THE IMPACT OF COVID-19: FRUSTRATION, FORCE MAJEURE, HARDSHIP AND DEALING WITH UNCERTAINTY.

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INTRODUCTION

The focus of this session is on the impact of the current COVID-19 pandemic on commercial contracts. When considering the impact on the pandemic, it may be helpful to distinguish three broad time-frames.

The first is the period before January 2020. At that time the risk of the pandemic was generally not recognised (other than at a high level where it has been known for some time that a pandemic might break out and that one was 'overdue'). In such cases parties may be able to invoke the doctrine of frustration (although, as noted below, the doctrine is a narrow one) or it may be possible to rely on a force majeure or equivalent clause, although any such clause will have been drafted without specific knowledge of the existence of the pandemic.

The second is the period between January 2020 and late March 2020. During this period, the world was becoming aware of the possibility of a pandemic, although in the very early part of 2020 that knowledge was largely confined to China. The ability to invoke frustration in this period is doubtful because of the rule, discussed below, that an event that is foreseeable to the parties will not, in general, have the effect of frustrating a contract (although the degree of foreseeability may not be sufficiently high in the very early days of 2020). It may be possible to rely on a force majeure or equivalent clause but, once again, the clause may not have been drafted with the knowledge of the pandemic in mind.

The third is the period after mid to late March 2020. In the case of contracts entered into after this period, it is extremely unlikely that the parties will be able to invoke frustration because the pandemic was then known about and so it will not be a supervening event (although note that the foreseeability requirement does not apply to cases of supervening illegality). Again, it may be possible to rely on a force majeure clause but the content of the clause is likely to be a contested matter in the context of contractual negotiations given the parties' knowledge of the pandemic and their greater understanding of the risks which it presents to contractual performance.

One final point to make by way of introduction. The pandemic is a global one and governments have responded to it in different ways. So, for example, in China the official stance that was taken was that measures taken by the government to combat the virus and which had an impact on the ability of contracting parties to perform their obligations should be regarded as a force majeure event. Thus the China Council for the Promotion of International Trade issued 6,454 force majeure certificates to Chinese companies in the period leading up to 25 March 2020.

The aim in doing so was to enable these companies to rely on such certificates in their dealings with overseas parties and so to exempt the Chinese companies from their obligation to fulfil these contracts.

Given the exceptional nature of the pandemic, there is clearly an interest in government in how commercial parties respond to the current crisis. This is reflected in guidance issued by the Cabinet Office on 7 May 2020 (and subsequently updated) on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency (see https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-Covid-19-emergency). This guidance is non-statutory and does not seek to override the express terms of the contract. Nevertheless, it sets a clear tone or expectation that parties will act responsibly and fairly in the performance and enforcement of contracts where there has been a material impact from COVID-19. One of the instances where the guidance encourages responsible and fair behaviour is in 'making, and responding to, force majeure, frustration, change in law, relief event, delay event, compensation event and excusing cause claims.'

Although the doctrine of frustration may not play a significant role in cases of this type, it is worthwhile starting with the doctrine recognised by English contract law before turning to consider drafting issues that relate to clauses such as force majeure clauses. I will proceed by asking a number of questions and by providing brief responses to these questions.

What is the scope of the doctrine of frustration?

A contract is frustrated where, after the contract was concluded, events occur which make performance of the contract impossible, illegal or something radically different from that which was in the contemplation of the parties at the time they entered into the contract. A contract is not frustrated where express provision has been made for the event which has occurred. So, for example, where the contract between the parties contains a force majeure clause which covers the event which has happened, it is likely that the consequences of the event will be regulated by the force majeure clause rather than by the doctrine of frustration.

Why is the doctrine of frustration of limited practical significance?

The doctrine of frustration is of limited practical significance for two principal reasons. First, the courts do not wish the doctrine to become an excuse for a party who has done no more than enter into a bad bargain from which it wishes to escape (*The Nema* [1982] AC 724, 752). Second, the consequence of the invocation of the doctrine is drastic in so far as it results in the automatic prospective discharge of the contract, irrespective of the wishes of the parties (*Hirji Mulji v Cheong Yue SS Co* [1926] AC 497), subject to the limited remedial provision made in the Law Reform (Frustrated Contracts) Act 1943. Recent cases have affirmed the narrow scope within which the doctrine of frustration continues to operate (see, for example, *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)).

