

Force majeure and frustration in the context of Covid-19



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This guide provides an overview of the principles of frustration and force majeure. It is not legal advice and should not be relied upon as such. Businesses and individuals should seek bespoke legal advice in respect of their particular positions.

Introduction

The implications of Covid-19 on businesses of all shapes and sizes are already acute, and look likely to worsen. Government guidance, personnel issues and cash-flow problems are wreaking havoc with the ability of businesses to perform existing contractual obligations. Businesses will be looking to lawyers for advice on where they stand in these highly testing circumstances. All businesses are examining their key contracts, whether as a supplier or a customer. Some may wish to ensure that their suppliers continue to supply them and that their customers continue to purchase and pay for their goods and services; others may wish to find ways to avoid their contractual obligations.

Two legal concepts will keep cropping up: force majeure clauses and the common law doctrine of frustration. This guide sets out the basics of both, before considering how they might apply to Covid-19 in particular.

These areas of law are complex. Do the doctrines of frustration and/or force majeure apply at all to a specific contract in the context of the Covid-19 pandemic? If so, when must these issues be raised by the parties? What will be the impact of any renegotiation of a contract or a relaxation of a party's obligations under it?

The implications of rightfully or wrongfully invoking the doctrine of frustration or a force majeure clause are often substantial. Parties will therefore need to take urgent advice upon the proper construction of any force majeure clauses and the formal requirements (if any) for their invocation.

Parties (and their advisers) should also take care to identify any obligation to take reasonable steps to avoid the force majeure circumstance or mitigate its effects.

Frustration

Frustration has a very particular legal meaning, quite distinct from the sense of cabin fever experienced by those enduring self-isolation. It is the common law's way of identifying circumstances which are so serious and unforeseen that the law cannot justifiably expect the parties to continue with their contract. The effect of the doctrine is to terminate the contract immediately upon the occurrence of the frustrating event and to release the parties from their obligations immediately. At common law this left the loss to lie where it fell, but the invocation of the doctrine in wartime Britain led to the enactment of the **Law Reform (Frustrated Contracts) Act 1943** and the creation of a mechanism for redistributing the effects of frustration between the parties.

General principles

Chitty on Contracts at **23-001** describes frustration as follows:

“A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.”

The editors go on to confirm an important limit to the doctrine, namely that *“where express provision has been made in the contract itself for the event which has actually occurred, then the contract is not frustrated.”* (at **23-003**): **Joseph Constantine SS Line v Imperial Smelting Corp**¹, at 163. A force majeure clause may be an example of such express provision (explained below).

The courts have also recognized that, upon the proper interpretation of a contract, it may be clear that the parties preferred the certainty of termination pursuant to the terms of the contract over the uncertainty of possible discharge under the doctrine of frustration: see **Total Gas Marketing v Arca**

¹ [1942] AC 154.

British², at 221-222. It is therefore important to work out whether the contract leaves sufficient room for the doctrine of frustration to operate in particular circumstances.

The leading statement of the fundamental principles of frustration remains that of Bingham LJ (as he then was) in **The Super Servant Two**³, in which he established five key principles:

1. The doctrine of frustration had evolved to mitigate the common law's insistence on literal performance of absolute promises where it would be unjust to do so after a significant change of circumstances.
2. Frustration operates to *"kill the contract and discharge the parties from further liability under it"* and so must not be invoked lightly.
3. Frustration brings the contract to an end *"forthwith, without more and automatically."*
4. Frustration should not be due to the act or election of the party seeking to rely upon it; it must be some *"outside event or extraneous change of situation."*
5. A frustrating event must take place *"without blame or fault on the side of the party seeking to rely on it."*

The test developed by the House of Lords in **Davis Contractors v Fareham UDC**⁴ asks whether literal performance of the contractual promise in the changed circumstances would involve a fundamental or radical change from the obligation or remedy undertaken. In **National Carriers v Panalpina**⁵, at 700, Lord Simon famously stated the test as follows:

"Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances."

² [1998] 2 Lloyd's Rep 209.

³ [1990] 1 Lloyd's Rep 1.

⁴ [1956] AC 696.

⁵ [1981] AC 675. The decision is significant as confirming that, in principle, the doctrine of frustration also applies to leases. To date there has been no reported case of a lease being frustrated.

The modern trend is known as “multi-factoral” analysis of potentially frustrating events. The court will consider the express terms of the contract, its matrix or context and the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk: see **Edwinton Commercial Corp v Tsavliris Russ (The Sea Angel)**⁶, at [111]:

“Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.”

