COVID-19

Force Majeure, Frustration and Illegality in English Law: a Detailed Guide

At the start of the coronavirus crisis, in March 2020, Peter de Verneuil Smith QC, Adam Kramer QC and William Day of 3 Verulam Buildings offered a detailed guide for analysing the impact of the 2019 novel coronavirus disease (COVID-19) on commercial contracts. This guide has now been updated in April 2021 in light of developments over the last year.

1. Keep the doctrines distinct

- It is helpful to group the relevant rules for supervening events into three categories:
  (i) force majeure,
  (ii) frustration, and
  (iii) supervening illegality (of the governing law, or the law of the forum, or the place of performance).
- Categories (ii) and (iii) are often lumped together, but it is sensible to separate them out. When illegality is involved, in addition to the private interests of the parties, issues of public policy are engaged: *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd [2010] EWHC 2661 at [100] (Beatson J).* Public policy creates the scope for additional arguments. We explore those at points 7 and 8 below.

2. Start with the force majeure clause

- Always start by checking whether there is a force majeure clause. Force majeure clauses provide certainty to the questions being faced by turning them into ordinary construction of contracts questions, in contrast with common law doctrines which require resort to general legal principles and detailed case law. In addition, the existence and scope of the force majeure clause is very likely to affect any argument about frustration. That is because, if the contract contemplates the supervening event or type of event, it cannot be said that the supervening event renders performance of the contract radically different from that contemplated at the time of contracting.
- The clause does not have to be labelled *"force majeure"*. What you are looking for, in substance, are clauses which anticipate that there may be some sort of supervening event beyond the control of the parties, be it factual (such as a pandemic causing staff to be ill and unable to work) or legal (such as restrictions imposed in reaction to a pandemic which might prohibit staff from travelling to work and cause them to be unable to work), which may affect the performance of a contract. Such clauses may be very specific in the events listed, but may also be general (for example, making reference generally to acts of government, or to performance having to be lawful, or to anything preventing performance that is beyond the party's control).
- Force majeure clauses are construed restrictively and often subject to implied limitations. For example:
  - In *Metropolitan Water Board v Dick Kerr & Co [1918] AC 119 (HL),* the clause purported to cover delays "*howsoever caused*". Despite this very wide language, the House of Lords held that the clause nonetheless did not cover substantial delays caused by the First World War: properly construed the force majeure was only intended to cover minor delays.
  - Similarly, in *Notcutt v Universal Equipment Co (London) Ltd [1986] 1 WLR 641 (CA),* the Court of Appeal was faced with an employment contract which included a force majeure clause which suspended salary when the employee was absent from work for sickness or incapacity. The Court held that this clause was not engaged where the employee had a heart attack leading to permanent disability.
- There are two caveats to this:
  - First, many of these decisions (including the two above) are cases where the court considers that the contract would be frustrated at common law, and the question then is whether the force majeure clause makes a difference. The outcome is influenced by that order of legal reasoning. Where there is no question of frustration, the impact of the force majeure clause may be different.
  - Second, this restrictive approach to force majeure clauses has echoes of the traditionally strict approach taken to exemption clauses: *Great Elephant Corp v Trafigura Beheer BV [2013] EWCA Civ 905 at [25] (Longmore LJ)*. But the modern approach to exemption clauses is to apply "*normal*" principles of construction because the clauses are subject to statutory regulation under the *Unfair Contract Terms Act 1977 (UCTA)*. In principle, UCTA may also apply to force majeure clauses: see *Chitty on Contracts (Sweet & Maxwell, 33rd ed, 2019)* at paragraph 15.167. If that is right, it might, as with exemption clauses, encourage a court to adopt the ordinary approach to construction, where ambiguity in the clause is not construed restrictively.
- Many phrases in force majeure clauses are boilerplate and have been well-litigated. You should bear previous cases in mind although these are not determinative. For example:
  - The language of "*Act of God*" is said to mean:

    "*such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect*"

    (Nugent v Smith (1876) 1 CPD 423, 426 (Cockburn CJ)).

    Historically, Acts of God have been linked to natural disasters such as floods and earthquakes. It could be argued that the phrase should be limited to such "*one off*" events which "*involved no human agency*": *Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61 at [59] (Lord Hobhouse)*. On balance, however, it seems to us that pandemics are really a natural disaster occurring on a microscopic rather than meteorological or geological plane (see the ten plagues of Egypt) and may be within the natural meaning of the phrase, subject to the particular terms of the contract. We note that this argument is consistent with the decision of the US District Court in the Southern District of New York on 16 December 2020 in JN Contemporary Art LLC v Phillips Auctioneers LLC (No. 20-CV-4370) which held that "*it cannot seriously be disputed that the COVID-19 pandemic is a natural disaster*" for the purposes of a force majeure clause in an auction agreement that referred expressly to "*natural disasters*".
  - The language of "*force majeure*" itself can sometimes be used in the clause to define and describe the relevant event triggering the clause: see, e.g., clause 5(b) of the ISDA Master Agreement 2002. This is wider that the language of "*Act of God*" because it can extend to human interventions. However, its precise scope will depend on the wider language of the clause and the context in which the contract was concluded: see *Lebeaupin v Richard Crispin & Co [1920] 2 KB 714, 719–720 (McCardie J)*.
  - While the *PLC long form force majeure clause* deals with "*epidemics and pandemics*", which almost certainly covers COVID-19, many force majeure clauses still do not mention diseases, epidemics or pandemics. This is, of course, likely to change in future contracts.

