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# COVID-19 and the Performance of Contracts in England & Wales

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With the COVID-19 pandemic causing major disruption globally, the incidence of commercial parties seeking to avoid liability for failure to perform by reliance on force majeure (FM) clauses is set to increase. While FM clauses may appear straightforward, they can be anything but – the fact that an event has occurred that may constitute an FM event is just the first step. The operation of these clauses is highly fact-specific. Whichever side of the contractual relationship you are on, close attention must be given to the precise wording of the clause and the circumstances of the performing party.

In England & Wales, FM clauses are contractual terms that excuse a party from performance in specified circumstances. English law will not imply the principle of FM into a contract; an express term is required. The scope of the excusal from performance will be dictated by the specific wording of the clause. Any assertion of FM in the current circumstances must address the following:

- Are COVID-19 and/or related events capable of constituting an FM event?
- Do COVID-19 and/or related events have the required impact on the performing party's ability to perform?
- What mitigation is required under the contract?
- What notice is required under the contract?

There may also be an issue as to whether the legal doctrine of frustration applies to certain English contracts that do not contain an FM clause. The threshold to establish frustration is generally higher than for FM. The party asserting frustration is required to prove that the event:

- Occurred after execution of the contract;
- Was not foreseeable at that time;
- Was not the fault of either party; and
- Made performance impossible or fundamentally different from that which was agreed.

We explore these concepts in a little further detail below.

## Force majeure

**Are COVID-19 and/or related events capable of constituting an FM event under the contract?**
FM clauses will often list specific circumstances that may constitute FM events and include general wording to capture other, unspecified events beyond the parties' control.

Disease, epidemics and/or pandemics may be specifically listed. If not, consideration should be given to whether the current circumstances would be captured by another specified event, such as acts of state or government action. Whether or not a pandemic is an Act of God has yet to be judicially determined.

If COVID-19 is not within the scope of specified events, it may fall within the general wording (if included). Whether or not any general wording should be construed as being limited to the same type of event as those specifically listed (the "ejusdem generis" principle) will depend on the precise wording of the contract.

An event that has already occurred at the time of contracting may still constitute an FM event.

**Do COVID-19 and/or related events have the required impact on the performing party's ability to perform?**
FM clauses almost invariably require the event to have a specified impact on performance. There are broadly three types of wording that may be used to indicate the level of impact required:

- That the performing party be prevented or unable to perform as a result of the FM event, in which case the performing party must prove that it is impossible (either physically or legally) to perform;
- That the performing party be hindered, impeded or impaired in its performance; or
- That the performing party be delayed in its performance.

**What mitigation is required under the contract?**
Performing parties are required to mitigate. If they fail to do so, that failure, rather than the underlying event, may be deemed to have prevented, hindered or delayed performance. The mitigating action required will be entirely fact-dependent

**What notice is required under the contract?**
FM clauses will usually contain strict provisions regarding the giving of notice, with compliance being a condition precedent to relief under the clause. These provisions can sometimes be quite onerous in terms of the detail and evidence required.

# Frustration

Where a contract does not contain an FM clause, a performing party may seek to rely on the common law doctrine of frustration if an event has occurred that makes performance of the contract impossible or renders it a thing radically different from that which was agreed. The event (i) must have occurred after execution of the contract, (ii) must not have been foreseeable at that time, and (iii) must not be the fault of either party.

If a contract is frustrated it is, without further act of the parties, cancelled. For obvious public policy reasons, the doctrine is not lightly invoked and is kept within very narrow limits. If performance is merely delayed or only part of the performance is impacted, it would be difficult to make out a claim to frustration.

# Further advice

COVID-19 has the potential to have a significant impact on the performance of contracts. Your options will depend on the terms of the contract and the specific facts of your case. If you want to discuss further, contact one of our team members listed here.

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