



# COVID-19, Force Majeure and Frustration:

Key legal principles and industry  
implications

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## Introduction

Around the world right now, companies – especially their in-house counsel – are pulling up from dusty databases the force majeure clauses of contracts. Often boilerplate, they have been rarely considered, because it is rare for an “*act of God*” or one of the other standard listed events to come up. Yet now, COVID-19 has arrived in full force. At a construction company, someone asks: “*We haven’t yet received raw materials from China due to the lock-down and logistics issues: can we rely on the force majeure clause as an excuse for delay in our work?*” In the pharmaceuticals sector, a representative poses the question: “*Thanks to Trump, sales of Hydroxychloroquine are through the roof, and we’re struggling to satisfy orders: can we refer to force majeure or frustration as regards any failure to supply?*” Elsewhere, at a large UK banking corporation, someone has just unearthed a contract with a force majeure clause and asks, “*Why is the governing law Japanese?*”

And so, force majeure and frustration have suddenly taken centre stage for parties who are either considering their remedies under existing contracts, or deciding what protections need to be built into their future contracts.

In this article, we set out the core legal principles as regards force majeure and frustration, consider their relevance in the context of COVID-19, and identify consequent issues for some of the major industries affected by the pandemic.

## Core legal principles and relevance in the context of COVID-19

We begin by examining the core force majeure principles, followed by an analysis of the COVID-19 implications, before turning to the legal doctrine of frustration and its significance in relation to the pandemic. Further below, we analyse the potential impacts for particular industry sectors. Of course, we address here the (relatively underdeveloped) current law, but recognise that this is an area of law that is likely to develop significantly, for obvious reasons.

### (a) *Force majeure principles*

1. **Function:** A force majeure clause lays down in what circumstances, and to what extent, parties will be excused from performing their contract. It enables the parties to control what is to happen if events outside the parties’ control prevent performance. It may extend to circumstances where the doctrine of frustration would not apply or, where there is an overlap, it may (as regards those matters for which the clause has made full and complete provision) exclude the rigid consequences imposed by that doctrine in favour of the solutions the parties have crafted for themselves. Where there is no express force majeure clause, it is unlikely one can be implied, since the existence of the doctrine of frustration makes it difficult to argue that the implication of such a clause is necessary.
2. **Definition of the force majeure events:** In English law, “*force majeure is not a term of art*” (*Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] 2 Lloyd’s

Rep 668 at 675). Whether an event amounts to force majeure is always a matter of construing the particular contract:

- a. The parties must define for themselves what they will treat as “*force majeure*” (in contrast to civil code jurisdictions, where this is often statutorily defined). They may list specific types of events (such as war, or strikes, or government intervention) and may in addition lay down criteria for recognising a force majeure event that is not listed (such as, “*any other causes beyond our control*”).
  - b. Any general “*sweeper*” words will be given their wider and natural meaning, and will not usually be limited to the categories of events preceding (or, as the case may be, following) them: *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240.
  - c. However, a court may in some circumstances be influenced by the list of events preceding (or following) the broad phrase. In *Tandrin*, the defendant claimed that the “*unforeseeable and cataclysmic downward spiral of the world’s financial markets*” in 2008 had triggered a force majeure clause, which contained a list of events and concluded with the words, “*any other cause beyond the Seller’s reasonable control*”. The court held (675) that the phrase should be read in the context of the entire clause: the list of events included, for example, acts of God, governmental actions and inability to obtain parts; the judge acknowledged that there was no requirement to limit the phrase to the categories preceding it, but ruled that it was “*telling that there is nothing in any of those specific examples ... which is even remotely connected with economic downturn, market circumstances or the financing of the deal*”. For a force majeure clause to release a party merely because performance has become economically more burdensome would require “*explicit terms*”: *Thames Valley Power Limited v Total Gas & Power Limited* [2005] EWHC 2208 (Comm). Thus, this result could not be derived from merely general language. Conversely, express language may make a specific economic change a matter that can be relied upon when otherwise (see below) it would not be.
  - d. Parties may also add words restricting what will be treated as a force majeure event (such as specifically requiring that the event be “*unforeseeable*” or “*unavoidable*” or excluding particular types of event).
3. **Elements that must be proved:** The onus is on the party seeking to rely on the force majeure clause to demonstrate that the case in question falls within the terms of the clause: *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd’s Rep 323. For example, whilst the China Council for the Promotion of International Trade, a quasi-governmental body, has been issuing force majeure certificates to many Chinese companies, the possession of such a certificate would not, of itself, prove that party’s entitlement to rely on force majeure as a matter of English law. In summary, the party must prove that:
- a. **Event occurred:** one of the events specified in the clause has occurred;

