauses to modify fundamental employee benefits, such as shift patterns or remuneration, in response to the COVID-19 pandemic.

This legal uncertainty has been compounded by a number of more recent judgments that are difficult to reconcile with the *Webb* case. For example, in *Hussman Manufacturing Ltd v Weir* [1998] IRLR 228, the EAT dismissed an employee's claim that an otherwise legitimate variation of his shift-pattern from day work to night work, which resulted in a significant drop in his take-home pay, was a breach of the implied duty of mutual trust and confidence. In this case, the EAT held that, save for exceptional cases, 'for this duty to be breached, consequences to an employee have to be more serious than merely a drop in earnings'. Similar to the *Webb* case, which does not clearly identify where the line should be drawn between an acceptable and unacceptable drop in wages, the threshold that must be surpassed for a case involving only a reduction in employee remuneration to be deemed sufficiently 'exceptional' to vitiate the operation of an otherwise valid flexibility clause is also not clear in the *Hussman Manufacturing* case.

Hardship Clauses

A hardship clause is a form of force majeure clause in which economic hardship is specified as one of the grounds for allowing parties to avoid their existing contractual obligations and (usually) negotiate new terms in good faith (Mead and Sagar 2006, 104). Indeed, there are a number of intrinsic difficulties with clauses of this kind, and these are including the hardship clauses and economic hardship (Andrews et al. 2019; *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763). Notwithstanding these difficulties, hardship clauses are, in principle, legally enforceable and do provide the kind of flexibility that may be required as a result of unforeseen events such as the COVID-19 pandemic.

Lord Justice Donaldson in the *Superior Overseas Development Corporation* case made some useful remarks about the nature and function of a hardship clause. He opined that a hardship clause is effectively a 'safety net' or 'manual override' that can protect the parties and keep a contractual relationship 'on course' in the event of unforeseeable 'economic storms' (*Superior Overseas Development Corporation v British Gas Corporation* [1982] 1 Lloyd's Rep 262 per Donaldson LJ; Mulcahy 2008, 136). The economic pressures faced by commercial entities due to the COVID-19 pandemic are certainly the kind of 'economic storms' to which Lord Donaldson was referring; however, there are some significant differences between the contract in the *Superior Overseas Development Corporation* case and a standard contract of employment. This brings about the question of the applicability of this public policy principle to an employment contract. Firstly, the contract in the

Superior Overseas Development Corporation case had a term of 25 years. As Lord Justice Donaldson overtly acknowledged, it is highly likely that an unforeseeable economic storm will arise over such a lengthy period of time. Secondly, the contract in the *Superior Overseas Development Corporation* case was a joint venture agreement underpinning a long-term oil and gas project. Thirdly, since the government introduced a number of schemes designed to help employers and employees during the COVID-19 pandemic, it was and it is still difficult for employers to accurately quantify the economic impacts of this pandemic on their profit and loss accounts. Therefore, this is not a straightforward matter to determine, either prospectively or accurately, as it is difficult to tell whether the threshold for economic hardship has been surpassed or not. However, since the COVID-19 pandemic affected nations economies as a whole; through assessing the influence of COVID-19 in the employees and workplaces across the globe, (Kniffin, 2020) provided a wide review for a sample of previous related researches through concentrating on the impacts of economic and social psychology like mental well-being and unemployment, the common changes in work practices such as virtual team and working from home. Additionally, the study examined potential moderating factors including personality, family status, age, and cultural differences. As a result, the study found that many industries have closed and shut down their businesses as well as many individuals became unemployed and experienced a range of stress-related consequences including depression, anxiety, and physical ailments.

Bilateral Variation of Terms Implied by Conduct

As previously indicated, there are certain circumstances under which terms that are not *expressly* stated within a contract of employment may nonetheless be *implied* into that contract by the court. The duty of mutual trust and confidence, discussed at length *supra*, is one such term. It is unlikely that an employer could ever argue successfully that there exists an implied term within their employment contract granting the employer the power to unilaterally vary the terms of that agreement. However, a question has been raised as to whether or not the conduct of the parties can be deemed to incorporate a unilateral variation into the employment contract (Cabrelli 2014, 222). For example, where an employer gives an employee a notice of a unilateral variation to the terms of their employment contract and that employee neither rejects the variation nor resigns or commences legal proceedings against the employer, it may be argued that the employee has impliedly accepted the terms of that variation through lack of action (Cabrelli 2014, 222). According to Rana (2020) this is particularly relevant to the situation many employees find themselves in because of the COVID-19 pandemic. There is no dearth of anecdotal evidence that a significant number of employers have made unilateral variations to their employees' contracts, which would have been the grounds for breach of contract had their employees decided to resign and bring claims for unfair dismissal.

