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Frustrating Times: Notes from the Field

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Abstract

Business Law Clinics' involvement in advising Small and Medium Sized Enterprises (SMEs) reached an interesting crescendo during the pandemic as businesses were often left high and dry by business customers and suppliers who could or would not fulfil their contractual obligations. SMEs, often sole traders or limited companies with no business premises, found themselves unable to access government support and facing insolvency. Many had no contracts in place, or they sought to rely on their terms and conditions of business only to find them lacking due to reasons grounded in law (there is no freestanding concept of force majeure under English law and if a contract is silent on it, English law will not imply it) or process (lack of incorporation of terms through their own fault). In this note I seek to examine the impact of the pandemic on the concept of force majeure and contractual remedies for SMEs in the UK and to contemplate the role of business law clinics in advising SMEs on the use of terms and conditions in business-to-business (B2B) contracts as part of successful operations in the post-Covid world. Drafting sets of terms and conditions for SME

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clients is a perfect vehicle for meeting the goals of a university business law clinic – community engagement with local SMEs providing them with fast, tailored advice with a bespoke tangible document to take away plus student experience of real-world learning in commercial law (experience which is not always readily available for students outside the big cities).

Frustrating Times

The doctrine of frustration of contract has always held a special place in my heart – it was a neatly contained topic on my degree program that did not need me to update my notes before final examinations because all the important cases were historic: set against back-drops of a cancelled coronation or war-time trading. Fast-forward to the twenty-first century and one notable legal impact of the global pandemic is likely to be a raft of new cases on frustration of contract. Until those cases are ruled in any great numbers however, those of us attempting to advise struggling Small and Medium sized Enterprises (SMEs) based upon century old common law rules have found it challenging. England and Wales are different to other (typically civil law) legal systems: in France for example, force majeure is a legally defined concept and as early as summer 2020, the courts declared that COVID-19 was a force majeure event.¹ This meant that, in France, performance of contracts could be suspended or

¹ French Law defines force majeure in Article 1218 of the French Civil Code: “force majeure occurs in contractual matters when an event beyond the control of the debtor, which could not reasonably be expected at the time of the conclusion of the contract and the effects of which cannot be avoided using appropriate means, prevents the performance of the debtor’s obligation”. The French government *declared COVID-19 a force majeure event in respect of public procurement and*

terminated without any party being deemed in breach. There is no freestanding concept of force majeure under English law – it is just a contractual issue, adjudicated by the courts on a case-by-case basis with the appropriate remedy thereafter. In this note I therefore consider the position of SMEs in England and Wales as they face life after the pandemic - situations of uncertainty, of legal wrangling and of reluctant negotiated settlements caused by contractual breaches – and the role that lawyers, but more importantly for the purposes of this note and potentially for the SMEs themselves, law clinics can play in helping them face the future with a level of confidence that otherwise can elude them in challenging times.

During the pandemic, many businesses became concerned that they were losing money due to events or orders being cancelled, often, but not always, as a result of the restrictions imposed by the Health Protection (Coronavirus) Regulations 2020.² In England and Wales, the terms of their commercial (“B2B”) contracts dictated their rights to cancel. If there happened to be a suitable cancellation clause or they could agree to cancel or suspend the contract, there should not have been a dispute. If, on the other hand, one party wanted to cancel and the other did not and money in some form has changed hands, then the situation became more complicated. SMEs

announced solidarity measures for all companies, suggesting a possible extension of the qualification. A decision by the Court of Appeal of Colmar on March 12, 2020 ruled that COVID-19 as a force majeure event (no. 20/01098). This was confirmed when the Paris Court of Appeal intervened in the interpretation of the Framework Agreement (an agreement entitling electricity suppliers to purchase electricity from Electricité de France (“EDF”) at a regulated price), it considered that the force majeure stems both from the Covid-19 pandemic and the governmental measures taken to stop the spread of the virus.

