

CLIENT ALERT

English Contractual and Common Law Remedies for COVID-19 Business Interruption

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COVID-19 has and will naturally lead many contracting parties to consider declaring that a force majeure event has occurred when performance becomes impossible or significantly more difficult. But that is not the only way in which contracts may be affected by the current crisis. In this article, we consider force majeure and a range of other contractual clauses in which risk may have been planned for and allocated between the parties, and which are likely to be highly relevant during the current crisis, as well as other remedies.

Excusing Performance with Force Majeure and Hardship Clauses

We gave an overview of force majeure clauses and steps to consider when invoking them or responding to such notices in English law in our alert [An English Law Perspective on COVID-19 and Contractual Disruption](#).

As that article indicated, force majeure clauses are specific to each contract. But particular things to note include:

- Does the definition of force majeure specifically include epidemics?
- For buyers: does the clause expressly carve out and exclude payment obligations?
- For sellers and manufacturers: does government action mean, for example, that a particular delivery location is blocked or can be considered the cause of an inability to perform?
- Are there particular terms regarding payments upon termination for force majeure and/or do existing payment obligations survive?

There may be specific contractual terms, either connected to a force majeure clause or otherwise, which entitle a buyer to suspend and delay payments. But there may also be hardship clauses which are triggered by adverse economic conditions and relax or delay performance.

It is therefore important to take a holistic view of such terms before triggering notice of a force majeure event or entering into negotiations with your contractual counterparty. You may have different options under your contract.

For more details on force majeure, which are effective guidance under English as well as US law, please see further the alerts:

- [Business Disruption and Commercial Contracts \(Part 1\): What Does The Force Majeure Clause Cover?](#)
- [Business Disruption and Commercial Contracts \(Part 2\): What Is The Actual Cause Of The Disruption?](#)
- [Business Disruption and Commercial Contracts \(Part 4\): How To Assert Force Majeure](#)
- [Business Disruption and Commercial Contracts \(Part 5\): Once Force Majeure Is Asserted, What Are Our Rights and Obligations?](#)

“Take or Pay” And Other Risk Allocation Clauses

Particularly in commodities contracts such as for energy, risk allocation is often dealt with at the outset on various subjects. “Take or pay” clauses require payment even if cargo is not wanted, and so may allocate the contractual risk in a way unfavourable to the buyer and potentially preempt a force majeure clause. Buyers will need to look carefully at their contract terms, which may allow purchase quantities to be varied, or to divert cargo from a default port to unimpeded ones. It is therefore important to check your other contractual terms to see if the effects of a take or pay clause may be mitigated.

Material Adverse Change

Particularly of note in corporate transactional contracts or finance agreements, “material adverse change” or MAC clauses can trigger a change of obligations or even allow for contract cancellation where a reasonably expected event materially affects the contract terms. The fact of recent prior epidemics such as SARS and MERS makes it worth checking whether an epidemic can trigger such a clause, and side step consideration of force majeure clauses.

We have considered MAC clauses in more detail with specific regard to lenders in [Will Lenders be able to use COVID-19 to Invoke Material Adverse Change Clauses?](#)

Change in Law

Contracts may also expressly change performance requirements by a “change in law” clause. The wide variety of legislative measures being introduced around the globe may therefore come into play here. The first step is to check which law is applicable to the contract. It is not necessarily the case that a change in law in a third country (even if that is where performance takes place) can trigger such a clause where the contract generally is governed by English law. The language of the clause would need to be drafted to specifically contemplate changes in other law. There is also the issue of whether the “change” is actually only guidance as opposed to hard law. Many government measures being introduced are in the form of recommendations rather than legally enforceable requirements, which may be outside the scope of such a clause.

Variations to Contracts

If you are considering varying your contracts, check to confirm whether they contain a clause which requires that variations be reduced to writing. The English common law generally respects such clauses. Please see our prior note [U.K. Supreme Court Moves English Common Law Towards International Consensus on ‘No Oral Variation’ Clauses](#). That case law has since been applied in, for example *NHS Commissioning Board v Vasant & Ors* [2019] EWCA Civ 1245.

Although the principles of estoppel are still available to potentially respond to representations from your counterparty if a dispute arises, being practical and preparing a formal document to confirm a change of position would reduce the need to consider such an approach.

Frustration

We discussed the basic principles of frustration in English law in our alert [An English Law Perspective on COVID-19 and Contractual Disruption](#). There is little specific case law available for considering a pandemic as a frustration event in English law. However, in *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 754 the Hong Kong District Court considered whether an isolation order during the SARS epidemic could have the effect of frustrating a tenancy agreement. Given that the lease was for two years and the order for a period of 10 days, the Court held that it was not so undermined as to be frustrated. This suggests that the much longer duration of stay-at-home orders during the present crisis may have a greater chance of being deemed events which make performance of certain contracts physically impossible.

In England, whether Brexit could be a frustration event for a lease was considered in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency (EMA)* [2019] EWHC 335. The EMA had argued that it needed to relocate to an EU country owing to Brexit, and its lease over a Canary Wharf office tower was therefore frustrated. The Court held that this was the lessor's choice, and the contract was still capable of being performed. More particularly, the Court discussed the idea of frustration of "common purpose". As the court described it at paragraph 38:

... where the supervening event causes one party to appreciate – with the benefit of hindsight – that he or she has made a bad bargain, there will be no frustration of a common purpose. If the only effect of the supervening event is to cause the price for the bargain to appear – in hindsight – to be too high, the contract will not be frustrated. (By "price" I should stress that I mean more than simply the consideration agreed to be paid, but all of the terms that go to define the benefit one party to the contract confers on the other.) That was the position both in the case of Vaughan Williams LJ's cab driver and in the facts of the Herne Bay case. In both of those cases, one party paid more due to market conditions that subsequently changed: the passenger paid more because of the high demand due to the races; the defendant in Herne Bay paid more because of the naval review. In each case, were the price bargained for to be adjusted in the light of the new, supervening, market conditions, neither party would be able to complain. That demonstrates that there was, in these cases, no common purpose to be frustrated: one party was simply complaining that he had made what was, in retrospect, a bad bargain. By contrast, even if the price paid by the licensee in Krell v. Henry were to be dramatically reduced, the purpose of the contract would still be undermined. In Krell v. Henry, the point of the contract was the purchase and sale of a room with a view: the view never came to pass.

The outcome shows an example of how care needs to be taken in considering if government action has actually made a contract impossible to perform, whether by making it no longer legal to do so or truly eliminating the mutual purpose of the contract, rather than inconvenient or uncommercial to perform.

Note also that frustration will likely be displaced by a force majeure clause (*Jackson v United Maritime Insurance* [1874] LR10 CP 125), and therefore a failure to invoke such contractual provisions may undermine a later attempt to rely on the common law.

Insurance

Rather than negotiating with your contractual counterparty, you may want to consider insurance claims. Coverage will naturally depend on your policy's specific terms and conditions, and just as for a force majeure clause, particular notice provisions may apply.

Please see our Crowell colleagues' alert [Insurers' COVID-19 Notepad: What You Need to Know Now](#) for details of recent activity at Lloyd's of London, the Association of British Insurers and the Financial Conduct Authority.

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We anticipate that in light of the current COVID-19 crisis, parties will be examining their contracts in an attempt to extricate themselves from either obligations that they can no longer perform or which are now uncommercial to satisfy. This will require close scrutiny of the contractual framework agreed between the parties and we anticipate that it will result in numerous disputes between parties as the crisis continues.

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