One of the leading case authorities on this issue is the case of *Solelectron (Scotland) Ltd v Roper* [2004] IRLR 4. In this case, Justice Elias set out the following statement of principle to help future courts decide whether or not, in any given case,

an employee's conduct ought to be treated as implied acceptance of a contractual variation imposed upon them by their employer:

The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, and then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct. (*Solelectron (Scotland) Ltd v Roper* [2004] IRLR 4, per Elias J at para. 30)

In practice, this approach means that employees who do not contest fundamental changes to their employment contracts, such as a reduction in their remuneration, are likely to lose the right to treat such variations as grounds for constructive unfair dismissal or breach of contract at a later point in time (*Cartwright and Others v Tetrad Ltd* [2015] UKEAT/0262/14/JOJ).

However, the recent judgement in *Carluccio's Limited (in administration)* [2020] EWHC 886 shows how important it is for an employer to carefully word the procedure required for employees to accept or reject a proposed variation. In this case, the proposed variation specifically requested that employees respond positively so they could be deemed to have agreed to the variation. The question under determination was whether or not the employees who had failed to respond to the notice were legally bound by the new terms of contract—i.e. whether they had provided their implied consent by conduct. The court held that they had not because (i) they had been asked to respond to the notice to accept the terms, which they did not do; (ii) the method by which the notice was delivered to employees was not tracked and, therefore, there was no way to determine whether the employees who had not responded had, in fact, received the notice and had ample time to respond to it and (iii) some Carluccio employees had responded by rejecting the variations, positing legitimate grounds for objection, which could equally represent the views of those who did not respond to the notice. Beyond that, while implied contractual terms derived from employee conduct cannot grant employers the authority to unilaterally vary employment contracts, they can provide a useful mechanism for securing consent from employees who are: (a) unaware of their legal rights; (b) too afraid to contest the proposed variations for fear of dismissal or being made redundant; or (c) disorganised and unable to raise a formal objection to those variations in a timely manner. The review of literature proved that worldwide the COVID-19 pandemic changed the nature of businesses through imposing new terms relating to the rights of employees and employers as well. For example, relating to UK the

literature argued that if the employee carried out the risk assessment and the result found to be positive, in this case if the employee feels to be unwell because of Coronavirus, and decided to be self-isolated the employer should pay him in accordance with their usual sick pay/leave arrangements. Additionally, the recent statistics documented that in most countries the workers' wages have declined due to COVID-19, for instance during the period March–April 2020 the labour wages in UK declined by 1.2%.

Bilateral Variations Executed under Economic Duress

Following from the discussion in Sect. 1.3 *supra*, one question that must be asked is: under what circumstances would an employee's express or implied consent to a proposed unilateral variation be deemed vitiated by the doctrine of economic duress?

For this doctrine to be invoked, the party seeking remedy must satisfy the court that on the balance of probability, they were illegitimately pressured into accepting the terms of the proposed contract by the defendant and that they had no other viable choice available to them but to accept the terms or variations proposed (*The Universe Sentinel* [1983] IAC 366). It is not necessary for the defendant to have threatened an unlawful act in order for the pressure exerted on the claimant to be deemed illegitimate. As Lord Atkin opined in the case of *Thorne v Motor Trade Association* [1937] AC 797, 'The ordinary blackmailer normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened'. (*Thorne v Motor Trade Association* [1937] AC 797, per Lord Atkin at 806; *R v Attorney General for England and Wales* [2003] UKPC 22) However, the threat made to the claimants' economic interests must go beyond mere economic pressure, which is a normal part of legitimate business dealings (Stone 2005, 311).