² SI 2020/129.

in England needing a remedy due to COVID-19 needed to overcome a series of contractual hurdles:

1. Is there a set of terms and conditions?
2. Are those terms and conditions incorporated into an enforceable contract?
3. Is there a force majeure clause included in that contract?
4. Does that force majeure clause include reference to "disease" or "pandemic"?

The reality of doing business as an SME in England and Wales is that business owners tend to be wholly focussed on time and money on making a success of the business rather than asking for help to put appropriate, or indeed any, terms and conditions in place. Of course, help may be available from solicitors, chambers of commerce, law clinics or even simply by "borrowing" a set of terms and conditions from the internet. Many SMEs have no formal contracts in place – relying on an email, a text or a phone call here or there. Those that have had the foresight to acquire or create a set of terms and conditions must then overcome hurdle number two.

The second hurdle is that of incorporation into a valid contract. Those with a legal background may recall the general rules of incorporation from contract law sessions and may even recall the specifics of Lord Denning's "last shot doctrine" from *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd*.³ Simply put, legal practitioners

³ [1977] EWCA Civ 9.

tell clients not to rely on printing their terms and conditions solely on their invoice but to bring them to the attention of their customers earlier in the transaction – for example, by making explicit reference to them in their quotation or other document which is communicated before the contract is concluded.

Assuming then that there are terms which are incorporated into the contractual relationship between the parties, the third hurdle for SMEs is whether there is a force majeure clause and how it is constructed. The title of the clause may give a hint that this is not a concept originating in English law (it means 'superior force' in French) and, in fact, the term has no recognised meaning in English law at all. On that basis, if it is used in commercial contracts, it must be expressly defined: a clause stating that the "usual 'force majeure' clauses shall apply" has been held void for uncertainty.⁴ The makings of an effective clause therefore could include "In this Agreement, Force Majeure shall mean any cause preventing either party from performing any or all of its obligations which arises from or is attributable to strikes, lock-outs or other industrial disputes, nuclear accident or acts of God, war or terrorist activity, riot, civil commotion, malicious damage (excluding malicious damage involving the employees of the affected party or its sub-contractors), outbreak of disease or pandemic, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors and, where they are beyond the reasonable

⁴ *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280.

control of the party so prevented, any other acts, events, omissions or accidents....”

(NB. Capitalisation denotes defined terms that would be used in the entirety of an agreement).

The eagle-eyed amongst you will have noticed that the long list of meanings attributed to force majeure includes ‘outbreak of disease or pandemic’. The reality is however, that before March 2020, many force majeure clauses that were included in commercial contracts, even bespoke ones, did not include such a provision. Even the ‘long list’ in the clause above may not be long enough – practitioners have now spent many hours looking at how to define ‘pandemic’ in a global market and in a similar vein, is the invasion of Ukraine covered by ‘war’ or would it need to include ‘act of government, embargo, blockade, imposition of sanctions, breaking off of diplomatic relations or supply chain disruption’. The ‘safe’ list is seemingly endless. Even once identified, there has to be a sufficient causal link between the force majeure event and the corresponding impediment to performance and it is likely that the party seeking to rely on the force majeure clause will have to demonstrate that ‘but for’ the force majeure event, they would have performed under the contract.

As a result, for SMEs that had overcome the first three hurdles and the ‘proofs associated with it’, they still needed a clause where that event could bring the contract to an end without penalty: the fourth hurdle. An effective clause within an effective contract also needs to consider the consequences of any of these force

majeure events (for example whether the contract will be delayed or will be terminated) and additionally set out what happens to payments made and services delivered prior to the force majeure event. These potential options for inclusion in a contract are expositions of remedies grounded in the principles of contract law but should be considered to form contractual terms that are capable of negotiation, tailoring and explicit inclusion and are more suitable for the parties, and certainly less of a blunt instrument, than simply discharging the contract.