It should also be noted that the orthodox view is that English law does not recognise a doctrine of 'partial frustration' (that is to say, frustration of part of the contract, leaving the other parts

intact). Thus where frustration is applicable its effect is to terminate the entirety of the contract between the parties, even if some minor parts of it remain capable of performance (so, for example, in *Taylor v Caldwell* (1863) 3 B & S 826 the contract between the parties was frustrated when the music hall was burned down and this was so notwithstanding the fact that it remained possible to use the gardens: the gardens were an incidental part of the contract and the fact that they could still be used was not sufficient to prevent the frustration of the entirety of the contract between the parties).

It should also be noted that the narrow scope of the doctrine of frustration has been affirmed by the House of Lords on numerous occasions. It follows from this that it is only open to the Supreme Court to re-consider the scope of the doctrine of frustration and to liberalise its sphere of application. This being the case, the safest course is to assume that the scope of the doctrine will remain as it is for the foreseeable future. In considering the role that the doctrine of frustration might play in future COVID-19 cases, the assumption that will be made is that the courts will continue to apply the doctrine of frustration as we understand it today.

On what basis might COVID-19 have the effect of frustrating a contract between commercial parties?

There are at least three possibilities.

(i) Supervening illegality

The first is supervening illegality (that is to say, illegality which occurs after the date of entry into the contract). There are a number of elements that must be noted here.

The first is that there must be illegality, that is to say the performance of an act which is unlawful. It will not suffice to show that the cause of the non-performance was government guidance or a statement of intent by a government minister. So, for example, in the case where an event is cancelled because it will not meet government guidance, the contract will not be frustrated by illegality (although it may possibly be frustrated on other grounds).

Second, the illegality which exists must exist as a matter of English law. Thus the fact that the contract is illegal according to the law of another country will not suffice to frustrate the contract (*Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)). There is, however, an exception of somewhat uncertain scope where a contract governed by English law (ie, English law is the applicable law) becomes illegal according to the place where contractual performance is to take place. In such a case the contract may be frustrated. But, in order to do so, the performance must involve the doing in a foreign country of something which the laws of that country make it illegal to do (*Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287). It will not suffice for a party to show that performance has become illegal according to its place of residence if that law is neither the law applicable to the contract nor the law of the place of performance.

Third, the illegality must have the effect of removing all or substantially all of the benefit that one party receives from the performance of the contract (*Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), [195]). Thus it is not the case that any

subsequent illegality will have the effect of frustrating the contract: it must have a sufficient impact on contract performance before it will do so.

Fourth, where the illegality is only temporary or partial, the contract will be frustrated only if the illegality affects the performance of the contract in a substantial or fundamental way (contrast *Denny, Mott & Dickinson v James B Fraser & Co Ltd* [1944] AC 265 and *Cricklewood Property Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221).

Fifth, cases involving subsequent illegality tend to have a significant public policy component which distinguishes them from other cases of frustration (*Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm); [2011] 1 Lloyd's Rep 195, [100]). This difference is reflected in a number of the applicable rules which depart from those that normally apply to a case of frustration. So, for example, a contract will not be frustrated where express provision has been made for the event which has occurred. This rule does not apply to cases of subsequent illegality because the parties cannot by the terms of their contract render something lawful which is unlawful. Similarly, the fact that the subsequent illegality is foreseeable will not in general prevent the frustration of the contract (although an event which is foreseeable to both parties will not typically suffice to frustrate a contract).

Sixth, the rather severe rules applicable to supervening illegality should be contrasted with the more flexible approach taken by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 in the case where the parties enter into a contract which was illegal at the time of entry into the contract or which they always intended to perform in a manner which was unlawful. There are so far no suggestions that this more flexible approach should be applied to cases of subsequent illegality.