Historically, there was a great deal of uncertainty surrounding the question of where to draw the line between legitimate economic pressure and illegitimate economic threats (Allen & Overy 2019). This uncertainty has now been largely laid to rest by the Court of Appeal in the case of *Times Travel (UK) Ltd v Pakistan Airlines Corporation* [2019] EWCA Civ 828, which established the principle that the doctrine of economic duress can now only be invoked in cases involving *lawful* threats where there is proof of subjective *bad faith* on the part of the person making the threat. This judgement certainly limits the circumstances under which an employee could rely upon this doctrine to avoid contractual variations that were unilaterally forced upon him or her by an employer. Nevertheless, it is arguable that an employer who threatens an employee with the prospects of redundancy if, say, they refuse to consent to a proposed variation would be deemed to have acted in bad faith if, in fact, they had no intention of making the employee redundant if he or she rejected the proposed changes. Likewise, if to secure consent for their proposed contractual variations an employer misrepresented the severity of the financial difficulties they are facing as a result of COVID-19, this could also be an example of bad faith. However, the obvious difficulty here is proving bad faith. The Court of Appeal in the *Times Travel* case made it clear that there would be no finding of economic duress

in cases where a party uses lawful threats to achieve a result to which it genuinely believes itself to be entitled, even if that sincere belief is not *objectively* reasonable (Allen & Overy 2019).

COVID-19 Pandemic and Employment's Law in Italy

Express Clauses (Including Those Applicable to all Contracts by Virtue of the Italian Constitution and/or the Italian Civil Code)

Because of the limited role of the express terms of individual employment contracts in Italy, the analysis provided within the following subsections include those 'express terms' that apply to all employment contracts by virtue of the Italian Constitution and the Italian Civil Code. In England and Wales, such mechanisms would be considered 'implied terms' because in this jurisdiction the contract of employment regulates the employment relationship and the only way the government can interfere with the freedom of that contract is to legislate for voluntary or mandatory implied terms that will be deemed to exist within all such agreements. In Italy, however, constitutional and statutory provisions supersede the contract of employment (Lena and Mattei 2002, 390) so it is more appropriate to consider these statutory mechanisms 'express terms'.

Force Majeure Mechanisms

Article 1256 of the Italian Civil Code provides that any party will be released from their contractual obligations when they are permanently prevented from meeting those obligations due to exceptional circumstances not attributable to the person seeking to avoid their obligations (Article 1218, *Italian Civil Code*; *Italian Supreme Court case no. 21973/2007 and no. 11914/2016*) and which are unforeseeable and unavoidable (*Cass. Civ., Sez. III, Sent. n. 18,392, 26 luglio 2017*). The party seeking the relief through this mechanism must have previously made all reasonable attempts to discharge his or her obligations, notwithstanding the difficulties (*Italian Supreme Court case no. 11914/2016*). In the event that performance becomes only temporarily impossible, then the party seeking to enjoy the benefit of this mechanism will be only temporarily released from its obligations for the duration of the unforeseen events in question (Arcinicono 2020). However, in the event of a prolonged delay, the contract will be deemed voidable, i.e. the other party will be entitled to avoid their own contractual obligations should they wish to do so (Article 1256, *Italian Civil Code*). As argued *supra* in Sect. 1.2.1, in England and Wales there is no equivalent mechanism to regulate for temporary unforeseen events. Force majeure in that jurisdiction is an all-or-nothing doctrine and is therefore less suited than the equivalent mechanism in Italy for dealing with the pressures faced by employers during the COVID-19 pandemic.

As with the UK, Italy has no statutory definition of 'force majeure' (Capecchi 2020). However, in response to the COVID-19 pandemic, the Italian government