The foreseeability of an event is obviously a relevant factor in evaluating the scope for the doctrine of frustration to operate. If an event was foreseen by the parties then it will usually, though not necessarily, prevent that event from frustrating the contract when it materializes. **Chitty** at **23-059** opines that *“if one party foresaw the risk, but the other did not, it will be difficult for the former to claim that the occurrence of the risk frustrates the contract.”*: see further **The Sea Angel**⁷, at [83].

It will also be important to investigate to what extent the contract itself allocates the risk of becoming unable to perform. In **CTI Group v Transclear SA**⁸ contracts were entered into for the supply of cement in Asia destined for transport to Mexico. The contracts were an attempt to break a cartel in the cement market operated by ‘C’. The sellers became unable to perform their contracts because their own suppliers refused to supply them with cement, having come under pressure by C. The sellers argued that the contracts were frustrated by these events. The Court of Appeal disagreed, holding that the sellers had undertaken an obligation to procure delivery of the cement and undertook the risk that their own suppliers would fail to perform. The central judgment confines the role to be played by the doctrine of frustration in cases where a seller assumes a personal obligation to procure delivery, reasoning that the seller thereby assumes the ordinary risks that he will be unable to do so. It takes *“some exceptional supervening event”* [23] to discharge such a contract by frustration.

Supervening illegality

⁶ [2007] EWCA Civ 547.

⁷ [2007] EWCA Civ 547.

⁸ [2008] EWCA Civ 856.

One well known type of frustrating event is supervening illegality, i.e. where the law changes such that performance becomes illegal.

In **Metropolitan Water Board v Dick, Kerr & Co**⁹, a contract existed for the construction of a reservoir subject to the proviso that if the contractors should be impeded or obstructed by any cause the engineer should have power to grant an extension of time. Under the powers conferred by the Defence of the Realm Act and Regulations (in wartime) the Ministry of Munitions issued an order obliging the contractors to cease work. The House of Lords held that the contract was frustrated by supervening impossibility, and that the provision for extending the time did not apply to the prohibition by the Ministry. The interruption was of such a character and likely duration that it fundamentally changed the contract, and could not possibly have been in the contemplation of the parties when entering into the contract. One unusual feature of the case is that the express contractual provision for the extension of time did not prevent the Government order from frustrating the contract.

What if performance of the contract requires the taking of steps in other jurisdictions, in circumstances where such performance remains lawful under English law but has become unlawful under the law of the jurisdiction in which it must be tendered? Generally the validity and enforceability of a contract governed by English law is unaffected by the question of whether it would be valid or lawful under foreign law, but there are exceptions. One exception is where the contract, though governed by English law, requires performance abroad (and the law of the place of performance renders it unlawful): see **Ralli Bros v Compania Naviera Sota y Aznar**¹⁰. But a party relying on foreign illegality must show that the illegality covered the whole of the period within which performance was due: **Ross T Smyth & Co v WN Lindsay**¹¹.

It is also important to ascertain precisely what has become prohibited under foreign law. In **J W Taylor v Landauer & Co**¹² a government did not place an absolute embargo on dealings in a particular commodity, but did require a licence to be obtained in order to do so. It was held that the seller could not rely on frustration unless he had actually applied for a licence and been refused, suggesting that the efforts taken to overcome apparent difficulties will be relevant. Singleton J's judgment suggests

⁹ [1918] AC 119.

¹⁰ [1920] 2 KB 287.

¹¹ [1953] 1 WLR 1280.

¹² [1940] 4 All ER 355.

that if the seller had applied and failed, or could demonstrate that any such application for a licence would have failed, he might have been excused from his obligations under the contract.

It is also possible that, even absent a strict legal prohibition, the reality of the situation might create a de facto prohibition capable of frustrating the contract under ordinary principles. In **Société Coopérative Suisse des Cereales v La Planta Cereal Co**¹³ a contract was frustrated by an effective de facto prohibition against export, even though there was no absolute legal ban.

Delay

Delay in performance may give rise to frustration, but it is a difficult context specific question of degree. In **The Nema**¹⁴, Lord Roskill said at 752:

“...it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations ‘radically different’... from that which was undertaken by the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all of the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree whether the effect of delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question.”

