An update on *force majeure* and frustration in the context of COVID-19

DENTONS

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The lockdowns implemented by the British government as a consequence of the COVID-19 pandemic have had a profound effect on business. In some industries, such as travel and hospitality, it has caused contracts to become unnecessarily burdensome and economically difficult to maintain. Legal challenges have been brought on the basis of *force majeure* and frustration, and this article provides an update on these recent decisions.

What is *force majeure*?

Force majeure is a type of contractual clause which will exclude one or more parties from having to perform their obligations under a contract if a certain event arises, known as the "supervening event". Examples include war, riots and hurricanes or other such events outside the parties' control. The reason this type of clause exists is because it helps parties navigate what obligations they may still owe if the unexpected occurs.

English law does not have a general rule of *force majeure*. What will or will not count as a supervening event will depend on the contractual drafting and the court's interpretation of the event.

Case law

Franchising

The most recent key case in *force majeure* is *Dwyer (UK Franchising) Ltd v. Fredbar Ltd* [2021] EWHC 1218. In this case, the *force majeure* clause granted the franchisor the power to designate an event as a supervening event. The franchisee argued that the franchisor had irrationally refused to designate COVID-19 as a supervening event because it had not taken into account the defendant was under a legal requirement to self-isolate because a member of their household was clinically extremely vulnerable. The franchisor refused to designate COVID-19 as a supervening event because the business (emergency plumbing) was an essential service and could still operate during the lockdowns. The judge disagreed with the franchisor and held that it had fallen below the standard of acting honestly, genuinely and good faith by failing to designate COVID-19 as a supervening event.

What is frustration?

Frustration is where an event occurs after the formation of the contract which makes it physically, legally or commercially impossible to fulfil the contract, or transforms that obligation to perform into something radically different than what was originally planned which makes it unjust to enforce. If frustration is successfully proven, the contract will come to an end and the parties will be released from all future obligations.

Take the example of a venue which is rented out by Party A to Party B but, before the event takes place, the venue

burns down for reasons outside Party A's control. It is now physically impossible for Party A to fulfil its contractual obligations and the contract has become frustrated.

Frustration will not form part of the contract when it is entered into, unlike a *force majeure* clause. The threshold for proving frustration is high and it is a difficult legal challenge to make. Whether or not frustration has occurred is entirely a matter of interpretation based on the facts of the case.

Case law

Airline industry

In *Salam Air SAOC v. Latam Airlines Groups SA* [2020] EWHC 2414, the claimant sought an injunction to restrain the defendant from making demands in relation to underlying leases of three aircraft. This was on the basis that the contract had been frustrated due to regulations issued by the Public Authority of Civil Aviation from Oman which led to a substantial decrease in demand for flying. The court held that, whilst this caused the travel industry to become "challenging", it was not a sufficient basis for frustration as it did not prevent either party from performing its contractual obligation.

The approach was similar in *Wilmington Trust SP Services (Dublin) Ltd v. Spicejet Ltd* [2021] EWHC 1117. The parties entered into three lease agreements for the provision of aircraft. The lease was known as a "dry" lease under which the defendant had assumed the entire commercial risk of operating the aircraft for 10 years. The defendant failed to make payments due under the leases because its use of one aircraft was significantly curtailed by the COVID-19 pandemic, and the other two aircraft were grounded by the Indian government. The court held that the lease had not been frustrated as the defendant had agreed to undertake all the risks of operating and maintaining the aircraft for that 10-year period, and this was compounded by the fact that the lease contained no wording which suggested payment of rent could be suspended for any reason.

Commercial property

In *Bank of New York Mellon (International) Ltd v. Cine-UK Ltd* [2021] EWHC 1013, the tenants argued that their lease of the commercial premises had been "temporarily frustrated" because they were forced to close due to the government's legislation arising from the COVID-19 pandemic. Their argument was unsuccessful because an 18-month forced closure in the context of a 15-year lease would not make the contract impossible to perform or radically different from what was originally planned. The Master clarified that there was no such thing as temporary frustration.

Your Key Contacts

Rob Francis
Partner, Milton Keynes
D +44 20 7320 3906
rob.francis@dentons.com

Natasha Lowry
Associate, Milton Keynes
D +44 20 7246 7201
M +44 7436 786381
natasha.lowry@dentons.com