

# COVID-19: Frustration under English law

## BCLP's Commercial Disputes team addresses some key questions






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Sports fixtures are off; mass gatherings are prohibited; events, construction projects and manufacturing are grinding to a halt. All of these situations are directly related to the COVID-19 Pandemic, and there is a significant impact on the multitude of commercial arrangements sitting behind them. Commercial organisations will be considering whether COVID-19 has made performance of their contracts impossible, and whether this may mean contractual relationships are at an end. Is the English law doctrine of frustration an avenue worth pursuing? Here are some key points to consider:

Issue	Advice
 <b>What is frustration of a contract?</b>	Frustration is a common law concept which addresses whether events occurring after conclusion of a contract allow a party to treat the contract as discharged – bringing to an end their obligations to perform. The concept is very narrow – UK courts are usually reluctant to find a contract is frustrated, as it conflicts with the general idea that in normal circumstances the parties have allocated risks as they see fit.
 <b>If my contract is frustrated, what benefits does that bring me?</b>	Your contract (governed under English law) is automatically terminated from the time it has shown to be frustrated. Statute permits (for certain types of contract) a party to recover amounts paid prior to termination and relieves the obligation to pay any unpaid amounts payable prior to the frustrating event. You will need to take specific advice as to whether the financial outcome which may result under the statute is worthwhile.
 <b>Does a force majeure clause in my contract affect the ability to argue frustration?</b>	Yes: whilst not an absolute rule, you can generally only argue frustration if your contract does not contain a force majeure provision (where parties have explicitly provided for remedies if a specified supervening event occurs). The UK courts will generally infer that, having elected for the certainty of termination/suspension for a force majeure event, the parties prefer that outcome to the uncertainty of trying to rely on frustration. Note that other clauses – price escalation, delay, hardship - may provide for what should happen in the event of delay or cancellation, and they too might undermine the opportunity of arguing frustration.
 <b>What are the hurdles to showing frustration?</b>	The event must change the nature of contractual performance – not just make it more expensive or onerous – so that there is a radical or fundamental change from the original obligation. The exception is where the increased cost or burden of performing may be so great as to make the contract so impracticable it is almost impossible to achieve. But to date, English cases do not provide a clear example of this – even in times of war. The hurdles are high, and the test will be a “multi-factorial” one, applied case by case.
 <b>Could COVID-19 be a frustrating event?</b>	This will need to – and no doubt will - be tested and determined in the courts. But these situations might give rise to arguments relying upon frustration: <ul style="list-style-type: none"><li>• Changes in the law which make it illegal to perform the obligations in a contract.</li><li>• Delayed delivery in a contract where supply is time critical to the very nature and existence of the</li></ul>

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	<p>subject matter of the contract means the delay amounts to non-performance.</p> <ul style="list-style-type: none"><li>• The fundamental assumptions on which the parties decided to contract no longer exist.</li></ul> <p>Even if arguable, frustration cannot be assumed. In a scenario where a mass gathering, for example at a pop concert, becomes itself illegal, frustration may well not come into play for any, or many, of the multitude of contracts put in place to make that event happen. It will depend on an analysis of each contract, the parties' assumptions and expectations, the nature of the supervening event, and the parties' intentions in the new circumstances – a multi-faceted approach. Supply contracts, for example, may still be easily fulfilled – even if the concert cannot go ahead on the date planned. Other contracts, for example any relying on a workforce which is now unavailable because of the virus, might be analysed differently – again dependent on the multi-faceted approach.</p>
 <p><b>What are the risks of arguing frustration in the current climate?</b></p>	<p>In some contracts both parties might be in agreement that the contract should be discharged. But in other scenarios the parties' positions may be irreconcilable. We are being asked to consider frustration as one of a number of legal means to navigate the commercial problems arising during the COVID-19 pandemic. Each contract needs unique analysis, and whilst frustration might be arguable, and COVID-19 might be the time to see a development in the English law of frustration, it should probably be used alongside other arguments for discharge. Frustration arguments are difficult to run and the stakes are high for a party claiming it. Where arguments exist, they will need to be considered with you as part of a wider disputes strategy.</p>

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## THE BCLP TEAM

If you have any questions, or would like to discuss any of these issues with our team, please get in touch.



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This document provides a general summary only and is not intended to be comprehensive nor to provide bespoke legal advice. Given the fast moving nature of the coronavirus outbreak and that fact that the UK government is introducing new legislation and measures on a regular basis to address it, employers need to adopt a dynamic approach. Specific legal advice should always be sought in relation to the particular facts of a given situation.

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