- There have been limited examples of reported force majeure disputes since the start of the pandemic. In *Fibula Air Travel SRL v Just-US Air SRL [2020] EWHC 3048 (Comm)*, in the context of an injunction application, the claimant contended that a wet lease for the charter of an aircraft for commercial flights between Romania and Turkey had terminated by force majeure on 17 March 2020, the day before the first instalment was due. Jacobs J doubted (although did not have to finally determine) the strength of that case: while the pandemic had struck by that stage, commercial flights were not suspended between the two countries until some weeks later. This underlines the importance of identifying precisely what is said to impact contractual performance. On normal force majeure wording, you cannot simply rely on the fact of the pandemic itself: you have to pinpoint the relevant consequences of the pandemic upon performance .
- In construing force majeure clauses in COVID-19 disputes, it will no doubt be tempting to make reference to two major pieces of COVID-19 litigation, both of which have some limited read across for the topic of this note.
- In a trial of preliminary issues in *Travelport Ltd v Wex Inc [2020] EWHC 2670 (Comm)*, the Commercial Court was asked to consider a material adverse change ("*MAC*") clause in a share purchase agreement for a payments business which primarily operated in the travel sector. The buyer sought to rely on the MAC clause to avoid having to complete the transaction. The MAC clause was structured broadly with then numerous carve outs, two of which made reference to "*pandemics*" and changes to "*tax, regulatory or political conditions*". But there was then an exception to the pandemics carve out, allowing pandemics to count where it could be shown that the pandemic had had a disproportionate effect on the businesses of the companies being sold versus other "*participants*" in their "*industries*". Cockerill J concluded that the relevant industry was the payments industry generally not a "*travel*" payments industry. For present purposes, two things are striking:
  - First, the Court's analysis was primarily textual, and focused on the words used by the parties in preference to arguments about context or commercial common sense. The MAC clause in Travelport was clearly the product of bespoke negotiation; force majeure clauses typically use more boilerplate, and so the words used may yield to a more context-sensitive analysis.
  - Second, in light of the "*dearth*" of English authority on MAC clauses, the Court was willing to look at Delaware authority and US academic commentary to assist in its analysis. While the Court will always have in mind the approach taken in other common law jurisdictions, this point is less likely to arise for force majeure clauses because of the wealth of existing case law in this jurisdiction.
- For these reasons (and subject to one point we note in the next part) any read-across from Travelport to force majeure clauses should be made cautiously. It shows consideration of the COVID-19 pandemic being a materially adverse change and having a disproportionate effect on some businesses, but this falls (quite far) short of the test for force majeure or frustration.
- In *Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1*, in which one of the authors of this guide appeared, the Supreme Court decided a test case related to the application of certain non-damage business interruption insurance coverage clauses to the COVID-19 pandemic and its effects on businesses. The legal area is plainly very different to that considered here, but the decision may be of the following limited uses:
  - First, albeit in the context of insurance clauses that were expressly triggered by notifiable diseases (a certain category of infectious human diseases designated as imposing notification obligations in the UK when they are spotted), part of the Supreme Court's reasoning in relation to how the requirements of causation were to be applied depended upon it being foreseeable that some infectious diseases can spread rapidly, widely and unpredictably (see paragraph 194). That said, the fact that insurance exists against something does not mean that the relevant event is foreseeable and so cannot frustrate a contract or trigger a force majeure clause: it is the job of insurance to make provision for unlikely catastrophes and other events.
  - Second, whether COVID-19 and the Government's reaction to it "*prevented*" use of or access to premises (a concept employed in some force majeure clauses) was considered in some depth, applying similar concepts of impossibility but in an untechnical and relatively expansive way (see e.g. paragraphs 150 to 155).