So many hurdles! Therefore, we can see that the situation would be the same for businesses with a contract that did not contain an appropriate or adequate force majeure clause or for businesses where there was no contract at all. It is worth repeating that force majeure cannot be implied under English law. Without such implicit inclusion or usable contractual terms, SMEs were scrambling around for alternative solutions. The fallout from the pandemic has meant that SMEs have been forced to consider the business relationships that were potentially at stake. For one-off events, where there was effectively 'no relationship' they often chose to take a more rigid line. For example, the owner of an events venue could charge full fees for cancellations and hope that those fees were unquestioningly paid by an equally struggling business at the other end of the contract. Where there was a long-standing, often important, business relationship (e.g. an event hosted annually at the same venue), then a more commercial, pragmatic approach may have been preferred, agreeing a course of action outside of the contract to try and share the

exposure more fairly. If a negotiated settlement could not be reached, parties could look to rely upon the common law doctrine of frustration. That said, lawyers always warn that a misplaced assertion of frustration may render these SMEs in anticipatory breach of contract. The doctrine of frustration applies where performance of a contract has become legally or physically impossible through no fault of the parties. For frustration principles to apply, performance of the contract must be adjudged by a court to be impossible, illegal or radically different to what was contemplated at the outset of the contract rather than just difficult, more expensive or likely to be delayed, even if that delay is significant. The frustrating event must, in the words of Bingham LJ in the 'Super Servant Two' case,⁵ 'bring the contract to an end forthwith, without more ado automatically.' Even a hint of foreseeability about the supervening event and its consequences would mean that the doctrine of frustration could not be relied upon. The burden of proof lies with the party asserting that the contract has been frustrated to establish there has been a frustrating event and that its effect on the agreement is termination without penalty. The other party could then seek to prove that the doctrine should not apply, for example, on the basis that the frustration was self-induced or there was a break in the chain of causation.

The law of frustration aims to guard against so-called 'unjust enrichment' where the loss falls unreasonably or too much on one party by comparison with the other. Seeking to achieve a fair apportionment of incurred costs by relying on frustration,

⁵ *Lauritzen A/A v Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

cannot simply be negotiated between the parties. yet seeking a remedy in court is, as we all know, not the easy option. Even using the Small Claims Court track in an attempt to pursue lost revenue and a fair apportionment of costs takes a considerable amount of time and organisation, not to mention an average of £1000. I have stated that establishing that performance was actually impossible is a high bar to overcome. If that bar can be overcome, where money was paid prior to the frustration of the contract, under the Law Reform (Frustrated Contracts) Act 1943, the court will usually find that that sum may be recovered by the payer and where money was due to be paid at the time of the frustration, it would no longer be payable. Neither party would be in line for any huge compensation pay out – just an allocation of costs and losses already incurred. Setting aside the time and / or money to go to court however is simply not an option, nor is it likely to become an option within the 6-year limitation period, for most SMEs that are already cash-strapped as a result of the pandemic and a looming cost-of-living crisis.

There has been talk that the English courts could begin to recognise the use of a Force Majeure Certificate as in other countries around the world. The English courts certainly have not yet tested the effect of a Force Majeure Certificate and given the fundamental principles the Courts apply when considering a force majeure claim and the cautious (some may say slow) route to progress, the position may be that, whilst a Force Majeure Certificate is useful evidence of the fact that a force majeure event has taken place, the fact of the certificate itself will not lead the Court to hold that

the party invoking the force majeure provision is entitled to relief. Perhaps if the force majeure clause within the contract expressly refers to the issuance of Force Majeure Certificates as an event which can be relied on, the circumstances could be assessed to be different, in the contemplation of the parties and the contractual remedy will be available.

In fact however, the reality is that neither reliance on force majeure clauses or on the doctrine of frustration have proved effective remedies for businesses trying to recoup losses incurred through failed contracts during COVID-19. It has been suggested⁶ that courts' and legal practitioners' reluctance to find, or even advise, that the pandemic may be an event of force majeure or a frustrating event was due to the wording of the UK Government's May 2020 guidance note⁷ which stated that

Responsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19.

