



COVID-19, force majeure and frustration: An in-depth analysis

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The outbreak of COVID-19 has caused major disruption to businesses around the world, with many finding it difficult, or impossible, to fulfil their contractual obligations because of the pandemic and the response to it. As a result, force majeure and frustration are being viewed as increasingly attractive options for parties seeking a legal remedy where, through no fault of their own, they can no longer perform their obligations.

This article provides an in-depth analysis of the core legal principles of force majeure and frustration and how they can apply to contracts affected by COVID-19.

Force Majeure

What is force majeure?

Unlike many civil law systems, English law provides no universal concept or definition of force majeure, which instead operates only to the extent contractually agreed. For this reason, the ability of a party to invoke force majeure (and the effect this will have on the contract in question) will depend on the presence of a force majeure clause and its particular terms.

A typical force majeure clause sets out the circumstances (generally involving an unforeseen supervening event) where a party is excused from performing their contractual obligations, and the contractual consequences that will follow where the clause is triggered. Such clauses often also prescribe a procedure that the parties must follow to avoid liability for non-performance on the occurrence of a trigger event.

Though each force majeure clause will vary and must be considered on its own terms, there are various common elements.

Common elements of force majeure

The onus is on the party relying on the clause to demonstrate that it has been engaged in the particular factual circumstances.¹

Occurrence of event

First, the party calling force majeure will always need to establish that one of the prescribed events has occurred. Typically, specific trigger events such as war, natural disaster or acts of god will be included. It is not uncommon for a pandemic or epidemic to be included as a qualifying event, which plainly would cover the outbreak of COVID-19. Clauses may also list a change in law or compliance with any government regulation or order. These triggers are particularly relevant in the current circumstances, where many governments are imposing

unprecedented restrictions in response to COVID-19.

The list of prescribed triggers is frequently followed by catch-all wording such as “or any other cause beyond the parties’ control.” Language of this sort will be given its natural and larger meaning and should not generally limit the “other” qualifying events to only those that are similar to the ones listed.²

However, the court held in *Tandrin* that an unforeseen downward spiral in the world’s financial markets did not trigger a force majeure clause, despite the presence of catch-all wording.³ The court held that the phrase should be read in the context of the entire clause, and that because none of the prescribed events were “even remotely connected” with the economic downturn, the clause was not triggered.

Explicit wording will be required to relieve a party from contractual obligations where they have simply become uneconomical.⁴ Accordingly, parties will be unable to call force majeure on the basis of a general economic or market downturn unless the force majeure clause includes express wording to that effect.

Although many businesses are struggling to fulfil their contractual obligations due to the increased cost of doing so, a change in economic or market circumstances that make fulfilling the contract less profitable or desirable will generally not be a valid ground for declaring force majeure.⁵

Impact on performance

Having established that a trigger event has occurred, the party seeking to rely on the force majeure clause must also show that the event has impeded their ability to perform their obligations to the necessary degree. A force majeure clause will normally require that the event has prevented, hindered, delayed or impeded performance.

Where there is a requirement for the event to have “prevented” performance, the defaulting party will need to demonstrate that it has become physically or legally impossible to perform, and not merely more difficult or unprofitable.⁶ This means a party will still be required to fulfil their obligations via any available alternative means, including, for example, by sourcing goods from another supplier, even if at a substantially greater cost.⁷

Similarly, if the clause does not specify that the event must have prevented performance, but provides that a party’s obligations are to be “excused” on the occurrence of an event, that party must demonstrate that performance has become impossible.⁸

Greater leeway is given where the clause refers to a party’s obligations being “hindered”, which requires performance being substantially more difficult, rather than impossible. This may be satisfied where complying with the contract would cause a party to dislocate their business and break other contracts.⁹

Additionally, provision may be made for circumstances where performance is “delayed.” Circumstances hindering performance may amount to delay.¹⁰

As noted above, an increase in the cost of performing the contract will generally not be enough to satisfy a requirement that performance has been prevented, hindered or delayed by the relevant event.