3. Force majeure clauses: requirements, formalities and effect

- A force majeure clause is based on the parties' agreement. Its requirements and effects will be those stipulated by the parties in the contract. Subject to the express language in each case, you should have in mind the following issues.
- First, the party seeking to rely on the force majeure clause will bear the burden of proof to (i) demonstrate the scope of the clause and (ii) demonstrate that the facts in question fall within that scope: see, for example, *Great Elephant at [31] (Longmore LJ)*. That said, if the facts at first analysis are shown to fall within the scope of the clause, the burden may then shift to the party relying on a carve out to prove that the facts actually fall into the carve out, based on the evidential practice that the party who asserts must prove: see, by analogy, *Travelport at [279] and [311] (Cockerill J)*.
- Second, the non-performance must be due to circumstances both beyond the control of the party and for which the party had not assumed responsibility. This will usually be implied if not an express term. See *Fyffes Group Ltd v Reefer Express Lines Pty Ltd [1996] 2 Lloyd's Rep 171 at [196] (Moore-Bick J)*, describing this as a "*presumption*" (that is, a rebuttable presumption as to the construction of the clause).
- Third, there must therefore have been no reasonable steps which could have been taken to avoid or mitigate the supervening event or its consequences. This ties into the self of self-induced impossibility, which runs through all three of these doctrines: see point 10 below. But it is convenient to make a couple of observations here:
  - Compliance with UK government guidance following the outbreak of COVID-19 is likely to be relevant. For instance, a performance date under a contract may fall during a time when UK government guidance applies. This may lead to complexity in cases where performance is dependent on different sectors of the economy, where some sectors in the supply chain are permitted under UK government guidance to work, but other sections are not.

— But if the non-performing party has not complied with government guidance or other good practice then that may debar that party from relying on force majeure. See e.g. the example given in *Treitel, Frustration and Force Majeure (Sweet & Maxwell, 3rd ed, 2014)* at paragraph 14.014, of a farmer who failed to spray his potato crop, that then died of disease). A COVID-19 example might be for force majeure to be disallowed if a regime is introduced permitting businesses to operate where employees have been regularly tested, but the employer elects not to have its employees tested.

- Fourth, although it will in each case depend upon the particular wording of the force majeure clause, many clauses exclude foreseeable and/or foreseen events. This requirement, where present, will have to be construed with some common sense:

  — While in every case it is foreseeable with sufficient reflection that even a highly rare natural disaster, war, pandemic or other event might occur (as such things are physically possible and have some historical precedent), the parties cannot have intended such a broad meaning of foreseeability, otherwise the force majeure clause would never be satisfied and so have no effect. Instead, and taking colour from the listed events often intended to be covered (riot, earthquake, flood etc), the question is likely to be that the parties would have to foresee the particular event with some degree of specificity beyond the general.

  — In the COVID-19 context, parties contracting before the first wave of the pandemic are not likely to have reasonably foreseen the pandemic in the relevant sense (save in the grey area of contracts entered into after developments in the Wuhan province began to be reported in the international media but before it became local news and before the impact was felt worldwide). In contrast, it will be much hard to argue force majeure in respect of contracts entered into after the pandemic started. Even if the parties contracted in the period between waves of the pandemic, when restrictions were relaxed, the prospect of a second wave was reasonably foreseeable and – unless the parties directly address that possibility in their contractual terms – the parties will likely be taken to have accepted that risk and cannot escape it through general force majeure wording.

  — Where the force majeure clause does not expressly exclude foreseeable and/or foreseen events, we have not found an English authority which say that there would be an implied term to that effect. Further, it would be odd if this were an implied requirement for a force majeure clause since this is not a requirement in the common law of frustration (see point 4 below) and force majeure clauses generally seek to capture a wider array of events than frustration. However, the more foreseeable an event, the more it might be preventable or avoidable and thereby be a risk assumed by the relevant party or at least within its control or due to its fault (depending upon the circumstances – fault is not likely to be important in the COVID-19 context).

- Fifth, the formalities specified in the contract are important. Notice invoking force majeure may need to be given in a particular way, or in a particular time period, or the event or consequences may need to be certified by an independent state or other body. The leading case is *Bremer Handels GmbH v Vanden Avenne Izegem PVBA [1978] 2 Lloyd's Rep 109*. Two key points are:

  — The first is that formalities only matter if "*framed as a condition precedent*" (at 113). That will be a question of construction in each case.

  — The second is that, even if framed as a condition precedent, formalities can be waived (at 116 – 117). Waiver is an omnibus term which catches a range of different doctrines including forbearance, election and estoppel. As Lord Wilberforce said in Bremer, this is fact-sensitive and "*turns upon an analysis of the communications passing between [the parties]*".

  — However, even if there is an arguable waiver, many contracts contain no oral variation clauses. No oral variation clauses now take effect according to their terms: *MWB Business Exchange Ltd v Rock Advertising Ltd [2018] UKSC 24*. The extent to which this decision tracks across to a no oral waiver clause is likely to vary depending on exactly which waiver doctrine is being invoked.

- Sixth, the consequences of a force majeure clause will also depend on the express terms of the clause. Normally parties agree to suspend performance, or excuse liability for non-performance, rather provide for an automatic discharge of the contract. Sometimes a long stop date is included. Other times there is no longstop. In the latter scenario, parties facing indefinite suspension will want to consider their ability to terminate at common law, by express provision or by implied provision.

- COVID-19 unfortunately may not be the last pandemic we experience in our lifetimes. Going forward, drafters will want to think carefully as to how to allocate the precise scope of risks in respect of future pandemics. There no doubt will be cases where the start date of the COVID-19 pandemic in the UK is disputed, and expensive expert evidence may be required to resolve that issue. Such disputes will be eliminated if force majeure clauses identify which body is determinative for deciding questions as to start and finish and impact of the pandemic (the World Health Organisation or the UK government, for instance).