This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other

⁶ LexisNexis "Frustration event analysis – a practical guide".

⁷ Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/Covid-19_and_Responsible_Contractual_Behaviour_web_final_7_May.pdf>.

party (or parties), the availability of financial resources, the protection of public health and the national interest.

As DLA Piper stated in a recent article,⁸ “legal practitioners consistently poured cold water over attempts by commercial parties to rely on force majeure clauses (and the doctrine of frustration)” during the pandemic. What started with BREXIT and continued with the pandemic is now exacerbated by the global economic impact of the war in Ukraine and the looming energy crisis: the agony for businesses with even more of their contracts becoming untenable for a variety of reasons is prolonged. DLA Piper state their belief that ‘now, as the hot water really does begin to turn off in Europe, it is looking increasingly likely that commercial parties may finally be in a position to invoke force majeure.’ So, what has changed and is 2022 the time when new frustration cases become like buses: you wait so long and then they all come at once? The High Court in *European Professional Club Rugby v RDA Television LLP*⁹ found that a TV company wishing to terminate a contract on the grounds of force majeure when it could not televise rugby games that were cancelled due to the pandemic was permitted to do so. The reason that court found that this termination was valid was due to the rather specific wording of the clause (as I have already indicated, the more specific the better seems to work): the non-defaulting party had

⁸ Force Majeure revisited – the gas crisis of 2022 (5/9/22)
<<https://www.dlapiper.com/en/france/insights/publications/2022/09/force-majeure-revisited-the-gas-crisis-of-2022/>>.

⁹ [2022] EWHC 50 (Comm).

the right in the contract to terminate the agreement if the force majeure event delayed the other party's performance *by more than 60 days* (author's emphasis). Whether this is the dawn of a new era in frustration and force majeure is doubtful however as the decision in this case contrasts with another decided by the High Court only days earlier. In *Football Association Premier League v PPL Sports International*,¹⁰ the court held that the postponement of matches and the fact that the matches were held without spectators were not fundamental changes to the format and accordingly the licensee was not entitled to terminate the contract. The clause here was broader and thus performance within the contract was still possible, just different. The Court of Appeal in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*¹¹ decided in similar terms – that COVID-19 was not a defence against a claim for non-payment of rent.

An additional word of warning though about including force majeure clauses in standard terms and conditions – they must still abide by the rule requiring a clause to be reasonable. Where the effect of a force majeure clause, as drafted, is to entitle one party to render no contractual performance at all or a performance substantially different from that reasonably expected of them, the clause must be reasonable to avoid a challenge under section 3 of the Unfair Contract Terms Act 1977.

¹⁰ [2022] EWHC 38 (Comm).

¹¹ [2022] EWCA Civ 1021.

Arguably, these tough times have brought the potential impact of business / entrepreneurial law clinics to the fore, further cementing their significance for industry and commerce. Whilst the provision of pro-bono legal advice has become an integral part of the UK's legal infrastructure and higher education institutions participate effectively, the advice letter model is not a model that works for fledgling, cash-poor businesses who need assistance with a huge range of documentation from sets of terms and conditions (as already mentioned) to contracts of employment. In 2018, a report of the Legal Services Board¹² based on research over five years concluded: 'we estimate the annual cost of small businesses' legal problems to the UK economy to be roughly £40 bn. Furthermore, 20% of businesses reported health impacts on personnel, which extrapolates to a minimum of 1.1m individuals, with possible knock-on effect for health services.' Over 50% of small businesses try to solve their legal problems completely alone. The legal and regulatory needs of small businesses, start-ups and charities are often overlooked because these organisations are presumed to have money in their budgets that can be used to pay for legal advice, but this becomes unlikely, particularly in an era of difficult trading conditions and rising legal fees.¹³

¹² <<https://research.legalservicesboard.org.uk/wp-content/media/FINAL-Small-Business-Report-FEB-2018.pdf>>.