Sole cause

As regards the necessary extent of the causal link between the force majeure event and a party’s inability to perform their contractual obligations, the defaulting party must demonstrate that the event is the sole and operative cause of the impediment.¹¹

Where there are two events that have (on a common-sense view) “caused” the non-performance, one of which is not an event envisaged by the clause, it will not be possible to call force majeure if the non-force majeure event was the main cause.¹²

Causation is likely to be a heavily disputed factor. If a party was already facing issues that would impact their obligations, it may be difficult to prove that the force majeure event was the sole cause.

This may present problems in supply contracts where a business was facing financial difficulty before the outbreak of COVID-19. Declaring force majeure on oil purchase contracts may be particularly challenging, as careful consideration will be required to determine whether a party is unable to fulfil their obligations as a result of the

effects of COVID-19 or the decline in oil prices.

Mitigation

Force majeure clauses will commonly require a party to mitigate the effects of the trigger event, for example by imposing a duty to use all reasonable endeavours to do so. What constitutes reasonable endeavours is fact-specific and will vary depending on the type of business and the surrounding circumstances. During the COVID-19 pandemic, examples of reasonable mitigation measures could include implementing quarantine protocols, sourcing alternative suppliers or making new delivery arrangements. The increased burden these measures place on a party will be considered when assessing the reasonableness of a party's actions.

Even where mitigation is not expressly required by the force majeure clause, parties should take reasonable steps to minimise their losses, as English courts will not look favourably on a party that makes no attempt to do so.

Contractual consequences

The consequences of a party validly calling force majeure will depend on the wording of the clause. The clause may entitle a party to suspend or extend time for performance, or allow for termination of the contract. It is common for a force majeure clause to allow suspension of obligations for a certain period of time, after which one or both of the parties have the option to terminate the contract.

In addition, force majeure clauses often include notice or other procedural requirements that must be complied with by the defaulting party.

In particular, some contracts include a time bar providing that notice must be given within a specified period from when the affected party first became aware of the force majeure event. Similarly, where a party has the right to terminate the contract, careful regard must be had to the applicable termination provisions in the contract.

See our article for more information on force majeure and COVID-19.

Frustration

What is frustration?

In the absence of a force majeure clause, contracting parties may consider relying on the common-law doctrine of frustration. Frustration discharges a contract where an event occurs that renders it physically or commercially impossible to perform, or transforms the obligation to perform into one radically different than envisaged at the time of contracting.

Frustration is a narrow doctrine that is applied strictly by the courts to prevent parties from using it to escape a bad bargain.

Elements of frustration

The test

Frustration applies only in extreme scenarios, and the threshold for establishing that a contract is frustrated is very high. Though there is no definitive test for frustration, generally a contract may be frustrated where:

- the frustrating event occurs after the contract has been formed;
- the event is beyond what was contemplated by the parties on entering the contract and is so fundamental that it strikes the root of the contract;
- neither party is at fault; and
- the event renders performance of the contract impossible, illegal or radically different from that contemplated by the parties at the time they entered into the contract.

For frustration to occur, it must be demonstrated that the event affects the main purpose of the contract.¹³ The main purpose of a contract is often held to be narrow, and may be capable of fulfilment even where several important elements can no longer be delivered. Where a non-trivial part of the contracted performance can still be

performed, the contract will be held not to have been frustrated.¹⁴

All relevant factors, including the wider contract and factual circumstances, will be taken into account by the court when considering whether a frustrating event has occurred.

Events

Types of events that have been held to frustrate a contract include war, incapacity or death, cancellation of an event, a change in law, destruction of subject matter, or an abnormal delay.

An increase in hardship or financial loss in performing the contract, however, will not amount to frustration.¹⁵ Certain types of contracts, such as charterparties and contracts for the sale and carriage of goods, may be more susceptible to frustration on the occurrence of a specified event that clearly makes performance impossible.

On the face of it, a pandemic such as COVID-19 could be considered a frustrating event. In practice, however, it will more likely be the consequences flowing from the COVID-19 outbreak that qualify.

In particular, given the introduction of wide-ranging government restrictions as a result of the pandemic, certain contracts may be said to be frustrated on the basis that performance would no longer be legal.

Beyond contemplation

Frustration requires that the supervening event was unforeseeable. If the supervening event was in some way contemplated at the time of contracting, it is more likely that the parties will have impliedly taken account of (and allocated) the risk that it would occur when contracting.