4. Frustration: general considerations

- After force majeure clauses, the next port of call is the common law doctrine of frustration. Putting aside supervening illegality cases (see points 7 and 8 below), frustration arises because of the effect of the supervening event on performance, or on the reason for bargaining for that performance in the first place. The best expression of the general test remains at set out in *Davis Contractors Ltd v Fareham UDC [1956] AC 696 (HL) 729 (Lord Radcliffe)*:

  "*frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*"

  In the most recent major frustration case, *Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335 (Ch)*, Marcus Smith J described this as having stood the "*test of time*" (paragraph 22). We think it is the right starting point.

- Frustrating events are not the same as unforeseeable, reasonably unforeseeable or unforeseen events. This was clarified in *The Sea Angel [2007] EWCA Civ 547*. However, if the supervening event was in some way in contemplation at the time of contracting, it is more likely that the parties will have impliedly allocated the risk of it (see point 5 below) which would prevent frustration. Conversely, if the supervening event was not in contemplation, it is more likely that the parties have not allocated its risk and that may give greater scope to the frustration arguments. As Rix LJ explained in *The Sea Angel 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 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.*"

- Frustration only emerged as a contractual doctrine in the late nineteenth century just as the frequency and extent of pandemics were being reduced by advances in public health and medicine. Perhaps for that reason we have not found an English case considering frustration by pandemic before COVID-19. Despite the comparisons made in the press between the current crisis and the Spanish Influenza of 1918, there do not appear to be any reported judgments arising from that epidemic addressing the doctrine of frustration.

- There appear to have been few frustration claims following the onset of the pandemic. The only English judgment we could find is *Salam Air Saoc v Latam Airlines Group SA [2020] EWHC 2414 (Comm)*. This was a without notice application to injunct demands under standby letters of credit which had been issued to secure rent in respect of three aircraft leases. The applicant argued that it had an arguable case that the leases had been frustrated because of the restrictions imposed on passenger flights in Oman, where it was based. Foxton J considered this argument "*far too weak*" to justify the injunction. The relevant lease was a dry charter, such that, from the owner's perspective, it was irrelevant whether the aircraft were used at all. All the lessor cared about was the payment of rent over a six-year period. To put the matter beyond doubt, the payment of rent was also expressed to be on a so-called "*hell or highwater*" basis. The obligation to pay rent was expressed to be "*absolute and unconditional irrespective of any contingency whatsoever*", the total constructive loss of the aircraft, their requisition or even their ineligibility to be used in a particular business or trade. Plainly the risk of the aircraft being useless was allocated to the lessee.

- In advising on frustration, it is helpful to have in mind three subcategories: (a) impossibility of agreed performance; (b) the mutually agreed purpose of the contract becoming impossible (impossibility of the "*commercial adventure*"); and (c) a significant change to a mutually agreed state of affairs (e.g. destruction of the subject matter of the contract or cancellation of an event). These subcategories overlap. Disputes arising from commercial contracts due to the impact of COVID-19 no doubt will engage all three subcategories.

- An example under (a) is *Pissard v Speirs and Pond (1876) 1 QBD 410* where an opera singer fell ill and was not able to perform on the opening night on 28 November 1875 but recovered by 4 December 1875. Blackburn J (the founding father of the law of frustration) held her contract with the opera company to be frustrated because "*it must have been of great importance to the defendants that the piece should start well*". The illness left the singer unable to perform and went to the "*root of the matter*" between the parties (at 414).

- In the COVID-19 context, and still leaving aside illegality, impossibility of this sort may arise because there are insufficient staff, raw materials, transport providers etc to perform the contract. In *Howell v Coupland (1876) 1 QBD 258* a farmer who had promised potatoes from a specific source was not liable for producing only part of the specified quantity when the remainder of the crop was killed by disease. That case probably depends upon the fact that the contract was for goods from a source specified in the contract (see further *Frustration and Force Majeure* at paragraphs 4-052 to 4-055) which is uncommon in domestic commerce although still common in international trade, but nevertheless provides an example of disease rendering performance impossible and so (to that extent) frustrated.

- The "*coronation cases*" are examples of (b) and (c): *Krell v Henry [1903] 2 KB 740 and Herne Bay Steam Boat Company v Hutton [1903] 2 KB 683*. These cases arose from the cancellation of coronation events due to King Edward VII's ill-health. In Krell the contract (hire of a flat) was held to be frustrated; in Herne Bay (hire of a boat) it was not.

- The difference between the two cases is best understood on the basis that there was an implied term in Krell that the coronation would go ahead. The same implied term did not exist in Herne Bay. This underlines that it is not enough to point the unprecedented impact of COVID-19: the argument has to be framed by reference to the express and implied allocation of risk in the contract. We turn to this next.

5. Frustration: express and implied allocation of risk

- In COVID-19 cases, impossibility is not the end of the frustration enquiry. Disputes will often be resolved by considering the allocation of risk.