- b. **Causation:** by the occurrence of the event, the party has been prevented, hindered or delayed from performing – the event must have *caused* the non-performance (*Bunge SA v Nidera BV* [2013] EWCA Civ 1628 (the relevant clause was not in issue when the case came before the SC));
  - c. **Beyond control:** his non-performance was due to circumstances beyond his control (*B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419);
  - d. **Not avoidable:** there were no reasonable steps that the party could have taken to avoid the event or mitigate its results (*Channel Island Ferries* 327). This flows naturally from the requirement that the event be beyond a party's control (since a consequence that could have been avoided by reasonable steps may fairly be said to be within a party's control) and it may also be the subject of express contractual requirements as to mitigation, both before and after the event. The test of reasonableness here is fact-sensitive and introduces some flexibility (but clauses may be drafted to specify more stringent mitigatory requirements than that default).
4. **“Prevented”:** Where a force majeure clause refers to a party having been “prevented” (or been “unable”) to perform due to a relevant event:
- a. “prevention” means “physical or legal prevention” and not merely economic unprofitability (*Tennants (Lancashire) Ltd v G S Wilson & Co Ltd* [1917] AC 495);
  - b. in the case of supply chains:
    - i. an obligation to supply is generally only excused if it is an obligation which cannot be performed (*Dunavant Enterprises Inc v Olympia Spinning* [2011] 2 Lloyd's Rep 619) and not if supply is merely “commercially unacceptable or impracticable” or uneconomic (unless this is itself specified as a force majeure event, of course);
    - ii. it is insufficient for the seller to establish that his supplier cannot supply the goods, if the seller can obtain them from another supplier (*Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404);
    - iii. however, a seller in a string of contracts in a supply chain may be able to rely on a force majeure clause if, for example, it or a shipper higher in the chain was prevented by government embargo from providing goods after the seller (or someone above them in the chain) had already made arrangements to ship the goods, since in that scenario the seller is not under an obligation to seek to acquire equivalent goods afloat (*Tradax Export SA v André* [1976] 1 Lloyd's Rep 416);
    - iv. the force majeure clause will often specifically provide for what is and is not required by way of alternative steps a seller/purchaser must

take to obtain alternative supply, or other commercially reasonable steps.

5. **“Hindered”**: There is more flexibility if the clause refers to a party having been “*hindered*”. The expression means “*an interference with the manufacture or delivery from the same cause as ‘preventing’, but interference of a less degree*”: *Tennants*. In the latter case, the court held (510): “*to place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his contracts in order to fulfil one surely hinders delivery*” (emphasis added). However, the court also stated that a mere rise in price, making the contract more costly to carry out, would not be a “*hindrance*”. Again, there is flexibility introduced in terms of where the court will draw the line between the two positions.
6. **“Delayed”**: The clause may provide for an extension of time if there is a “*delay*” due to events beyond the parties’ control. “*Delayed*” is not necessarily the same as “*prevented*”, and circumstances which hinder may fall within the provision: *Chitty* [15-159]. It is also right that some clauses go beyond the “*prevented, hindered or delayed*” wording and take a more expansive, or at least different, approach.
7. **Sole cause**: As noted, the party seeking to rely on the force majeure clause must show that the relevant event *caused* his non-performance (for example, by preventing, hindering or delaying it). In *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All ER (Comm) 34, 52-53, the court stated that:
  - a. preceding authority establishes that “*a force majeure event must be sole cause of the failure to perform an obligation ... however ... the question is one of construction of the contract*”;
  - b. the contract expressly limited force majeure events such that only a government moratorium would qualify as a force majeure event under the relevant clause;
  - c. there were “*two effective causes*” of non-performance, one being a force majeure (a government moratorium on drilling) and the other not (the government’s unwillingness to approve a drilling plan);
  - d. on the facts, the drilling plan extended to an area wider than that subject to the moratorium and the absence of approval would have prevented drilling even had there been no moratorium, hence the impediment was an event which was *not* a force majeure, so the party could not rely on the clause.
8. **Economic considerations**: Under English law, adverse economic conditions will not generally constitute a force majeure event, or at least not “*unless the parties plainly contracted to that effect*” (*Tennants* at 510) in “*explicit terms*” (*Thames Valley*):
  - a. Even supposing extreme economic events, as occurred for example in 2008, a contractual payment obligation is unlikely to be rendered impossible (in the sense that the circumstances physically preclude payment from

being made, as opposed to the paying party lacking the funds to make it) and nor will such conditions generally excuse performance of other types of contractual obligations. In *Tandrin*, the court stated (675): “*It is well established under English law that a change in economic/market circumstances, affecting the profitability of a contract or the ease with which the parties’ obligations can be performed, is not regarded as being a force majeure event*”. Further, a supplier cannot normally rely on an increase in market price as a force majeure event; and the fact that a contract has become more expensive to perform, “*even dramatically more expensive*”, is not a ground to excuse performance based on force majeure or frustration.

- b. Importantly, however, in *Tandrin*, the court noted (676) that in the context of the clause before it, matters relevant to delivery of the aircraft in question would be caught by the clause, “*such as the seller being unable to deliver the aircraft on time due to a **pandemic** causing a dearth of delivery pilots*” (emphasis added).
- c. Moreover, in *Seadrill*, the court noted obiter (at 55) that whilst “*mere difficulty of additional expense*” may not trigger a force majeure clause there was authority in the context of an exceptions clause for drawing “*a distinction... between having to make a payment which meant the contract was unprofitable and having to incur a cost equal to a hundred times the contract price which would be ‘prohibitive’ or ‘entirely outside the contemplation of the parties’*” (*Brauer & Co v James Clark* [1952] 2 All ER 497 at 500, [1952] 2 Lloyd’s Rep 147 at 153 per Singleton LJ).