(ii) Impossibility

The second is impossibility as in the case where it has become impossible for one party to perform its obligations under the contract (*Taylor v Caldwell* (1863) 3 B & S 826). A contract may also be frustrated where the subject-matter of the contract is unavailable for the purpose of carrying out the contract (*Bank Line Ltd v Arthur Capel & Co Ltd* [1919] AC 435). Where the contract is one of fixed duration and the unavailability of the subject-matter is only temporary, the court will consider the ratio of the likely interruption in contractual performance to the duration of the contract when deciding whether or not the contract has been frustrated (*The Nema* [1982] AC 724).

A potentially difficult case is one in which these is a failure of the supply chain. Where the failure is complete or total (such that no goods of the contract description are available) the contract may potentially be frustrated. But the same conclusion does not follow in the case where there is a partial failure of supply. In such a case the Court of Appeal has held that the existence of a choice on the part of the supplier as to which contracts to perform (and which not to perform) has the consequence that there is no frustration of the contracts in respect of

which no performance has been tendered. The reason for this is that the cause of the non-performance is the choice of the supplier not to allocate goods to the contract rather than the event which caused the failure of supply (*J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1). This may seem rather artificial given that the supplier's choice may seem to exist in theory rather than practice because it does not have the goods to perform all of its contracts. In so far as it may be said to have a choice, that choice is one that relates only to the identity of the contracts where performance will not take place. Nevertheless, the existence of that choice will suffice to exclude the operation of the doctrine of frustration.

(iii) Delay

The third is delay. It is, however, no easy task to discern when delay will be sufficient to frustrate a contract (see generally *The Nema* [1982] AC 724). It is clear that, in order to do so, the delay must be abnormal and so outside what the parties could have reasonably contemplated at the time of entry into the contract. The length, or probable length, of the delay must be assessed by reference to the nature of the contract and the intended duration of the contract. The contract will not be frustrated if the delay was within the commercial risk accepted by one or other party to the contract.

When deciding whether or not delay has frustrated a contract, the task of the court is not to engage in a retrospective analysis with the benefit of hindsight but rather should seek to put itself into the position of the parties at the time of the occurrence of the events in question and look forward prospectively. In other words, the question whether the contract has been frustrated will be decided by reference to the time of the occurrence of the event said to have frustrated the contract and, in answering the question whether the contract was frustrated, the court will consider whether a reasonable person in the position of the parties would have taken the view that the event would bring about a sufficiently serious interference with the performance of the contract so as to frustrate the contract (*Embiricos v Sydney Reid & Co* [1914] 3 KB 45). This gives rise to some difficulty in the case where the duration of the event, or its likely impact, is uncertain. The current pandemic is an illustration of this problem in the sense that it is unknown when the crisis will pass and some semblance of normality will resume. In such a situation it is very difficult to tell when the magnitude of the actual and the anticipated delay will suffice to frustrate the contract.

What other factors limit the ability to invoke frustration?

Two other factors operate to place limits on the ability of contracting parties to invoke the doctrine of frustration. First, it does not generally apply to an event which was within the contemplation of the parties at the time the contract was concluded (although the degree to which the event must be foreseeable is a contestable point). Thus it may be necessary to identify the point in time at which COVID-19 became a foreseeable event, which is likely to be some point early in 2020. After that point in time, it is unlikely, cases of supervening illegality apart, that COVID-19 will amount to a frustrating event.

Second, apart from cases of subsequent illegality, a contract will not be frustrated if express provision has been made in the contract for the event which has occurred. Thus if there is a force majeure clause or a clause of a similar type in the contract it will be necessary to give consideration to the scope of that clause before considering whether the contract has been frustrated. If the contract extends to the event which has occurred, then the contract will not have been frustrated and the relevant contract term will govern the consequences of the occurrence of the event in question. But the fact that the contract contains a force majeure clause does not have the necessary consequence that the doctrine of frustration will be excluded. The force majeure clause may be held on its proper construction not to extend to the event which has occurred (see, for example, *Metropolitan Water Board v Dick, Kerr and Co* [1918] AC 119). The type of event that is likely to fall outside the scope of a force majeure clause is one where the consequences of its occurrence are extreme and unlikely to have been within the contemplation of the parties. For example, a force majeure clause which made provision for 'war' may still be frustrated on the occurrence of a war such as the Second World War. This is particularly so where the clause makes provision for the suspension of the contract for a limited period of time. A court may infer from this provision that the type of event that the parties had in mind was one that was capable of resolution within that limited time frame so that it did not extend to an event that lasted for a number of years.