- A potentially significant dictum in the current crisis comes from *Herne Bay at 691 (Vaughan Williams LJ)*:

  "*I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake [i.e. taxi] to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain.*"

- This dictum may make you think twice about running a frustration argument for COVID-19 where it is the purpose that has been frustrated (rather than the performance being impossible or illegal: as to the latter, see points 7 and 8 below). But Herne Bay does not overrule the principle that frustration is ultimately determined by the terms of the contract. The theory that frustration is governed by the express and implied allocation of risk in the contract is currently unfashionable: see Marcus Smith J in *Canary Wharf at [26]*. Nonetheless, in most cases, the contractual terms will be determinative of the dispute.

- In Canary Wharf itself, the case was resolved based on the express terms of the lease. As is well known, the European Medicines Agency (EMA) unsuccessfully sought to escape a 25-year lease on a London skyscraper by arguing that the lease would be frustrated when UK ceased to be an EU member state. Brexit, it claimed, represented a frustration of common purpose. But the lease itself contemplated that the EMA's headquarters might not remain in Canary Wharf for the duration of the lease. That was because, subject to (albeit onerous) conditions, the lease expressly permitted the EMA to assign or sublet the property in part or in its entirety. Thus the EMA took the risk of its purpose for taking the lease vanishing, because it bargained for the right to transfer it to another party.

- Similarly, the Herne Bay dictum above considers a leisure trip where the purpose (the Epsom races) is frustrated. In the present context, a contract to supply toilet paper is not likely to be frustrated because the corporate customer's premises are closed and so they do not need or want the toilet paper, but may still be frustrated because delivery has become impossible or illegal from either the supplier or customer's point of view.
- And much may turn on the length of the impossibility as compared with the length of the contract period.
  - So, for example, in a US case, Montgomery v Board of Education 131 NE 497 (1921) (Supreme Court of Ohio), an 8½ month contract with an individual to supply horse transport services to a school for its pupils was not frustrated by temporary closure of the school by the local board of health during an influenza epidemic. This may be because the closure was short, or (and this comes out of the reasoning of the court in that case) because the risk of closure was not intended to be shared with the claimant but rather to fall on the school. But, as set out below, things might well have been different if the law had made it illegal for the claimant to continue his trade and pick up pupils.
  - Another example arises from the SARS outbreak. In Wing v Xiong (DCCJ 3832/2003, Hong Kong District Court) a 10-day isolation order prevented the claimant from reaching his flat in Kowloon, Hong Kong. The claimant said that this frustrated the lease and discharged him from having to pay any further rent. The court disagreed because the lease was for 2 years. A 10-day exclusion from the property was "*insignificant*" in that context (see paragraph 11).
- Finally under this heading: does the identification of a particular risk in a force majeure clause exclude the common law of frustration because the parties have considered and made some provision for the risk? The answer is: "*sometimes but not always*".
  - In *Bank Line Ltd v Arthur Capel & Co [1919] AC 435 (HL)* a time charter was held to be frustrated when the ship was requisitioned by the Government. The charterparty contained a force majeure clause which expressly identified that as a relevant event. Lord Sumner held that there could still be frustration because the clause did not make "*full and complete*" provision for the events in question.
  - This has since been understood as asking whether the clause makes full and complete provision for the "*effects*" of the event in question upon the parties' rights and obligations: *The Florida [2006] EWHC 1137 (Comm) at [12]* (Tomlinson J).
  - As mentioned above, in our experience many force majeure clauses still do not expressly deal with pandemics or not expressly set out the full consequences of such an event, and so there is likely to be much argument over this issue.
- These issues have been tested in recent US disputes:
  - On 8 February 2021, the Massachusetts Superior Court decided in UMNV 205-207 Newbury LLC v Caffé Nero Americas Inc, No. 2084-CV-01493-BLS2, the shutdown of dine-in custom at a Boston café due to COVID-19 was held to frustrate the purpose of a 15-year lease where the lease specified the contemplated purpose of primarily dine-in custom. Since that was the only thing which the lessee was allowed to do with the leased property, frustration was found despite the existence of a force majeure clause (which was fairly narrow and did not address the relevant risk). The judge added that if the lease had allowed the tenant "*to use the leased premises for other purposes not barred by government order*", then the obligation to pay rent might not have been discharged.
  - In contrast, in the Texan decision in In re CEC Entertaining Inc (No. 20-33162) and the Southern District of New York decision of The Gap Inc v Ponte Gadea New York LLC (No. 20-CV-4541-LTS-KHP) (handed down on 14 December 2020 and 8 March 2021, respectively), the (untriggered) force majeure clauses were held to supersede the operation of frustration of the relevant leases, and the premises were still usable for business despite the pandemic – albeit on a more restricted basis.
  - As these cases demonstrate, the contemplated purpose in the lease is of some importance. However, in our view, lessees will generally face an uphill battle in arguing that the risk of their being unable to continue their business has not been impliedly assumed by them, the landlord not being part of or interested in that business. In this jurisdiction, the recent Canary Wharf decision itself acts as a reminder of the difficulties faced by lessees who raise frustration as a defence.