9. **Effect of clause:** The clause may require notice to be served to obtain the benefit of the clause, and the impact of the clause may, depending on its wording, be to suspend performance, extend time for performance, impose express requirements as to mitigation, render a party not liable, and/or trigger a right to terminate. The clause may also specify what is to happen in respect of any payments already made. If it does not do so, then arguably, if the event is of a type which would, absent the clause, have frustrated the contract, there remains scope for the application of the Law Reform (Frustrated Contracts) Act 1943. There may be scope for debate, depending on the exact wording of the clause, as to whether it operates to prevent any breach arising, or to exclude liability, and hence whether it is subject to the reasonableness test in the Unfair Contract Terms Act 1977. Even if the clause in question is not an exclusion clause, where it is in a standard form consumer contract it may be open to challenge under the Consumer Rights Act 2015, or the Unfair Terms in Consumer Contracts Regulations, which preceded that Act.

(b) *Relevance of force majeure principles to COVID-19*

It is clear that the principles of force majeure will have a significant impact in the context of COVID-19. We set out five key examples below:

1. **Function:** Parties may – depending on the impact of COVID-19 on their business – be looking either to escape contractual bargains, or to ensure they are enforced. COVID-19 may, for example, have caused disruption to a company’s supply chain:

lock-downs in jurisdictions may have led to decreased production of raw materials (due to workforce restrictions, factory closures etc), leading in turn to reduced supply to the company, which may then be unable to meet demand from purchasers. The company may well look to any force majeure clauses in the relevant contracts. The question as to whether force majeure clauses are triggered by COVID-19 will also be relevant in an enormous range of other contexts, going far beyond supply chain issues: such as sports, media, financial and banking transactions, construction, insurance, short-term rental agreements (chattels and land), etc. As discussed below, causation will be key: whether COVID-19 itself, or some related (or unrelated) factor, caused the non-performance.

2. **Events:** Clearly, parties will need to scrutinise the clauses to see whether the event falls within them. If the clause makes express reference to pandemic, epidemic or disease (or similar), that would obviously be relevant: but the boilerplate does not always contain those words. Where the clause includes terms relating to governmental intervention these could well be relevant, if the necessary causal connection can be shown. Around the globe, governments have taken steps ranging from lock-downs of citizens (of varying degrees) to prohibitions on certain commercial activity and it may well be the government intervention itself (rather than the disease) which has had a direct impact on the business, and its ability to function and perform its contract. Disputes may arise, however, where the impact arises from following Government advice, rather than mandatory requirements. Further, where a clause includes a “*catch-all*”, such as “*any other causes beyond our control*”, this is likely (subject to any issue that may arise in respect of mitigation) to include the direct consequences of COVID-19, such as staff absences and factory closures. However, indirect financial effects are more problematic (see *Tandrin* and the further discussion of economic factors, below).
3. **Proving causation:** Causation will be a major, and heavily fought-over, factor in any litigation. Importantly, courts will not allow a party to use a force majeure clause just to escape a bad bargain. Based on *Seadrill*, if a party wishes to rely on a force majeure event, he must normally establish that it was the *sole cause* of the party’s non-performance. However, if (as in *Seadrill*), more than one cause is in play, one being a force majeure event, the other not, that will make the matter more complex and construction of the clause will be crucial. Take the example of a supply chain: whilst the consequences flowing from COVID-19 may be a driver in a supplier’s non-performance, supposing that (say) the supplier had already been facing financial difficulties prior to the arrival of COVID-19, due to internal issues and/or matters of supply/demand stemming from other factors, then the factor that is the “*sole*” cause of non-performance may be more difficult to discern. Similar issues will arise as to the cause of non-performance if a construction company has been carrying out a project, and was already heading towards insolvency, and then COVID-19 came along and caused both the cessation of work and the final push to insolvency. Different results may ensue, depending on the exact wording of the clause. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd’s Rep 109 has been taken to stand for the proposition that a party seeking to rely on a force majeure clause does not need to show that “*but for*” the force majeure event they would have performed the contract. However, compare in this respect *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, where the Court of Appeal held that a supplier was not able to rely on a force

majeure clause to relieve it from liability for failure to supply because, properly construed, the clause (which relieved the parties from liability “*resulting from*” specified events) required the supplier to be ready willing and able to perform “*but for*” the force majeure event. It was held that “*a failure to supply the cargo (or even a cargo) does not ‘result from’ an event if in fact the event makes no difference because the charterer was never going to supply a cargo anyway*”. The Court of Appeal distinguished *Bremer Handgesellschaft* on the basis that the clause there under consideration had differed both as to its wording and its effect, in that it discharged the parties with immediate effect where they were “*prevented*” by the relevant event from performing, irrespective of whether they could otherwise have gone on to perform. Subtle differences in wording may have unanticipated consequences. It seems likely that the “*sole cause*” ratio may come under attack by parties seeking to argue that “*predominant*” cause should suffice.