What are the remedial consequences of the frustration of a contract?

Frustration results in the automatic prospective discharge of the contract, irrespective of the wishes of the parties (*Hirji Mulji v Cheong Yue SS Co* [1926] AC 497). The Law Reform (Frustrated Contracts) Act 1943 also makes limited remedial provision for the financial consequences of the frustration of a contract. In short, the Act seeks to reverse unjust enrichments obtained by one party to the frustrated contract but the Act does not attempt to apportion losses between the parties. This being the case, money paid prior to the discharge of the contract is recoverable and money payable ceases to be payable, subject to the possibility that the recipient of the money may be permitted to deduct from the sum so paid expenses incurred before the time of discharge in, for the purpose of, the performance of the contract (see s 1(2)). In relation to non-monetary benefits conferred by one party on the other prior to the discharge of the contract, section 1(3) of the Act provides that the recipient of a 'valuable benefit' may be required to pay a sum which the court decides to be 'just' in respect of that benefit (although where the effect of the frustrating event is to destroy that benefit, then nothing is recoverable).

Why are force majeure (and related) clauses an important feature of many commercial contracts governed by English law?

Force majeure clauses are an important part of many commercial contracts because they give to contracting parties the opportunity to escape from the narrow doctrine of frustration recognised by English law. This is so in a number of respects. First, the parties can define for themselves the events that are to fall within the scope of the clause. Second, they can define the scope of the clause broadly or narrowly as they see fit. Third, they can make provision for different remedial consequences, such as the suspension of the contract for a period of time.

Fourth, the parties may wish to build in notification obligations in relation to the triggering of the clause, compliance with which may (or may not) be compulsory.

However, it is vital to note that when English lawyers talk about force majeure clauses, they are not referring to a legal doctrine of that name. Rather, they are referring to a particular type of clause and the type of clause may vary from case to case (and also, importantly, may include within it events that would not amount to force majeure under, for example, French law).

The variations in the content of force majeure clauses can be of great significance. Some clauses are drafted more broadly than others. In particular, clauses drafted by sellers tend to be drafted more broadly than clauses drafted by buyers because in practice it tends to be the case that it is the seller who is most likely to wish to invoke the clause (particularly where the only obligation of the buyer is to pay the price where force majeure tends to have limited significance).

There is a particular risk with 'boilerplate' force majeure clauses because the 'boilerplate' clause which has been incorporated into the contract may not be suitable for its purpose (for example, because it is drafted too narrowly or too broadly or has been drafted with a particular industry in mind and so is not suitable for more general use). Great care should be taken when incorporating a boilerplate force majeure clause from a database into a contract: it is always necessary to ensure that the clause is suitable for incorporation into the contract.

In functional terms, a force majeure clause may be relied on for a number of purposes. First, its function may be to shield the non-performing party from a liability in damages for the consequences of non-performance. Second, its function may be to suspend the contract for a period of time until the force majeure event has ceased to have an impact on the performance of the contract. Third, the clause may entitle a party to terminate further performance of the contract on the occurrence of the force majeure event. Whether or not a clause performs a particular function will depend on the aim of the party drafting the contract and on the bargaining power of the parties to the particular contract. There is no particular 'right answer' to the question of the form which a force majeure clause should assume.

How to courts approach the interpretation of force majeure clauses?

In the past examples can be found of cases in which the courts applied a strict approach to the interpretation of force majeure clauses, particularly via the application of the *contra proferentem* rule. Today, the courts are more likely to apply the conventional principles that govern the interpretation of contract terms to force majeure clauses, particularly in the case where the parties to the transaction are both commercial parties. The courts will generally require that the contract term be clearly drafted but in the absence of ambiguity the courts are likely to give effect to the clause as it stands (*National Bank of Kazakhstan v Bank of New York Mellon SA/NV, London Branch* [2018] EWCA Civ 1390, [50]).