6. Consequences of frustration

- Whereas force majeure clauses usually temporarily suspend a contract (or otherwise provide for bespoke effects of invocation), frustration discharges a contract. That means all current and prospective rights and obligations are cancelled. Frustration does not merely suspend performance (although there are a few dicta to the contrary in pockets of case law). And frustration does not work retrospectively at common law. Past performance is not automatically unwound. Nor is the contract void ab initio.
- An important practical question for the party which was due to receive performance is what claims, if any, can be made against the non-performing party after frustration takes place?
- First, there are statutory claims. In most cases, the parties will then have a claim to under the *Law Reform (Frustrated Contracts) Act 1943* (1943 Act). Space precludes detailed discussion but, in summary:
  - Section 1(2) allows claims for money paid before discharge and section 1(3) allows for recovery of non-money benefits.
  - The leading case on section 1(2) is *Gamerco SA v ICM/Fair Warning (Agency) Ltd [1995] 1 WLR 1226 (Com Ct)*, where Garland J adopted a broad and flexible approach to the claim based on loss apportionment.
  - The leading case on section 1(3) is *BP Exploration (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783 (Com Ct)*, where Goff J adopted a more structured and technical approach to the claim, forcing it into a restitutionary analysis.

— The tension between the two cases has not yet been resolved. As a result, it is difficult to predict in advance how a court would now approach the quantification of claims under the 1943 Act. This is an important issue which is likely to go on appeal before there is certainty as to the approach to be taken. Given the massive number of contracts affected by COVID-19 we anticipate appeals on this issue and the other areas of uncertainty will be expedited to give legal certainty to commercial parties as soon possible so that other disputes can be settled without litigation.

- Second, there are common law claims. Section 2 of the 1943 Act excludes contracts for carriage of goods by sea, the sale of specific goods, insurance contracts, and certain charterparties. And even where the 1943 Act does apply, the common law is available in the alternative. In these cases, any claim would be in unjust enrichment, likely for total failure of consideration. Well-known difficulties arise for a "*total*" failure where (as is often the case) the contract is partly performed. See further *Goff & Jones: The Law of Unjust Enrichment (Sweet & Maxwell, 9th ed, 2016)* at paragraphs 12.16–12.32.

7. Supervening English law illegality

- We now move from the impact of the fact of the pandemic to the impact of legislative or executive actions in response to the pandemic. In an English law-governed contract, a contract is discharged if its performance becomes illegal by English law.
- This doctrine requires the illegality clearly to prohibit performance. Hindering performance, or making it more inconvenient, is not good enough. We expect this distinction will mean for many contracts affected by COVID-19 that they will not fall within the scope of supervening illegality doctrine.
- In *Waugh v Morris (1872–73) LR 8 QB 202*, a charterparty provided that a ship was to load a cargo from a port in France and deliver it to London. In London, the ship was prevented from landing the cargo by the authorities because of a fear about the spread of cattle disease from France to England. Blackburn J held that the contract was not frustrated: the charterparty required the cargo to be unloaded from "*alongside*" the vessel. Landing was not necessary: "*the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable*" (paragraph 207).
- A case like Waugh v Morris involves a blanket prohibition. But in most cases a prohibition is subject to discretionary exceptions. The question then is whether a party is under a duty to obtain to obtain the relevant consent from the authorities and, if so, whether that is an absolute duty or one involving reasonable or best endeavours. We return that in point 9 below.
- In *Frustration and Force Majeure,* Treitel argued that a supervening illegality should only discharge a contract if, at the time of contracting, that same illegality would have rendered the contract void or unenforceable (paragraph 8-001). There is some support for that in Waugh v Morris.
- However, after *Patel v Mirza [2016] UKSC 42*, the law for illegality at the time of contracting now involves the following exercise (Lord Toulson at [120]):

"*it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts?*"