4. **Prevention, hindrance and delay:** Parties will need to scrutinise the force majeure clause to assess whether it is couched in terms of prevention, hindrance and/or delay, or other language. “*Prevention*” language is quite restrictive, in that the party must establish physical or legal prevention, and (normally) not merely economic unprofitability. In the context of, say, a government embargo, or illness or death of individuals essential to the delivery of a personal service, a “*prevention*” argument may be available. Where the effects are temporary, it may still be that performance is “*prevented*” if the contract related to a specific time period during which performance was rendered impossible. However, that is a stringent test and, therefore, where the clause includes broader language such as “*hindered*” or “*delayed*” this will often be more relevant. For example, again in the supply chain context, where raw materials have been sourced from China, there may be bottlenecks derived from China’s period of lock-down, which may have “*hindered*” or “*delayed*” performance so as to engage the clause, even though those bottlenecks are likely to ease now that Wuhan is opening up again. Any impact has to be assessed in the context of the duration of the contract and the time for performance.
5. **Economic factors:** As already noted, courts have historically not been sympathetic to an argument that a change in economic circumstances, even a dramatic one, can be relied on in the context of a force majeure clause. Plainly, COVID-19 has, and will continue to have, a major impact economically, leading to a significant downturn across the globe. If the list of events in the clause does not make any express reference to economic factors, then an attempt by a party to rely on economic issues stemming from COVID-19 is likely to be difficult. This will likely become a fertile area for litigation, however, and “*economic hardship*” arguments should not be dismissed out of hand in this particular context. There may be scope for argument if, for example, the economic issues are causatively linked with other factors preventing performance, including government interventions (see above); or if, on the facts, the economic impact on the contract may be such as to be “*entirely outside the contemplation of the parties*” (*Brauer*). We can expect that the Courts will come under pressure to re-consider the principles and, if necessary, make new law to cater for unprecedented scenarios.
6. **Mitigation:** There may be issues (especially the longer COVID-19 is with us) as to whether a party has done what it reasonably can to avoid or mitigate the effects.



Reasonable preventative or mitigatory steps will, of course, vary according to the type of business, the circumstances, and the state of knowledge at the time but could include, for example, putting in place quarantine protocols and/or sanitation measures and/or instituting remote working.

(c) *Frustration principles*

1. **Test:** Frustration is a narrow concept in the current law. A contract will be viewed as frustrated if, objectively assessed, an event occurs subsequent to formation which makes it “*physically or commercially impossible*” to perform the contract, or changes the obligation to one that is “*radically different*” from that undertaken upon entry into the contract, such that it would be “*unjust*” to hold the parties “*to the literal sense*” of the obligation; and in such a case, the law declares the parties discharged from performance (*Chitty* [23-001]; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. It was held in *Panalpina* that the doctrine should still be “*flexible and capable of new applications*”.

2. **Narrow application and interplay with force majeure:**

a. Notwithstanding *Panalpina*, the doctrine in fact has a narrow operation. The narrowness of the doctrine has recently been reiterated in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)), where Brexit was held not to frustrate a 25 year lease by the EMA of offices in London: whilst Brexit itself was not foreseeable as a reason for vacating the premises, the parties had contemplated the possibility that the EMA might leave before the term of the lease (as was evident from alienation provisions in the lease) and the EMA had assumed the risk of taking on a 25 year lease without a break clause in return for inducements which would not have been available had a break clause been included. This stringent approach is adopted, firstly, because courts do not want to enable parties to use it to escape a bad bargain. Secondly, where parties insert force majeure, hardship and intervening events clauses into their agreements, these reduce the scope for the frustration doctrine to operate: where the parties have made express provision for an event that occurs, the contract is not frustrated. The broader the clause, the narrower the scope for the law of frustration (*Chitty* [23-003]).

b. That said, courts may construe force majeure clauses in a restricted way and require that the wording covering the event be “*full and complete*” before reaching the view that frustration is ousted (*Bank Line Ltd v Arthur Capel & Co* [1919] AC 435). Thus, for example, where a force majeure clause relieves a party of further performance in relation to an event that would otherwise frustrate the contract but makes no provision as to payments already made it may be arguable that the doctrine of frustration is not altogether excluded and that there remains scope for The Law Reform (Frustrated Contracts) Act 1943 to operate.

c. The more “*catastrophic*” the event, the less likely the clause will cover it, unless clear words were used; if the clause merely caters for an extension

of time, then it may not apply to a dramatic event rendering performance impossible; and the clause may not provide for all the legal issues stemming from the event (for example, it may stipulate what happens in relation to one party, but not the other). Further, an express clause cannot exclude frustration by supervening illegality if that would be against public policy, though in some situations of supervening illegality (e.g. export/import restrictions) the clause can exclude frustration (*Chitty* [25-058]).