There is no express requirement that the event must be unforeseeable at the time of entry into the contract (although it is possible to include such a requirement in express terms in the clause, for an example of which see *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 WLR

210 where the contract referred to 'unavoidable hindrances'). This being the case, it is possible to include the current pandemic within a force majeure clause even though its impact will be evident to the parties (although its impact on the performance of the contract may not be apparent to the parties at the time of entry into the contract). Thus it has been stated (*Chitty on Contracts*, 33rd edn, para 15-155) that 'there is no justification for limiting the ordinary meaning of words in a force majeure clause to events or states of fact not in existence at the date of the contract or to those which are unpredictable at the time it was made.' However, it is likely as a matter of fact that the other party to the contract will resist the attempt to include events that are known about within a force majeure clause. But that is a matter of bargaining power and not an issue of legal doctrine.

Where does the burden of proof lie?

The burden is on the party relying upon the force majeure clause to prove that the event which has occurred is one that falls within the scope of the clause and that it has had the required impact on the ability of that party to perform its obligations under the contract (*Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323, 327). It has further been asserted that the party relying on the clause must also prove that its non-performance was due to circumstances beyond its control and that there were no reasonable steps that could have been taken to avoid or mitigate the event or its consequences (*Chitty on Contracts*, 33rd edn, para 15-155). However, it is important always to have regard to the wording of the particular clause. In some of the cases the source of the requirement that a party prove that the non-performance was due to circumstances beyond its control is to be found in the express terms of the contract and may not be a proposition of law of universal application. As in all of these cases, it is important to have regard to the wording of the clause in dispute.

What events should be included within a force majeure clause?

This is very much for the parties to determine. Given that force majeure is more often relied upon by a seller than a buyer, it may be that a business should have two standard force majeure clauses, one when it is acting as the seller/supplier and the other when it is a buyer. The clause may be drawn more broadly in the former case than the latter.

It is customary for force majeure clauses to contain a list of specific events followed by a general catch-all formula at the end of the list of specific events, such as 'any other event which reasonably may impede, prevent or delay the performance of this contract.' It is important to examine the list of events contained in the specific list. If the list includes 'epidemics' or 'pandemics' then it will likely encompass the current pandemic (although any attempt to insert a reference to epidemics or pandemics post-March 2020 is likely to be vigorously resisted by the other side). If the reference is to 'laws of any Government' this will not encompass advice, guidance or recommendations of government which fall short of the enactment of laws. Nor will it generally suffice to point to legislation that is imminent. In order to trigger the operation of the clause the event must be an existing fact and not an apprehension (*Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227). Slightly broader is the inclusion of an 'act of any

governmental authority' which may catch an announcement of action by a government minister which does not have the force of law.

If no suitable event can be found in the list, it will be necessary to rely on the catch-all formula at the end of the list of specific events. It has been stated (*Chitty on Contracts*, 33rd edn, para 15-153) that the general words to be found typically at the end of a force majeure clause 'are prima facie to be construed as having their natural and larger meaning and are not limited to events ejusdem generis with those previously enumerated' (see *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175).

Must the event be beyond the reasonable control of the parties?

Not necessarily. There is no rule of law to the effect that a force majeure event must be beyond the reasonable control of the parties (an example might be internal industrial action). But if the aim is to include within the list an event or events that are beyond the reasonable control of the parties, clear words should be used to that effect because otherwise a court may conclude from the nature of the events listed in the clause that it is directed exclusively towards events that are beyond the reasonable control of the parties.

A recent example is the decision of O'Farrell J in *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC). The force majeure clause provided:

> 'Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.'

It can be seen that the clause requires in express terms that the event must be one that it is 'beyond the reasonable control of the party affected.' On the facts rioters gained access to the defendant's storage warehouse where they started a fire which caused extensive loss to the claimants whose goods were in the store at the time. O'Farrell J held that the risk of intruders was foreseeable, that the risk of arson was, or should have been, foreseen and that the risk of destruction of the warehouse and its stock by fire was, or should have been, foreseen. Given the failure by the defendant to take adequate security measures and to take reasonable fire precautions, the fire and the resulting loss suffered by the claimants did not amount to circumstances beyond the reasonable control of the defendant so that the defendant was not entitled to rely on the force majeure clause in order to resist the claim brought by the claimants.

A reference in a force majeure clause to acts or events beyond the reasonable control of 'either party' has been held to mean beyond the reasonable control of that party or any party to whom the contractual performance of that party's obligation has been delegated by that party (see *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2013] 2 All ER (Comm) 992, [33]).