Delay in this sense must be abnormal, in its cause, its effects or its expected duration, so as to fall outside what the parties could reasonably have contemplated: see **Blankley v Central Manchester and Manchester Children’s University Hospitals NHS Trust**¹⁵.

Frustration and leases

It is, in principle, possible for a lease to be frustrated. The House of Lords confirmed this in **National Carriers v Panalpina**¹⁶. But there is yet to be a single reported case in which the courts have actually

¹³ (1947) 80 LIL Rep 530.

¹⁴ [1982] AC 724.

¹⁵ [2014] EWHC 168.

¹⁶ [1981] AC 675. The decision is significant as confirming that, in principle, the doctrine of frustration also applies to leases. To date there has been no reported case of a lease being frustrated.

found a lease to have been frustrated. The most recent high-profile attempt came in the wake (or more technically, in anticipation of) Brexit. In **Canary Wharf (BPF) T1 v European Medicines Agency**¹⁷ the High Court held that EMA's 25 year lease of premises in Canary Wharf would not become frustrated upon the UK's departure from the EU. The EMA initially lodged an appeal but later withdrew it. Central to the court's reasoning was its finding that, even in the event of a no-deal Brexit, there was no common purpose underlying the lease which would be frustrated. Even though the UK's withdrawal from the EU was not contemplated as a potential future cause of the EMA's relocation, the lease *did* expressly contemplate the possibility that the EMA might involuntarily have to leave the premises due to circumstances beyond its control.

A contractual licence to occupy premises is also liable to frustration (and might more readily be frustrated than a lease). **Taylor v Caldwell**¹⁸ itself concerned a licence to use a music hall for four concerts, held to be frustrated by the destruction of the hall by fire. Familiar to law students are the so-called Coronation cases, such as **Krell v Henry**¹⁹, in which the cancellation of King Edward VII's coronation for illness frustrated licences for the hire of flats overlooking the route of the procession.

"Partial-frustration" or partial excuse for non-performance

There is a rarely encountered principle in English contract law by which a party might temporarily or in part be excused from performance of their contract if, through no fault of their own, performance in full is not possible. The principle is often dealt with in the context of frustration, but properly speaking it is something altogether distinct. The effect of frustration is to automatically discharge the contract from that point onwards. But the effect of the rule of partial excuse is only to excuse a failure to perform in full; the remainder of the contract remains in force.

A key example is **HR & S Sainsbury v Street**²⁰. D agreed to sell P 275 tons of barley from a crop growing on a farm. Without any fault of D, the yield from the farm was only 140 tons. D refused to supply that 140 tons, and claimed frustration of the entire contract. The court held that although excused from

¹⁷ [2019] EWHC 335 (Ch).

¹⁸ (1863) 3 B&S 826.

¹⁹ [1903] 2 KB 740.

²⁰ [1972] 1 WLR 834.

the obligation to deliver the remaining 135 tons of barley, D remained obliged to deliver the 140 tons yielded.

There are other examples, such as **Poussard v Spiers and Pond**²¹, in which an opera singer was excused her temporary non-performance because of illness. Others include **Cricklewood Property and Development Trust v Leightons Investment Trust**²², at 233 – 234 (HL); **Libyan Arab Foreign Bank v Bankers Trust**²³, at 772; **John Lewis Properties v Viscount Chelsea**²⁴, at 82.

Consequences of frustration

At common law frustration automatically brings the contract to an end, discharging the parties' obligations from that point on. It does not affect rights or obligations which have already accrued prior to frustration. It does not rescind the contract ab initio, or render it void. It simply discharges it from that point onwards (akin to valid termination). At common law, value which had already passed under the contract prior to frustration could not be returned *unless* there had been a total failure of consideration (i.e. nothing had been given in exchange for it).

This common law position was widely regarded as defective because it often yielded unjust results. If part performance had already occurred prior to frustration, one party might come out of the frustrating event at an advantage (having had the benefit of performance to date, but without any obligations in the future). As a result, England passed the **Law Reform (Frustrated Contracts) Act 1943**, which contains powers to effectively even out the position post frustration.

Force majeure

A *force majeure* clause expressly excuses a party from performance following the occurrence of certain events. The nomenclature comes from French law, and technically has no freestanding

²¹ (1876) 1 QBD 410.

²² [1945] AC 221.

²³ [1989] QB 728.

²⁴ [1993] 2 EGLR 77.

meaning in English law.²⁵ It is simply a label applied to a type of contractual clause which provides for the suspension or release of contractual obligations in specified circumstances.