¹³ Previously cited in IJCLE, Helen Codd, Lucy Blackburn, David Massey, Deborah Wood and Stephanie Jones 'The Best of Times and the Worst of Times': Reflections on Developing a Prison-Based Business Law and Tax Clinic in the Midst of a Global Pandemic' International Journal of Clinical Legal Education (2020) 27(4) 39-61.

Helping SMEs in this way is a method of promoting social justice – pro-bono work has always had this at its core. Helping small businesses casts a less-traditional lens on social justice, but it is certainly a valid one. It is worth noting therefore that many such clinics can also promote social justice in another way – by providing unapologetic attempts to level the playing field for graduates and students whose A level results or social background may prohibit them from acquiring essential work experience in commercial law firms, who commonly recruit solely from Russell Group universities. Clinics that provide internships and / or graduate employment allow graduates and students to gain confidence, essential skills and legal experience. For graduates and students who get involved, this real-world experience enables them to develop often elusive essential professional attitudes and attributes. Over 88% of trainee solicitors in commercial law firms are recruited from Russell Group universities¹⁴ with most of those trainees coming from middle class backgrounds.¹⁵ Some of the elite universities recruit under 3% of their students from low social classes¹⁶ and under 13% from BME backgrounds. Over 64% of Russell Group students take part in a formal internship / work-experience programme that is relevant to their chosen career¹⁷ and most commercial law firms take over half of their trainee solicitor recruits from those formal internship / work-experience

¹⁴ <<http://www.chambersstudent.co.uk/where-to-start/newsletter/law-firms-preferred-universities>>.

¹⁵

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434791/A_qualitative_evaluation_of_non-educational_barriers_to_the_elite_professions.pdf>.

¹⁶ <<http://www.hefce.ac.uk/analysis/yp/POLAR/>>.

¹⁷ <<https://universumglobal.com/>>.

programmes. A majority of law graduates from provincial post-1992 universities have traditionally gained employment in high street private client small firms of solicitors in which the pay is lower and opportunities for progression fewer than in commercial firms. For a variety of reasons, they have very limited access to commercial law experience – they often come from low social classes, BME backgrounds, have lower pre-university achievements and so on. Furthermore, almost 70% of graduate employers see relevant work-experience as an essential part of a graduate job application.¹⁸ Commercial law experience and the jobs that can flow from it are evading many students in provincial post 1992-universities. Clinics are therefore often focussed on attempting to give these students and graduates access to opportunities that others take for granted. In the future, with correct resourcing, such clinics are excellently placed to provide placements that contribute to graduates' Qualifying Work Experience under the Solicitors' Regulation Authority's new route to qualification (Solicitors Qualifying Exam). Once again potentially contributing to the levelling-up agenda for such students.

Our legal and commercial systems could certainly become more receptive to the use of, and reliance upon, force majeure clauses and legal practitioners can begin to work out a possible route through the minefield that at least creates a workable backdrop for all parties engaged in commercial activity. Clinics are well placed to overhaul the terms and conditions of SMEs to include reasonable clauses that are

¹⁸ <<https://www.ucas.com/connect/blogs/work-experience-important>>.

bespoke to the SME's business and as specific as possible on what could count as a force majeure event. These clauses may not be a water-tight solution for SMEs simultaneously dealing with global and national crises but it is certainly worth a try. Many SMEs are rather cash-strapped and, in any event, would rarely seek bespoke contracts for every deal that they do. They may welcome the prospect of a well-drafted set of standard terms and conditions that could protect them rather than having nothing in their corner. Clinics can certainly provide this without forcing these cost-conscious SMEs into expensive legal appointments – thus promoting the levelling up agenda at every turn and steering businesses away from frustrating times into encouraging ones.