It is unlikely that a force majeure clause will be held to cover an event that is caused by the negligence of the party seeking to rely on the clause. Thus it has been held that a force majeure clause which referred to 'perils or danger and accidents of the sea' did not extend to the sinking of the vessel as a result of the negligence of the party seeking to rely on the clause (*J Lauritzen AS v Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1).

Can a change in economic circumstances amount to force majeure?

Again, the answer depends upon the drafting of the clause. If the parties wish to include a change in economic circumstances as a force majeure event, then they are free to do so. But if it is desired to include a change of economic circumstances within a force majeure clause, it is important to give consideration to the nature of the impact which the event has on the ability of a contracting party to perform its obligations. If the force majeure clause provides that the event must 'prevent' performance, then it will be difficult to establish that a change in economic circumstances is a force majeure event because a change in the economic environment does not 'prevent' performance from taking place. The word 'prevent' suggests that it must be physically impossible to perform the obligation and that it will not suffice to show that performance has become more difficult or more burdensome. Some contracts make use of softer wording such as 'hinder' or 'impede' and it may be that these words will suffice to encompass economic dislocation (although the matter is not free from doubt).

Must the force majeure event cause the non-performance?

In the typical case the force majeure event will be the cause of the non-performance and so the issue of causation will not give rise to difficulty. But in the unusual case where causation is an issue (for example, because the party seeking to rely on the clause would not have been able to perform in any event) difficult questions of law arise. The most recent consideration of this issue was given by the Court of Appeal in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, [2019] 4 All ER 1145). There it was held that a party who sought to rely on a force majeure clause as a defence to a claim for damages, but who would not have been able to perform in any event, was liable in damages and unable to invoke the force majeure clause as a defence to the claim. But matters would appear to be otherwise where the force majeure clause is relied upon for the sole purpose of the prospective discharge of the contract. In the latter case there may be no requirement that the party invoking the clause demonstrate that the force majeure event was a 'but for' cause of its decision to invoke the clause so that in such a case the fact that the party relying on the clause may have been unable to perform in any event is irrelevant (*Bremer Handelsgesellschaft mbH v Vanden- Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109). In such a case it is sufficient that the force majeure event viewed in isolation would have caused the non-performance.

Are there notification obligations applicable to the triggering of a force majeure clause?

Once again, this depends upon the drafting of the clause. The force majeure clause may impose obligations upon a party seeking to rely on a force majeure event to notify the other party of the occurrence of the event. The obligation to do so may be mandatory but a party wishing to make notification, or the form of the notification, mandatory should use clear words to that

effect. Clear words for this purpose are words which demonstrate that the giving of notice is a condition precedent to the entitlement of a party to invoke the clause. Otherwise, the notification obligation will not be regarded as mandatory. But, in order to avoid disputes at a later stage, it is important to pay careful attention to any procedural requirements relating to the calling of a force majeure event and to comply with them.

What is the remedial effect of the triggering of a force majeure clause?

This is another matter that depends upon the drafting of the clause. A force majeure clause offers to the parties much greater remedial flexibility than does the doctrine of frustration. The clause may provide for the grant of an extension of time of a fixed duration, the suspension or variation of the contract for a period of time or the termination of the contract at the option of the party invoking the clause. Force majeure clauses differ in their remedial consequences and so it is always important to have regard to the wording of the particular clause in order to ascertain its effects.

The most common effect of the force majeure clause is to provide a shield from liability in damages for the non-performance. But the parties may wish to go further and make more extensive provision for the consequences of the occurrence of a force majeure event. One option sometimes seen is to make provision for the termination of the contract on the occurrence of a force majeure event. However, we saw in the case of frustration that termination of the contract may be too drastic for the parties and so care should be taken before deciding to include termination as a consequence of the occurrence of a force majeure event. This is especially so where the term makes provision for the automatic termination of the contract. It may be preferable to give one party the option to terminate the contract (although such an option may be more difficult to negotiate).