The burden of proving that performance is excused rests upon the party relying upon the *force majeure* clause. That party must prove that the event in question falls within the clause *and* that non-performance was caused by that event.

Interpretation of *force majeure* clauses

Force majeure clauses are often drafted widely, listing a variety of events followed by a “sweep up clause” designed to include anything similar. The courts have indicated that sweep up clauses will be interpreted in the context of (a) the contract as a whole, and (b) any specified force majeure events listed.

In **Tandrin Aviation Holdings v Aero Toy Store**²⁶ it was argued that the collapse of financial markets in 2008 triggered a force majeure clause and released it from the obligation to purchase an aircraft. The force majeure clause included “*any other cause beyond the Seller’s reasonable control*”, but the court held that viewed in its context that did not encompass a change in economic or market conditions. In general, a change in economic or market conditions which affects the profitability of a contract, or the ease with which the parties’ obligations may be performed, is not regarded as a force majeure event. It would take very clear contractual language to have that effect.

Some force majeure clauses expressly refer to the need to comply with government requests, and have been held to be effective where such request are independent of the affected party and beyond its control: see **Okta Crude Oil v Mamidoil-Jetoil**²⁷.

The effectiveness of a force majeure clause does not depend upon events being unforeseeable. Indeed the fact that the parties have alluded to them in their contract naturally entails that, at least to some extent, they have already foreseen that very possibility. In **Great Elephant Corp v Trafigura Beheer**²⁸

²⁵ In fact a clause simply stating that “*the usual force majeure clause shall apply*” is void for uncertainty for this very reason: see **British Electrical and Associated Industries v Patley Pressings** [1953] 1 WLR 280.

²⁶ [2010] EWHC 40.

²⁷ [2003] EWCA Civ 1031.

²⁸ [2013] EWCA Civ 905.

the Court of Appeal held that in a force majeure clause referring to an “*unforeseeable act or event which was beyond the reasonable control of either party*”, the word “unforeseeable” added nothing.

Equally it does not necessarily matter that the allegedly force majeure event was already in existence at the date of the contract: **SVH Gas Supply & Trading v Naftomar Shipping & Trading**²⁹.

Whereas the test for frustration is a very strict one (an obligation simply becoming more onerous will not achieve frustration), the test for engaging a force majeure clause depends upon its language. A clause which expressly states that an event must “*prevent*” performance will require a party to demonstrate that performance has become impossible, rather than simply more difficult or expensive: see **Tennants (Lancashire) v G S Wilson & Co**³⁰. But it is perfectly possible for a force majeure clause to expressly provide for events which “*hinder*” or “*delay*” performance, in which case it will not be necessary to demonstrate impossibility.

Where the event falls within the language of the clause, a party must still demonstrate that the event has *caused* him not to perform. The courts have held that the force majeure event must be the only effective cause of default: see **Seadrill Ghana v Tullow Ghana**³¹ and **Classic Maritime Inc v Limbungan Makmur**³².

Most force majeure clauses refer to events “*beyond the control of the relevant party*”. The courts have held that such language imparts an obligation to take all reasonable steps to avoid the operation of the clause or to mitigate its effects, akin to the ordinary duty to mitigate loss: see **Channel Island Ferries v Sealink UK**³³.

Effect of force majeure clauses

The effect of a *force majeure* clause can vary depending upon its drafting and the circumstances in which it is invoked. Often the effect will be to suspend the duty to perform for so long as the *force majeure* event continues, but some clauses will also contain language entitling one or both parties to terminate. Again much depends upon the language actually used. The parties can, by their drafting,

²⁹ [2005] EWHC 2528.

³⁰ [1917] AC 495.

³¹ [2018] EWHC 1640 (Comm).

³² [2019] EWCA Civ 1102.

³³ [1998] 1 Lloyd’s Rep 323.

impose formal conditions upon the invocation of a *force majeure* clause, such as the giving of written notice of reliance upon it: see **GPP Big Field v Solar EPC Solutions**³⁴. The courts will ordinarily give effect to such contractual requirements.

In the Covid-19 context

Foreseeability

The severity of the Covid-19 crisis has taken businesses and stock markets by surprise the world over. In general it will be difficult to argue that the crisis or its extent was or ought to have been foreseen by contracting parties. Nevertheless, arguments will likely be made to the effect that the possibility (or increasing probability) of a widespread pandemic of some description had been identified by the scientific community for some time. Whether this prospect should be taken as having been in the parties' minds at the time of contracting will be highly context specific.