enacted *Decree Law of 17 March 2020 No. 181*, Article 91 of which confirms that a party's need to comply with the government's COVID-19 containment measures enables them to avoid liability under Article 1218 of the *Italian Civil Code* (Arcinicono 2020) where they would otherwise be deemed in breach (or delay) of their contractual obligations. This has injected a degree of much needed legal certainty into the law on force majeure during these difficult and unprecedented times, removing one of the potential barriers facing employers who wish to rely on force majeure clauses in England and Wales—namely, the requirement and difficulty in proving causation between the force majeure event and the contractual non-performance, when multiple regulatory factors and economic hardship all contribute towards the employer's inability to discharge its obligations. Additionally, through classifying economic sectors relating to the confinement decrees of three European countries (Italy, Spain and Germany), the study of (Fana et al. 2020) focused on understanding the short as well as long terms effect of COVID-19 on employment. For this purpose, the study evaluating these three decrees via formulated an assessment for the implications of COVID-19 on labour markets, and also to speculate on mid and long-term developments, since the most and least impacted sectors will be likely continued to operate differently until a vaccine or other long-term solution is found. Thus, through utilizing the ad-hoc extraction of EU-LFS data, the study assessed employment in Italy, Germany, and Spain as well as UK, Poland and Sweden were included for the aim of covering the whole spectrum of institutional labour market settings within Europe. Consequently, the results showed that the effect of employment is asymmetric within and between the studied countries. More specifically, countries like Spain, Italy, and UK are found to be as the more countries, which are witnessed the worst employment implications of the confinement, due to their labour market institutions and productive specialisation.

Flexibility Mechanisms

'Clausole elastiche' (elastic clauses) and 'clausole flessibili' (flexible clauses)

There are two types of flexibility clause that are permitted within individual employment contracts in Italy: '*clausole elastiche*' (elastic clauses), which permit an employer to increase employees' working time, and '*clausole flessibili*' (flexible clauses), which allow an employer to vary an employees working hours on a day-to-day basis. However, these clauses are more likely to appear in part-time employment contracts than in full-time ones and are therefore not generally available to all Italian employers (Tiraboschi 2014, 64). Further, the terms of these clauses are likely to be set within the applicable collective bargaining agreements, so employers do not have significant scope to choose the degree of flexibility and/ or elasticity that is provided for within their employment contracts (Tiraboschi 2014, 64). Additionally, the Italian Constitutional Court has tended to interpret these clauses restrictively and in favour of employees, as overuse can prevent employees from planning and scheduling their working lives or from taking on additional employment to supplement their

income (*Corte Costituzionale, Sentenza 4 maggio 1992, n 210, GU 20/05/1992*; Countouris 2016, 160; Davidov and Langille 2013, 199).

Statutory Flexibility

Under the Italian Civil Code, an employer can unilaterally change the employee's duties and place of work, subject to the prevailing duty to act fairly and in good faith as required within this jurisdiction (Antiniolli and Veneziano 2005, 60). However, this is permitted only if the duties belong to the same statutory job category (within the applicable national collective labour agreement) and preserves the same salary level as their previous duties (Article 2201, *Italian Civil Code*). In the event that their new duties belong to a lower classification level within the same statutory job category, there must be an objective reason for making the variation and the employee must be entitled to receive the same level of remuneration they had before the variation (Article 2201, *Italian Civil Code*; Berkowitz and Müller-Bonanni 2006, 103).

Hardship Mechanisms—'eccessiva onerosità'

Article 1467 of the Italian Civil Code provides a mechanism through which a party can seek the immediate termination of a contractual agreement in the event that 'extraordinary and unforeseeable' circumstances have rendered its obligations too onerous (e.g. expensive) to perform. No distinction is made between temporary or permanent burdens; however, the corresponding party is entitled to avoid the termination by offering to amend the terms of the contract that the other party can no longer afford to honour (Clifford Chance 2020). While this would require a contractual renegotiation, this would presumably be regulated by the prevailing duty of good faith and fairness imposed on the parties by Article 1337 of the *Italian Civil Code*.

There remains debate about whether this kind of 'impossibility' should be evaluated from an objective or subjective standpoint. Some commentators argue that the correct test should be whether or not another person placed in the same position as the defendant (i.e. the party seeking to terminate the contract) would also be unable to perform their contractual obligations. Others hold that a lower subjective threshold should be utilised (Fauvarque-Cosson and Mazeaud 2009, 235).