The other principal option is to make provision for the suspension of the contract. If this option is chosen, it is necessary to consider carefully the duration of the suspension and what is to happen at the end of that period if the event is still having an impact on the ability of the parties to perform. It is possible to make provision for rolling suspension periods either at the option of one of the parties or with the agreement of both parties. There is no one solution here – it is necessary to consider the best interests of the client and draft accordingly.

What other clauses might be triggered by COVID-19?

There may be other clauses to which regard may be had when seeking to deal with the COVID-19 pandemic. These include hardship clauses and material adverse change clauses. In relation to these clauses it is necessary to pay careful attention to their wording in order to ascertain whether they are applicable to the particular facts of the case.

A hardship clause is more likely to be invoked where the aim of the parties is to adjust the contract in order to take account of the changed circumstances. A force majeure clause by contrast tends to perform a defensive function in terms of providing a defence to a claim for non-performance or providing a basis for the termination or suspension of the contract between the parties.

Two points can be made in relation to hardship clauses. The first relates to the definition of hardship. This is notoriously difficult. It is always necessary to have regard to the particular hardship clause in the contract. But the general idea is that hardship is an event which fundamentally alters the equilibrium of the contract (either because the cost of performance has increased or the value of performance has diminished) as a result of an event which occurs after entry into the contract, is an event which could not reasonably have been taken into account by the disadvantaged party at the time of entry into the contract, the event is beyond the control of the party invoking the clause and the risk of the event in question was not assumed by that party.

The second point relates to the remedial consequences of the occurrence of an event of hardship. The typical remedial consequence is the renegotiation of the contract with a view to restoring the equilibrium of the original contract. The difficulty which occurs as a matter of English law arises from the well-known reluctance of English law to recognise an obligation to negotiate in good faith. Yet, hardship clauses frequently require the parties to the contract to re-negotiate the contract in good faith. It is possible that a court could conclude that such an obligation is too uncertain to be enforced. But a court may be slow to reach that conclusion where the term has been included in a contract by parties of roughly equal bargaining power, both of whom have had access to professional legal advice. In such a case a court can be expected to be slow to strike down the clause as being too uncertain to be enforceable. To guard against a court concluding that the hardship clause is unenforceable, it might be wise to make provision for a reference to arbitration in the event that the parties fail to reach agreement on the re-negotiation of the contract.

A material adverse change clause (or a material adverse effect clause) is most likely to be found in a financing contract, such as a loan agreement, or in an M&A agreement The aim of the clause in general terms (in the case of a contract of loan) is to protect the lender against unforeseen changes in the borrower's financial position or to protect the lender in the event that there are significant changes in the market which are likely to make it more difficult for the borrower to repay the money which it has borrowed from the lender. The focus of the clause will generally be on the financial standing of the borrower and its ability to meet its obligations to the lender. Unlike force majeure clauses, a material adverse change clause does not usually consist of a list of events which fall within the scope of the clause. This being the case, it will be necessary to examine the individual clause to see whether or not the event that has occurred falls within the scope of the clause (and in particular is a 'material' adverse change).

Looking to the future

It is extremely difficult to predict when the current pandemic will end or be brought sufficiently under control. Added to this uncertain picture is the continuing uncertainty over Brexit. Uncertainty is therefore likely to be with us for the foreseeable future and it will make contracting a more hazardous activity, particularly in the case where the contract is intended to govern the relationship between the parties for a considerable period of time. Long term

contracts may be of considerable commercial benefit to a client, but at the moment they carry with them a high degree of legal risk.

It is at least clear that a party who wishes to get out of an improvident bargain will not be able to rely on the doctrine of frustration in order to do so (unless the Supreme Court decides at some future point in time to alter radically the scope of the current doctrine). So it is to the terms of the contract that we must look when seeking to advise clients. And here much will depend on what the client wants. If the client wishes protection against unexpected events, such as COVID-19, it will be necessary to include in the contract an appropriately drafted force majeure, hardship or material adverse change clause. But it may be that the client will wish to have an agreement that is drafted in more flexible terms and which imposes on the contracting parties an obligation to co-operate in order to achieve the purpose of the contract in changed circumstances. A client who wishes to go down the latter route will want to see a contract drafted in very different terms and, if drafting such a contract, it will be necessary to take care to ensure that the agreement as drafted is enforceable as a contract and is not held by a court to be an unenforceable agreement to agree.