Even if parties have not expressly provided for an event, they may still be held to have foreseen it, which will usually prevent reliance on frustration. The courts will take into account all factors when considering the parties' knowledge, expectations and assumptions regarding the risk that a particular event might occur at the time of contracting.¹⁶

Impossibility

Generally, to prove that a contract has been frustrated, performance of contractual obligations must be shown to be genuinely impossible. It is not enough that obligations have become extremely difficult, even if they would result in devastating hardship on a party. If any manner of performance remains an option, this must be taken, regardless of the burden it would inflict on the party.

Many of the effects and the measures introduced as result of COVID-19 will be temporary. Depending on the nature of the contract, it may therefore be difficult (though not impossible) to show that performance has become genuinely impossible and not merely temporarily delayed.

Consequences of frustration

Where frustration is successfully invoked, the contract is automatically terminated and all parties are released from their obligations. As the contract is terminated immediately, the parties are not restored to their pre-contractual position. This may result in an unfair or uncommercial outcome. If the Law Reform (Frustrated Contracts) Act 1942 does not apply, then money paid before the frustrating event is only recoverable where there has been total failure of consideration.¹⁷

The Act applies to commercial contracts, with the exception of contracts that have expressly excluded it. Certain shipping, insurance and perishable goods contracts also fall outside the scope of the Act.

Where the Act applies, money paid before the frustrating event can be recovered and unpaid sums that are due cease to be payable.

A party may also be able to retain an amount of the money paid to cover incurred expenses. Additionally, the court may require a party to pay a just sum for a valuable benefit received under the contract.

Relationship with force majeure

Where a contract contains a force majeure clause, it is unlikely the parties will be able to argue frustration. This is because the parties will be viewed as having already made express provision for the consequences of a particular supervening event in the contract itself.¹⁸

However, because force majeure clauses are viewed in a restrictive way, the courts will need to be satisfied that the wording of the force majeure clause covering the event is “full and complete” before concluding that frustration is not applicable.¹⁹ If complete provision is made for the precise scenario that has occurred, the parties will not be able to rely on frustration.

See our article for more information on frustration and COVID-19.

Conclusion

Force majeure and frustration, where applicable, both provide relief for parties who through no fault of their own can no longer perform their contractual obligations. However, they are concepts that are applied restrictively by the English courts.

Force majeure clauses are likely to provide a more appropriate and pragmatic solution to the issues posed by the supervening event, as the terms will have been negotiated by the parties.

By contrast, frustration sets a higher threshold to relief and its consequences are automatic. Accordingly, defaulting parties should review their contracts carefully for any applicable force majeure provisions before considering arguing frustration, which is often viewed as a remedy of last resort.

In either case, given the severity of the potential commercial consequences where a party wrongfully declares force majeure or frustration (including termination of the contract by the other party and facing a damages claim for repudiatory breach), any contractor considering taking these drastic options should tread carefully and take appropriate legal advice, especially in such volatile times as these.

¹ *Channel Island Ferried Ltd v Sealink UK Ltd* [1998] 1 Lloyd's Rep 323

² *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240

³ *Tandrin (Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] 2 Lloyd's Rep 668

⁴ *Thames Valley Power Limited v Total Gas & Power Limited* [2005] EWHC 2208

⁵ *Tennants (Lancashire) Ltd v G S Wilson & Co Ltd* [1917] AC 485

⁶ *Tennants*

⁷ *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404

⁸ *P.J van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep 240

⁹ *Tennants*

¹⁰ *Re Lockie and Craggs* (1901) 86 L.T. 388

¹¹ *Intertradedex v Lesieur* [1978] 2 Lloyd's Reports 509

¹² *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All ER (Comm) 34

¹³ *Denny Mott & Dickson Ltd v James Fraser & Co Ltd* [1944] AC 265

¹⁴ *Leiston Gas Co v Leiston-cum-Sizewell UDC* [1916] 2 K.B. 428

¹⁵ *Tsakiroglou v Noble Thorl* [1962] AC 93

¹⁶ *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517

¹⁷ *Chandler v Webster* [1904] 1 KB 493

¹⁸ *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP

¹⁹ *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435

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