Bilateral Variations Implied by Conduct

Beyond those unilateral variations which *are* permitted under Italian employment law, discussed *supra* in Sect. 2.2.2, if an employer wishes to modify the individual terms of its employment relationships, then they must secure express consent from their employees. This is done via a rigorous procedure set out in the Italian Civil Code. The agreements must be negotiated in good faith (Article 1337, *Italian Civil Code*), signed before a conciliation committee, and the variations must be in the employees' interests, i.e. to preserve their job, help them acquire a different

skill, or improve their living conditions (EBL Miller Rosenfalck 2017). The review of literature proved that worldwide the COVID-19 pandemic changed the nature of businesses through imposing new terms relating to the rights of employees and employers as well. For example, relating to Italy the literature showed that employers have a duty to ensure the safety and health not only of their employees, while of nonemployees as well. Where, nonemployees are for example including contractors and members of the public. This practice could contribute in monitoring the spread of virus. Additionally, employees can also play a vital role to mitigate the risk of COVID-19 for instance through carrying out risk assessments, as well as being aware of COVID-19 symptoms. In addition, The COVID-19 crisis impacted the workers of fixed-term contracts as many of them are removed from their workplace, and relating to Italy, the literature revealed that the number of workers who lost their jobs during the period February 2020–April 2020 was larger than employees who lost their jobs during the same period of the last year 2019. Furthermore, it is essential to implement a reporting procedure for individuals who having or suffering from symptoms or living in high-risk areas. Beyond that the legal obligations and National Health Service certify that employees who are required to implement the rules of self-isolation should be urgently removed from their work-place. All that contributed in changing the nature of business such as working remotely from home.

Bilateral Variations Executed under Economic Duress

In light of the requirements and procedures identified in Sect. 2.3 *supra*, the opportunities to secure contractual variations under duress are very limited within the employment context in Italy. The only proviso here is that if Article 1461 of the *Italian Civil Code* is available to employers, then there is a risk that they might use this mechanism to threaten termination and encourage their employees or their union representatives to avoid that eventuality by proffering a variation to the terms of the contract in favour of the employer. However, within the English-language literature on this subject matter, there is no evidence that this mechanism is being used by employers at all, let alone being abused by them.

Summary and Conclusions

There are fundamental differences between the employment law regimes that operate respectively in England and Wales and in Italy. England and Wales is a common law jurisdiction, whereas Italy is a civil law jurisdiction; Italy's labour market is significantly more tightly regulated than England's; in England and Wales, the employment contract regulates the employment relationship, whereas in Italy the individual employment contract, if any, is subordinate to the Italian Constitution, the Italian Civil Code and the collective agreements within most industry sectors. Despite these differences, the mechanisms that are potentially available to employers from both of these jurisdictions who wish to vary the terms of their employment relationships in response to the COVID-19 pandemic can be broadly said to

fall into one of the following categories: (i) force majeure mechanisms; (ii) flexibility mechanisms; (iii) hardship mechanisms and (iv) mechanisms facilitating bilateral variations which may be tantamount to unilateral variations. However, relating to force majeure mechanisms, in England and Wales, a properly drafted force majeure clause can be used by employers to avoid their contractual obligations in the event of unforeseen circumstances such as the COVID-19 pandemic. However, (i) it can be difficult to prove causation between the force majeure event and the contractual non-performance, especially in instances where multiple regulatory factors and economic hardship all contribute towards the employer's inability to discharge their obligations; (ii) this mechanism will only be available to a very small number of employers who have already included a force majeure clause in their existing pre-COVID employment contracts; (iii) there is no legal certainty that the force majeure clause will continue to provide employers with any protection within post-COVID employment contracts and (iv) such clauses do not entitle employers to unilaterally modify the terms of their employment contracts, but only to avoid contractual obligations that have become impossible to discharge as a direct result of the force majeure event. On the other hand, the Article 1256 of the *Italian Civil Code* provides a robust force majeure mechanism that can be used either to avoid contracts that have become permanently impossible to honour or to suspend the performance of contractual obligations that have become temporarily impossible to discharge. Article 91 of *Decree Law of 17 March 2020 No. 181* confirms that a party's need to comply with the government's COVID-19 containment measures will be deemed force majeure events and, consequently, the difficulties faced in England and Wales with establishing factual causation do not exist in Italy.