- d. Therefore, even where there is a force majeure clause (but especially if there is not), the doctrine of frustration may have an important role to play.
3. **“Multi-factorial approach”**: The courts take a “*multi-factorial approach*”, considering: the terms of the contract; its matrix/context; the parties’ knowledge, expectations and assumptions, especially as to risk, at the time of the contract; the nature of the supervening event; and the parties’ reasonable and objectively ascertainable calculations as to future performance in the new circumstances (*Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd’s Rep 517).
  4. **Categories**: Cases relating to frustration can be categorised by (a) types of frustrating events or (b) types of affected contracts (*Chitty* [23-020]):
    - a. **Events**: The following (amongst other events) may, depending on the circumstances, be frustrating events:
      - i. a change in law or supervening illegality (*Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, 126);
      - ii. requisitioning of the subject matter of a contract by the government (*Capel*);
      - iii. cancellation of an expected event, involving physical destruction or frustration of commercial purpose (see the “*coronation cases*”, eg *Krell v Henry* [1903] 2 KB 740: coronation procession postponed due to illness of King Edward VII);
      - iv. delay – the delay must be “*abnormal, in its cause, its effect or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting*” (*Blankley v Central Manchester* [2014] 1 WLR 2683, [40]); if the delay was caused by a “*new and unforeseeable*” event, that will be relevant, but there is no frustration if the delay was within the parties’ commercial risks (*Davis Contractors*);
      - v. war; and
      - vi. incapacity or death, in the case of contracts for personal services.

However, inconvenience, hardship or financial loss in performing the contract have normally been held not to amount to frustration (*Tandrin*).

b. **Types of Contracts:** Frustration has been invoked (though often not successfully) in relation to the following types of contract, amongst others:

- i. sale and carriage of goods – a contract to sell goods is not frustrated simply because performance would be unprofitable, if performance is still physically and legally possible (*Davis Contractors*); however, it may be frustrated if the importation of unascertained goods from a specific country (required for performance) has become impossible, for example due to governmental prohibition of export (*CTI Group Inv v Transclear SA (The Mary Nour)* [2008] 2 Lloyd's Rep 526); see also cases involving closure of the Suez Canal such as *The Eugenia* [1964] 2 QB 226 (where contracts for non-perishable goods were not frustrated by having to take the longer and more expensive route round the Cape, but the answer would have differed had the cargoes been perishable);
- ii. charterparties – in *The Sea Angel*, a delay of just over three months when a vessel was detained by port authorities as security for the costs of pollution was not frustration (the risk was foreseeable in the industry);
- iii. building and construction contracts – in *Davis Contractors*, work was meant to take 8 months, but due to bad weather and also an unforeseen shortage of labour, it took 22 months and cost more; the builders claimed frustration, but this did not succeed; “*the job proved to be more onerous but it never became a job of a different kind from that contemplated*” (724); however, governmental prohibition/restrictions on building during wartime could amount to frustration (*Metropolitan Water Board v Dick* [1918] AC 119).

5. **Limits of frustration:** As noted, one limit to the ambit of the doctrine of frustration is the presence of a force majeure clause. Aside from that, the following are relevant:

- a. Even if the parties have not expressly provided for an event, they may still have foreseen it: this will usually, though not always, prevent reliance on frustration; construction of the contract as a whole and (objectively ascertained) evidence of intention will be relevant (*Chitty* [23-059]).
- b. If the event was foreseeable, but not in fact foreseen by the parties, the doctrine of frustration is less likely to be ousted (*The Sea Angel*). Indeed, “*Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike, or a restraint of princes, lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for*” (at [127]).
- c. A party cannot rely on self-induced frustration, namely “*frustration due to his own conduct*” (*Capel* 452). It will be self-induced when caused by a breach

of contract, or where an act of the party relying on frustration broke the chain of causation between the alleged frustrating event and non-performance (*Maritime National Fish v Ocean Trawlers* [1935] AC 524; the party's choices as to allocation of limited resources broke the causation chain between the frustrating event and non-performance).

6. **Impact of frustration:** If the doctrine of frustration is successfully invoked, it brings the contract to an end automatically, such that all parties are released from future performance. The Law Reform (Frustrated Contracts) Act 1943 covers certain consequential issues. We do not canvas them all here, but briefly, the role of the Act is to prevent unjust enrichment flowing from the consequences of automatic termination brought about by frustration. Section 1(2) of the Act makes provision for recovery of payments made prior to the frustrating event (subject to coverage for expenses incurred by a counterparty for the purpose of performing); and section 1(3) addresses payment in respect of valuable benefits received prior to termination by frustration. Under section 2(5), certain contracts (including charterparties, carriage of good by sea, and contracts for sale of specific goods that have perished) are excluded from the scope of the Act.

(d) *Relevance of frustration principles to COVID-19*

1. **Test:** As a starting point, if a party wishes to rely on the doctrine of frustration in light of the effects of COVID-19 on its business, it will need to satisfy the legal test: the pandemic must have made it “*physically or commercially impossible*” for the party to perform, or have changed the obligation to something “*radically different*” from that contemplated under the contract. The test is a difficult one to satisfy (particularly given the “*multi-factorial*” approach indicated in *The Sea Angel*), and as with force majeure, much will turn on causation: whether it was the pandemic per se, and/or other (albeit perhaps linked) factors which caused non-performance. Further, performance must have become physically or commercially *impossible*: so mere added difficulty in performance, even if grave, may well not count for the purposes of the doctrine. The issue will be, of course, fact-dependent as to whether the obligation has become “*radically different*” from that contemplated under the agreement. In many cases, the obligation may have become more onerous, due to the effects of the pandemic (supply shortages, reduced availability of labour, logistics problems, etc), but the core obligations may still be similar in form. Moreover, the temporary nature of some of the issues will be relevant, depending on the nature of the contractual obligation – for example, the lock-downs are temporary, though the precise duration and continuing nature of the lock-downs per country is still unknown. In other cases, for example supposing a government has requisitioned a business or its operations for the supply of a particular service or product (e.g. ventilators; as to which, see below), this may have so drastically affected the business's ability to fulfil other contractual obligations, that the test would be satisfied (but not if it is the business's choice to prioritise supplying the Government over its other contracts).
2. **Interplay with force majeure:** Parties should first look to see whether a force majeure clause is contained in their contract, and if so, whether it covers the pandemic and/or its follow-on consequences, such as government intervention. If they have made complete provision for the precise scenario in question, frustration