- The Supreme Court has recently emphasised that Patel v Mirza applies whenever illegality is raised as a defence to a claim in private law, but that it built on existing law so Patel itself does not represent "*year zero*": *Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43 at [76] – [77] (Lord Hamblen).* However, it remains to be seen whether this value judgment approach to illegality at the time of contracting changes the approach to illegality arising after the time of contracting. In a recent decision (albeit on foreign law supervening illegality, discussed next) the Court indicated that there was some scope for a "*balancing exercise*" in supervening illegality cases, although the extent of the suggested read-across is not at all clear: *Magdeev v Tsvetkov [2020] EWHC 887 (Comm) at [331] – [332] (Cockerill J).*
- Finally, in the context of a discussion of illegality and COVID-19, one US case deserves mention. In Whitman v Anglum 103 A. 114 (1918) (Supreme Court of Connecticut) a milk seller's premises were quarantined as a result of hoof and mouth disease, his cows destroyed, and removal of any milk that could be contaminated was prohibited. The one-year contract to supply 175 quarts of milk per day was held not to be frustrated, and the buyer recovered damages for non-delivery. This result derives from the court's conclusion that the contract was not impossible due to illegality, the court interpreting the contract as not requiring the milk to be supplied from the quarantined address, and construing the risks resting on both sides where they fall rather than being shared. As regards risks on the buyer, there was a take or pay clause meaning the buyer had to pay whether he collected or wanted the milk or not, which presumably influenced the conclusion that the seller was liable whether or not it was able to supply.
- At present, it is difficult to foresee the impact of the doctrine of illegality in relation to COVID-19.
- The key legislation affecting UK businesses (the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) and similar) focus its fire on particular retail business and private behaviour. In-store shopping and in-restaurant dining had to end, and individuals had to stay at home save for particular specified travel reasons. People could travel for work where it was not reasonably possible to work from home. This regime typically did not render illegal the commercial supply of materials, operation of factories, or payment of money (for example), although it obviously impacted demand and profits heavily, matters which more usually implicate the doctrine of frustration which we have already considered.
- In contrast, albeit currently speculative, if current bouts of vaccine nationalism ultimately led to prohibitions on the export of certain goods beyond the UK, that would constitute a relevant supervening illegality for English law governed contracts. It still may be physically possible for the exporter to supply the goods but, in doing so, that person would commit an offence and that would furnish a lawful reason not to fulfil existing contractual commitments. Such a case (if it were to happen) would implicate the supervening illegality doctrine rather than frustration.

8. Foreign law supervening illegality

- Do not forget that foreign law supervening illegality is likely to relevant to international services or supply contracts.
- Article 9 of *Regulation 593/2008 on the law applicable to contractual obligations* (Rome I), now incorporated in English law, gives effect to overriding mandatory provisions of (i) the law of the forum or lex fori and (ii) at the discretion of the court, the law of the place of performance or the lex loci solutionis. Laws passed in response to a pandemic may be overriding mandatory provisions. Indeed, an attempt to put the matter beyond doubt, some of Italy's COVID-19 laws self-proclaim that they are overriding mandatory provisions. It is unlikely that this would bind an English court's hands: it would need to consider for itself whether the law in question meets the Rome I definition.
- From our perspective (that is, practitioners in the English courts) Rome I means:
  - An English law-governed contract litigated in England but to be performed elsewhere may be subject to the effect of any overriding coronavirus legislation in the place of performance (the lexi loci solutionis).
  - A foreign law-governed contract litigated in England may be subject to the effect of any overriding effect of the English law coronavirus legislation (as the lex fori);
  - A foreign law-governed contract litigated in England but to be performed in a third country may be subject to the effect of any overriding coronavirus legislation in that third country (the lexi loci solutionis).
- At common law, there is also a rule that a contract will not be enforced, even if lawful by the applicable law, if prohibited in the place of performance. This is the rule in *Ralli Bros v Compañia Naviera Sota y Aznar [1920] 2 KB 287 (CA).* The rule is controversial, and the prevailing view is that it is part of the law of frustration, although in a recent case (in which one of the authors of this guide appeared) the Court warned against the elision of this rule with frustration: *Banco San Juan Internacional Inc v Petróleos de Venezuela SA [2020] EWHC 2937 (Comm) at [78] (Cockerill J)*. If that is wrong and it is a choice of law rule (a view held in the early twentieth century), it has been replaced by Rome I. A third (and, we suggest, better) view is that the Ralli Bros rule is a law of the forum and therefore survives Rome I: *W Day, "Contracts, Illegality and Comity: Ralli Bros Revisited" (2020) 79 Cambridge Law Journal 64.*
- Whereas the cases on English law illegality draw no distinction between executive acts and legislative acts, the Ralli Bros rule only applies to legislative acts: see *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency [1925] 2 KB 172 (CA)*. Of course, it may be difficult to separate purely executive acts from purely legislative acts: in many cases, the executive will be exercising powers conferred by the legislature.
- There have been a number of attempts to expand the Ralli Bros rule to take into account laws other than in the stipulated place of performance (or English law). These have been firmly resisted over the years. The place of performance is given a narrow meaning and it is "*immaterial whether one party has to equip himself for performance by an illegal act in another country*": *Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728 (Com Ct) 745 (Staughton J).*
- That means that an obligor cannot use the Ralli Bros rule to invoke illegality in their place of residence or domicile or incorporation, where that place is not also where performance is stipulated under the contract. *Canary Wharf* itself is a recent example of an attempt to overturn this (the alleged supervening illegality being in EU law after Brexit). Another example is *Deutsche Bank AG v Unitech Global Ltd [2016] EWCA Civ 119*, where an Indian debtor attempted to argue that it could not repay a loan because it did not have central bank clearance. That was irrelevant because the place of performance of the payment obligation was New York.
- Note, however, that illegality in a third country (other than the place of performance or England) might in some cases give rise to frustration if it renders the contract impossible, as distinct from merely illegal. This again underlines how important it is to keep the illegality analysis separate from the wider frustration analysis.
- In conversations had with solicitors following the initial publication of this guidance last year, anecdotally it seems that other countries had initially passed regulations temporarily made certain commercial activities illegal (rather than just very difficult or impossible). However, this is just anecdotal evidence and we have yet to see any COVID-19 related article 9 or Ralli Bros reported judgments on this topic, even if it theoretically may be a more likely source of disputes than questions of English law supervening illegality (for the reasons which we explored at the end of point 7 above).