Canary Wharf (BPF) T1 v European Medicines Agency³⁵ gives a useful steer in this regard. The court spoke of an event being "relevantly foreseeable" (in the sense of being relevant to the parties' contractual venture). It held that while Brexit was theoretically possible at the time of entering into EMA's lease, it had not strongly featured in political debate at that time.

This raises the possibility that contracts entered into after Covid-19 began to hit the headlines could fare quite differently. If parties have contracted in circumstances where the spread of Covid-19 had already become well known, it will be easier to argue that this event was "relevantly foreseeable". Argument may then focus on what exactly was widely known about the virus and at what stage.

Prohibitions on travel

At the time of writing Government guidance only recommends avoiding non-essential travel, but it is conceivable that outright prohibitions might be introduced (akin to those in force in France). In such

³⁴ [2018] EWHC 2866 (Comm).

³⁵ [2019] EWHC 335 (Ch).

circumstances contracts which require or contemplate bodily presence or physical performance may well become frustrated by supervening illegality.

It is equally conceivable that if illness or travel bans prevents a key performer from attending an event, the common purpose of contracts linked to that event may nevertheless be frustrated akin to the Coronation cases discussed above.

Timing issues

The timing of advancing any frustration arguments is likely to be a pressing concern for many businesses and individuals. It may be that initially neither party treats the contract as having been frustrated at the time, but instead proceeds to extend time for its performance. Does doing so prevent arguments about frustration being advanced at a later stage? In **Armchair Answercall Ltd v People in Mind Ltd**³⁶, at [51], the Court of Appeal said:

“Frustration if it occurs, is a definite event. Whether any given event is a frustrating event is, once the facts said to constitute the event have been determined, a question of law. If it was, the fact that the parties did not immediately treat it as such does not alter the position. What the parties did or did not do after the event may, however, be a pointer to whether the event was in truth a frustrating one.”

The answer cuts both ways. Since frustration is a matter of law, it is (strictly speaking) unaffected by the parties’ subjective perception of the state of their contracts. But the reality is that it will be very difficult to argue that an event was so severe and unseen as to render it unjust to require continued performance when the parties have, in fact, continued to perform.

Renegotiation / relaxation of obligations

The renegotiation of a party’s contractual obligations in light of Covid-19 (for example, extending time, agreeing to pay less / do more) is in principle perfectly capable of constituting an effective variation of their contract (assuming it has not been frustrated) or conceivably creating a new contract (assuming the original has been frustrated). While strictly speaking the rule in **Foakes v Beer** remains good law, the courts are increasingly willing to find “practical benefit” (capable of constituting valid

³⁶ [2016] EWCA Civ 1039.

consideration) in a promise to perform existing contractual obligations: see Williams v Roffey Bros³⁷ and MWB v Rock Advertising³⁸. It is certainly arguable that obtaining any measure of performance (as opposed to the onset of an insolvency situation) in the present crisis will be regarded as constituting a “practical benefit”.

Promises to refrain from enforcing particular contractual rights may also give rise to arguments of promissory estoppel (High Trees³⁹ itself arose in the context of promises not to insist upon the payment of full rent in the Second World War). Parties (and their advisers) should therefore take care in how they approach such discussions or renegotiations.

Invoking force majeure clauses

Parties will need to take urgent advice upon the proper construction of any force majeure clauses and the formal requirements (if any) for their invocation. Parties (and their advisers) should also take care to identify any obligation to take reasonable steps to avoid the force majeure circumstance or mitigate its effects. In the context of Covid-19, that obligation to mitigate could encompass an enormous variety of steps (including, for example, a party availing itself of any financial help proffered by the Government).

Summary

These areas of law are complex and give rise to a number of litigious battlegrounds, especially in novel circumstances such as these. The implications of rightfully or wrongfully invoking the doctrine of frustration or a *force majeure* clause are often substantial. Parties should, where possible, take detailed legal advice before and during any discussions with their contractual counterparties about the impact of Covid-19. Members of the St John’s Chambers Chancery and Commercial Group have extensive experience of advising upon and litigating such issues, both in this jurisdiction and overseas, and will be happy to assist wherever possible.

³⁷ [1991] 1 QB 1.

³⁸ [2018] UKSC 24.

³⁹ Central London Property Trust v High Trees House [1947] KB 130.

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20 March 2020