will have no role to play, so the parties cannot rely on it. However, if there is no clause, or it does not cover the event in a “*full and complete*” way, there might still be scope for the doctrine of frustration to operate. As the authorities note, the more “*catastrophic*” and unforeseeable the event, the less likely it is that the force majeure clause will cover it: a pandemic situation, not seen for a century, might not be covered, depending on the breadth of the wording used in the clause. However, even in a case where there is doubt as to whether a force majeure clause covers the COVID-19 situation, it may be worthwhile raising the issue, if the circumstances are such that the counter-party may well not want the “*all or nothing*” results that would flow from the contract being terminated due to frustration. In the case of force majeure, there is (potentially) some room for manoeuvre, since depending on the wording of the clause the contract may not be terminated but merely suspended or time limits extended on grounds of hindrance or delay. By contrast, with frustration the contract will, as a matter of law, come to an end automatically, with the consequences laid down by the Act. The parties may just be fundamentally at odds in their assessment of where their interests lie, as between those scenarios, or they may be able to find common ground in the proposition that suspension is a preferable outcome on both sides, especially if they expect to have a continuing business relationship.

### 3. Frustrating events:

- a. A pandemic per se might itself qualify as a frustrating event, but the reality is that the real cause of business difficulties will in many cases not be the pandemic but its consequences. Some of these may be frustrating events in their own right, but others may not be.
- b. A change in law or supervening illegality can, as is well established, constitute a frustrating event. Here, changes to law, such as the introduction of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, imposing lock-down restrictions in this jurisdiction, may have caused a business to cease operating (especially if its business is dependent on physical labour, and coupled with that there have been shortages of staff due to illness) – a party might be able to refer to the changed law/prohibition on operating as a causative frustrating event. However, in some instances the relevant impact on performance may have been due to steps that were taken voluntarily, when the restrictions were merely advisory and not mandatory.
- c. Governmental requisitioning of business/equipment is another recognised force majeure event. In the US, the President deployed legislation to force certain companies to produce ventilators; this might impact their usual business operations to such an extent that they could invoke force majeure to excuse performance under other (regular) contracts. In the UK and elsewhere, governments have reached agreements with industry to produce, for example, face masks and hand sanitiser, when those products are not typically made by those entities (or at least in the volume sought); a government *agreement* is different from a mandatory government imposition to produce goods. Even supposing the party is contractually obliged to give its government work priority, it seems doubtful that a party

would be able to treat that as a frustrating event vis-à-vis its contracts with other parties, since it would remain the result of that party's own choice to enter the agreement with government and do so on those terms.

- d. Cancellation of an event which was known on both sides to represent the commercial purpose of the contract is a recognised trigger for the doctrine of frustration. In the present context, a multitude of events have been cancelled across the globe, including especially in sports and the arts. A party may well rely on frustration in those situations, subject again to the terms of any force majeure clause. Just as there is a body of case law from a century ago referred to as the "*coronation cases*", so here we may see the development of the "*coronavirus cases*".
  - e. Delay may also potentially be a trigger for frustration, provided it was "*abnormal*" and caused by a "*new and unforeseeable event*". However, this will depend very much on the circumstances and in particular the duration of the contract and the time for performance. Depending on when the contract was entered, it is unlikely that parties saw COVID-19 coming, so there is a strong argument it is a "*new and unforeseeable event*". Whether the delay is abnormal in any given case will be the key question: a lockdown of (say) 3 months, leading to a delay in supply of (say) 5 months (after easing of the supply bottle-neck), may or may not be "*abnormal*", depending on the context.
  - f. The outbreak of war is a recognised frustrating event. This is not actually "*war*", of course, although the battle with COVID-19 has been often described in war-related terms and parties may seek to draw analogies with the jurisprudence on war-related events.
  - g. Finally, incapacity or death of employees is a frustrating event in the case of contracts where performance is thereby rendered impossible (as in the case of personal contracts) – again, the ability to rely on that will be fact-sensitive.
4. **Affected contracts:** Above, we described the legal principles as regards frustration in the context of three types of contracts: sale of goods, charterparties and building/construction contracts. Numerous other types of contracts will, of course, also be affected by COVID-19. We consider some possible examples in the industry-specific analysis below.
  5. **Limits of frustration:** As noted above, any force majeure clause will limit and may exclude the operation of frustration. There can be no reliance on the doctrine of frustration if the alleged frustrating event was self-induced (Chitty 23-061). Thus, for example, supposing exposure to COVID-19 resulted from disobeying restrictions, the resulting inability to perform a personal contract through illness might be said to be self-induced even if the COVID-19 epidemic, more generally, was outside that party's control. As knowledge about COVID-19 develops, and depending on how lockdown conditions are modified, one might reach the point where a business's failure to take basic steps to protect the ability of its workforce to continue production could be said to result in self-induced frustration. Causation here will also be key,

especially if a party carried out an act which broke the chain of causation between COVID-19 – or responsive governmental action – and the failure of performance. Decisions as to allocations of resources may be relevant, in that a choice to allocate resource to some contracts and sacrifice others is likely to bar reliance on frustration.