9. Obligations to remove a prohibition

- Most of the prohibitions currently envisaged by the UK government are not blanket prohibitions but build in an element of discretion. In other words, an exception can be made to a prima facie prohibition on an application to the relevant public authority.
- Contract law has long been accustomed to dealing with legislation framed in this way. For instance, the parties enter into an international sales contract, and a licence must be obtained before import or export. The licence is denied. What happens to the contract?
- In an unusual case, the contract may be construed as still requiring performance and discharged for illegality. But more often than not, the contract will be "*subject to licence*" and its express or implied terms will have placed a duty on one party to obtain the licence. Responsibility for the supervening event has been allocated. The failure to obtain the licence does not frustrate the contract but may lead to a claim for damages.
- We emphasise "*may*". There are some cases where one party has undertaken to obtain the relevant exemption from the prohibition. In *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL [1957] 1 WLR 273 (Com Ct)*, the sellers assured the buyers that the export licence was "*merely a formality*" and the only uncertainty was timing. Devlin J considered this conduct implied a term in the contract placing an absolute duty on the sellers to obtain the licence.
- However, in most cases, all the relevant party will have (expressly or impliedly) agreed is to make reasonable or best endeavours to obtain the licence: see, for example, *Re Anglo-Russian Merchant Traders and John Batt & Co Ltd [1917] 2 KB 679 (CA)*. If a licence is not obtained, the usual arguments will be had about whether the steps in fact taken by the relevant party discharged their endeavours obligation.

- In *Banco San Juan Internacional*, the Court extended this line of reasoning to foreign illegality cases. The Ralli Bros rule was held not to be available in circumstances where the foreign prohibition had a licensing regime, and the obligor had not applied for a licence or shown that such an application would necessarily fail. In other words, an English court expects the person seeking to escape their contractual commitments to have done everything reasonably possible to lawfully perform those commitments before allowing them to fall back on a supervening illegality defence, whatever the relevant law involved.

10. Your choices matter

- You need to carefully examine post-contractual conduct to see whether any choices made along the way (i) shut off avenues for performing the contract notwithstanding the supervening event, or (ii) were causes of the supervening event.
- That is because force majeure clauses, frustration and supervening illegality cases all draw their skirts up at a supervening event which is "*self-induced*". In *Canary Wharf*, at [206], Marcus Smith J rightly said that this was something of a "*misnomer*". The principle simply looks at:

  "*post-contractual events and actions which indicate that certain options – that might have ameliorated the frustrating event – have been closed off by the acts or omissions of the party claiming frustration*."
- To look at things another way, the force majeure or frustration event must be outside the party's control to be operative. See further point 3 above.
- The most famous example of "*self-induced*" frustration is *The Super Servant Two [1990] 1 Lloyd's Rep 1 (CA)*. The contract provided that a drilling rig would be carried from Japan to Rotterdam on either TSS1 or TSS2. The defendants intended to use TSS2, but it sank. By that time TSS1 was engaged for other contracts. Bingham LJ held that the contract was not frustrated. The inability to perform the contract came from the defendants' own decision to use TSS1 to honour other contracts.
- A difficult recent decision is *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2016] EWCA Civ 789*. Cottonex shipped 35 containers of cotton with MSC to Bangladesh. The bill of lading provided that, if there was a delay in returning the containers, a daily hire rate would accrue. A dispute arose between Cottonex and the party to which it was selling the cotton, and so the containers were held by Bangladeshi customs officials. The Court of Appeal held that the contract had been frustrated about eight months into the dispute, at which point the containers were to be treated as having been lost. This decision is problematic. Cottonex had promised to pay a hire rate until the containers were returned. It should not have been able to avoid the continuing hire rate by relying on its breach of contract to argue that the contract was frustrated and therefore at an end.

Conclusion

- The COVID-19 pandemic will lead to a wave of disputes as to which party bears the risks of non-performance. As this article seeks to show, there are some key principles which will help commercial parties assess the likely outcome of those disputes but as ever there are arguments both to widen and to narrow the relevant doctrines, and points of uncertainty in the case law.
- And if force majeure, frustration and illegality do not suspend or end the contract, then thoughts will turn to other effects. Most obviously, where the contract includes such a clause: whether there been a material adverse change (as in Travelport) or whether there has been an insolvency event or breach of an earnings covenant triggering termination or other effects; and whether there has been a material or repudiatory breach entitling termination under the contract or at common law. But such points go beyond the scope of this article.

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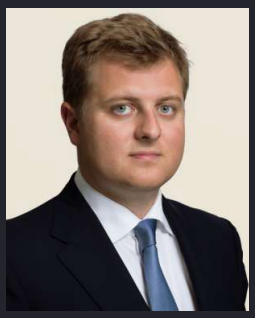

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