In the case of flexibility mechanisms, in England and Wales, while flexibility clauses can provide employers with a mechanism to reserve the right to unilaterally modify their contracts of employment, the unforeseeable nature of the events surrounding COVID-19, and the commercial unattractiveness of clauses purporting to allow employers to make significant contractual variations, make such clauses of limited value, particularly in light of the degree of specificity required for such clauses to be enforceable. In addition, the duty to preserve mutual trust and confidence limits the ability of employers' to make fundamental or exceptional changes to a contract, even where employers do have flexibility clauses in their contracts that purport to allow the kind of modification they wish to implement. As there is no way for an employer to pre-emptively test the lawfulness of a proposed variation before they implement it, there is always a risk that a unilateral variation will be challenged by a disgruntled employee that if successful, will result in legal liability for constructive unfair dismissal (McLellan 2020). Anyway, in the case of Italy, there are two types of flexibility clause that may appear in some employment contracts—the 'elastic clause' and the 'flexibility clause'. These clauses usually appear within collective agreements, as opposed to individual employment contracts, and seek to regulate the extent to which employers are able to vary the working hours of their part-time employees only. Additionally, the Italian courts tend to interpret these clauses restrictively and in favour of employees. Consequently, these clauses are unlikely to provide Italian employers with the kind of flexibility they need to manage the impacts of the ensuing COVID-19 pandemic. For more useful for Italian

employers wishing to restructure their operations in response to the COVID-19 pandemic is the statutory mechanism provided by Article 2201 of the Italian Civil Code which allows unilateral changes to employees' duties and places of work, as long as those changes do not result in a demotion or a reduction in remuneration.

In a relation to Hardship Mechanisms, in England and Wales, hardship clauses are, in principle, legally enforceable and do provide the kind of flexibility that may be required as a result of unforeseen events such as the COVID-19 pandemic. However, because of the challenge of defining 'economic hardship', it can be difficult for the parties and, ultimately, the courts, to determine whether or not either party is entitled to invoke the clause. Also, this mechanism will only be available to a very small number of employers who have already included a hardship clause in their existing pre-COVID employment contracts. By contrast, in Italy, Article 1467 of the Italian Civil Code provides a mechanism through which a party can seek immediate termination of a contractual agreement in the event that unforeseen circumstances have rendered their obligations too onerous to perform. However, it is not clear whether this mechanism is available to employers; there is certainly no evidence that it is being used by Italian employers at this time.

Eventually, in term of mechanisms facilitating bilateral variations, the law in England and Wales, grants employers the powers to unilaterally vary employment contracts, it can provide a useful mechanism for securing consent from employees who are unaware of their legal rights; are too afraid to contest the proposed variations for fear of dismissal or being made redundant; or are disorganised and unable to raise a formal objection to those variations in a timely manner. However, it is important that the variation notices disseminated to employees are tracked to prove that they were received and that they include a statement communicating that failure to respond by a certain date and time will be construed as tacit acceptance of the variations proposed. Such a principle does not exist in Italy. For a proposed variation to become binding on an employee, a rigorous procedure must be adhered to and the variation must be in the best interest of the employee, otherwise it will not be accepted by the conciliation committee or ratified by the courts.

Furthermore, since the ruling in the Times Travel case, the doctrine of economic duress can now be invoked in England and Wales in cases involving *lawful* threats where there is proof of subjective *bad faith* on the part of the person making the threat. This judgement significantly limits the circumstances under which an employee can rely upon this doctrine to avoid contractual variations that were effectively imposed upon him or her by the employer. Unless there is clear evidence of impropriety or a material misrepresentation of facts, it would also be difficult to prove that the employer acted in 'bad faith'. In Italy, for reasons set out in this paper, rigorous consent procedures are followed to ratify a bilateral variation and negotiations tend to occur at the collective bargaining level rather than at the individual level. As a result, the opportunities to secure contractual variations under duress are very limited within the employment context. Beyond that, some of previous related studies argue that the impact of COVID-19 relies on business's nature, for instance (Webb et al. 2020) revealed that sometimes informal parties are receiving less government support than the formally employed. Additionally, the study proved that informal workers are always desiring to have more employment security as well as

striving for continued labour flexibility while transferring costs to workers and government. Furthermore, the study argued that maybe COVID-19 led to accelerate the current trends and impose new solutions in order to protect the basic work security, while assisting companies to remain competitive. While, a study by Festing and Kraus (2020) found that the first intense stage of COVID-19 decreased as well as changed the roles of work plus a positive impact on job satisfaction.

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