## Consequent issues for industries affected by the pandemic

The impact of COVID-19 on many industries will be far-reaching and lengthy. Amongst the various impacts, we consider here the role that force majeure and frustration may have to play in relation to some particular industries.

- 1. International trade:** It is plain that force majeure and frustration will be hugely relevant to international trade industries, be they supply of goods, cross-border manufacturing, shipping, freight, logistics, etc. Around the world, supply chains have been disrupted, due to lock-downs and labour shortages, so it is a question of how the principles will be applied, both as between parties during any negotiations, and by the courts in any cases which get that far. Crucially, the legal principles indicate that normally a mere drop in profitability, even a sharp one, will not be enough to excuse performance. This is, however, subject to our comments above. The role of governmental intervention might be a ground on which to base a force majeure or frustration argument where this prevents or materially delays performance, rather than merely rendering it more expensive to obtain the necessary goods.
- 2. Food/beverage industry:** Numerous businesses in the food and beverage industry have been hard-hit by COVID-19, including those producing, distributing and selling (as just a few examples) crops, eggs, tea and beer. Taking the dairy industry as an illustrative example of the sorts of knock-on impacts that may be seen across other industries: farmers are having to dump millions of litres of milk per week due to disrupted supply chains. Due to closures of restaurants and cafes, demand for milk has significantly reduced in that area. Individual consumers still want milk, but there are difficulties in redirecting supply logistically from the hospitality sector to the retail sector. Further, as a result of COVID-related workplace restrictions in dairy processors, there are staff reductions and production problems, resulting in delays in collection of milk from farms. One can see the force majeure and frustration ramifications. The supply chain will typically consist of: farmers' milk production; transport to a dairy farmer group and then milk processing company; packaging and distribution to the wholesale and retail sectors; and then onward to consumers. Contracts will exist in conjunction with each link in the chain, and as the chain breaks down, so will the contracts. Parties may well look to force majeure clauses to excuse them (for instance) from purchasing a certain amount for their supermarket; or from acquiring a particular amount for processing, etc – and farmers take the hit. Key principles – such as that the relevant event must be the “sole” cause and that economic hardship is not force majeure or grounds for frustration – will be important, and may interact differently depending on which link in the supply chain is involved. Interestingly, there may be a forthcoming scheme to support dairy farmers, but only if they can show their market failure was “solely” due to COVID-19 – importing, in effect, a force majeure principle.

3. **Construction:** The construction industry, too, has been hugely affected by COVID-19, and force majeure and frustration principles will be relevant. In many jurisdictions, construction has been permitted to continue (in contrast with other businesses), but again, supply chain problems (e.g. as to raw materials) have caused, and will continue to cause, disruptions and delays. Again, there will be a question as to what any force majeure clause covers, and in the context of frustration, reliance on delay may be difficult as an excuse for performance. In *Davis Contractors*, there was a lengthy delay, but just because a job becomes more onerous, it may still not be “*of a different kind from that contemplated*”. Such a principle will present difficulties to those in the contracting industry wishing to find reprieve from performance obligations; and in any case, frustration would force termination of the contract, which may not be a desirable outcome for many contracting parties. Linked with disruption and delays to construction projects, there may also be attempted calls on associated standby letters of credit and performance guarantees, which banks will need to deal with and assess. (For a further, comparative analysis across various jurisdictions, please see the forthcoming piece by Fountain Court members when it is released, dealing with these issues; and as to banks’ potential defences to payment, see Horowitz, *Letters of Credit and Demand Guarantees: Defences to Payment* (OUP).)
4. **Trade finance:** Just as international (and, indeed, local) trade will be affected, so too will linked trade finance arrangements. Similarly to the construction scenario, for example, we may well see increased issues with letters of credit (especially as international supply chains are disrupted, with consequent impacts on linked documentary credits), and there will be a question as to whether the force majeure article of the UCP 600 will be applicable in any given case.
5. **Banking:** In addition to the trade finance issues, there will be other COVID-19 ramifications for the banking industry. The implications will be many and varied across different parts of the banking sector. A finance transaction may be associated with the manufacture, supply or lease of assets, and the underlying agreement (pertaining to the manufacture, supply or lease) may incorporate a force majeure clause. If, for example, a financier funds a party for payments related to the manufacture of an asset, the financier may take security over the underlying contract and, since COVID-19 is disrupting manufacturing, any delays and the potential operation of the force majeure clause could then diminish the value of the security. Where a company has a loan agreement in place, and due to COVID-19 – or perhaps more particularly, a government order requiring the company to close its business operations and obliging staff to be locked down at home – it can no longer make loan repayments (at least for an interim period), there will of course be consequences under the loan contract. An event of default will have occurred. Force majeure may well not provide the company with a safe harbour, given that any loan facility is more likely to be drafted so as to enable the bank to treat these circumstances as a Material Adverse Change, entitling the bank to declare an event of default and call in the loan, than so as to excuse non-payment in such circumstances. The doctrine of frustration is so restrictive in scope, particularly where the consequences may be said to be economic in nature, that it may likewise afford no defence. There may, however, be the potential for judicial development in this area, given the huge numbers of corporations likely to be affected by



payment defaults under loan agreements as a result of COVID-19, governmental order and/or unprecedented economic circumstances. Where debtors need to negotiate with their banks, the fact the latter are under a regulatory duty to treat customers fairly, which the FCA may be keen to enforce in such circumstances, may provide some practical leverage, and banks will also need to bear in mind reputational risk. Some governments are establishing loan schemes to certain types of corporate entities, within prescribed rules.

6. **Airline industry:** COVID-19 has, of course, impacted the airline industry significantly. A huge number of planes lie grounded around the world, and with the pandemic still rife, and many borders closed, travel will remain limited for a considerable duration. There are clear force majeure and frustration implications for participants in the airline industry. There will be passenger claims for cancelled/delayed flights, and airlines will seek to rely on the “*extraordinary circumstances*” provision of the relevant legislation to say that COVID-19 was the cause, and deny payment; that provision, in a sense, imports a force majeure concept. Separately, there will be widespread implications for the aircraft leasing industry. Airlines leasing aircraft may seek to rely on a force majeure clause to excuse performance of obligations owed to lessors, only to find in some cases that there may be a force majeure clause in favour of the lessor (eg covering all manner of items, including governmental intervention and quarantine), but nothing in favour of the lessee, or nothing sufficiently broad to cover the scenario. Potentially, there might be a role for the law of frustration, but as discussed, it has limited scope. There will also be contracts between airlines and fuel and maintenance providers, where force majeure clauses may become relevant. For further analysis of the impacts of COVID-19 on the airline industry, including force majeure clauses (both in their present form, and how they may be bargained in future), see <https://www.fountaincourt.co.uk/covid-19-the-airlines-battle-for-survival/> (the author of which was the successful advocate in *Tandrin*).
7. **Pharmaceuticals:** In the pharmaceutical industry supply chain issues are likely to be highly significant. For manufacturers, dependent on core ingredients from (for example) China and India, there will have been blockages and delays, leading to potential reliance on the doctrines discussed in this article. In other areas, supply and demand will have oscillated wildly, with potentially extreme consequences for the price and availability of supplies. Hydroxychloroquine, traditionally deployed as an anti-malarial and to treat rheumatoid arthritis and lupus, is now flying off the shelves, with concerns about shortages in India (which is supplying mountains to the US). Supply issues for that medication may trigger force majeure and frustration scenarios; and the scenario may transform again, such that purchasers are seeking to escape their obligations, if it is determined that the drug does not, in fact, treat COVID-19, or that it is causing unwanted side-effects. Similarly, ACE-inhibitors, used heavily around the world to treat high blood pressure, heart failure and diabetes, have now been shown potentially to facilitate the entry of COVID-19 into cells, catalysing respiratory failure; and yet, those same drugs may reduce tissue damage. For the manufacturer, supply and demand could change wildly at any moment, again triggering force majeure/frustration questions.
8. **Energy:** Reams could be written on the impact of COVID-19 on the oil industry. The lockdown of a large proportion of the world’s population and associated

measures have heavily reduced demand for oil, driving down prices. Again, numerous participants will be affected in the supply chain. To address the issues, the globe's largest oil producers, including the US, Saudi Arabia and Russia, have agreed to reduce output of oil by 10%, in an attempt to lift prices, which may or may not work. Participants in the oil industry will be at the mercy of COVID-19, governmental lockdown decisions, and price movements, as restrictions on human activity ease (but potentially tighten again if there is a second wave of infections). It is an unenviable position, and will lead to reliance, in ever-changing forms as the situation develops, on force majeure clauses and the doctrine of frustration.

9. **Insurance:** for an examination of the COVID-19 implications in the context of insurance, see <https://www.fountaincourt.co.uk/covid-19-some-insurance-law-implications/>. We also note that the UK Financial Conduct Authority has now pushed for insurers to pay out claims to small and medium firms in relation to business interruption (subject to policy terms).

## Conclusion

Across the world, in numerous sectors, COVID-19 is wreaking havoc. The impacts of force majeure and frustration, usually sitting in quiet and often forgotten corners of jurisprudence, will here be enormous. Important questions as to causation, especially where multiple causes are potentially at play, will arise, together with renewed issues as to the impact of economic disruption, and whether it can excuse performance. In light of the pandemic, parties will need to scrutinise the force majeure clauses of their existing (and future) contracts, as well as consider the relevance of the doctrine of frustration. Depending on how events unfold, there may be an opportunity for the courts to develop the legal principles beyond their historic scope (in particular, to address acute economic hardship caused by these novel conditions) but this needs to be balanced against the risk of introducing unacceptable uncertainty into commercial arrangements (for example, by disturbing long-standing assumptions as to where the risk of adverse economic developments will fall).

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Nothing in this article is intended to be, nor should be construed as, legal advice, and no liability is accepted.

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