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**COVID-19: CONSEQUENCES OF CANCELLATION**

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**A INTRODUCTION**

1. The COVID-19 global pandemic crisis will have wide-ranging implications as a result of the suspension of many aspects of civil society. Ongoing contractual relationships have, in many cases, been ‘*suspended*’ whilst other obligations have been ‘*cancelled*,’ ranging from holiday bookings to major events such as the Olympics. This note sets out a number of considerations for those faced with such ‘*cancellations*,’ whether they be the thwarted customer or the equally frustrated supplier, including what legal label is to be given to the ‘*cancellation*’ of an obligation to provide goods or services, and the consequential legal rights and obligations of the parties.

**B THE POTENTIAL IMPACT OF COVID-19 ON EVENTS**

2. On 11 March 2020, the Director-General of the World Health Organisation declared COVID-19 a pandemic.<sup>1</sup> In addition to the virus itself impacting upon attendees’ appetites for attending large-scale gatherings, the measures adopted by authorities worldwide to combat the spread of COVID-19 may make it difficult—if not impossible—to perform many contractual obligations, such as hosting events, supplying services or delivering goods.
3. As at the time of writing, the following measures taken by the UK Government are likely to have made many events impossible to hold. As a result of the developing nature of the crisis, many of these restrictions have been imposed in an open-ended manner, with no clear indication as to when they will be lifted.
  - 3.1. **Closure of potential event venues:** On 23 March 2020, the UK Government required a wide range of businesses to be closed, including theatres, concert halls, cinemas, nightclubs, museums and galleries, restaurants, and places of worship.<sup>2</sup> No concrete guidance has been given by the Government as to when these

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<sup>1</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>2</sup> <https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance>

restrictions will be listed, save as to say that there will be a review on or around 13 April 2020.

- 3.2. **Social distancing:** Since 26 March 2020, people in the UK have been required to stay at home, and gatherings of more than two people in public have been prohibited.<sup>3</sup> Dr Jenny Harries—England’s Deputy Chief Medical officer—has indicated that social distancing measures are likely to be in place for around “*three to six months*”, albeit possibly in different forms.<sup>4</sup>
- 3.3. **Restrictions on air travel:** There have been extensive restrictions placed on international air travel by authorities worldwide.<sup>5</sup> It will be difficult for organisers and attendees alike to travel internationally for the purpose of attending events.
- 3.4. **Conversion of convention centres into hospitals:** On a longer-term basis, a number of significant convention centres, including the EXCEL Centre in London,<sup>6</sup> the National Exhibition Centre in Birmingham, and the Manchester Central Conference Centre<sup>7</sup> will be converted into “*Nightingale Hospitals*” for the treatment of COVID-19 patients. These venues are likely to be unavailable to organisers for the foreseeable future.
4. Gazing into the crystal ball (to the best of our knowledge and abilities), it appears that the above measures have made it impossible to hold events in the near future (1-2 months), and have subjected events in the medium term (3-6 months) to considerable uncertainty. It is difficult to identify a cut-off date after which events can be regarded as “*safe*” from the effects of COVID-19. The authorities have been clear that “*there’s not a fixed date like Easter when you know that the peak will come*”.<sup>8</sup> Many events post-Easter and into the summer have pre-emptively been aborted. Perhaps recognising this uncertainty, the Tokyo Olympic Games have now been postponed, and will start on 23 July 2021 (over 15 months in the future).<sup>9</sup>

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<sup>3</sup> <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>

<sup>4</sup> <https://www.bbc.co.uk/news/uk-52084517>

<sup>5</sup> See by way of overview: <https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place>

<sup>6</sup> <https://www.bbc.co.uk/news/health-52018477>

<sup>7</sup> <https://www.bbc.co.uk/news/uk-england-52070611>

<sup>8</sup> As Mr Michael Gove stated in his briefing on 31 March 2020: <https://www.bbc.co.uk/news/uk-52112483>

<sup>9</sup> <https://www.bbc.co.uk/sport/olympics/52091224>

5. The upshot is that contractual parties—be they suppliers or customers—are likely to be attempting to “cancel” their legal obligations in the light of the current crisis. They should therefore be aware of legal arguments as to frustration and *force majeure* – legal labels in common parlance but which are rarely the subject of much scrutiny.

## C FRUSTRATION

6. The doctrine of frustration allows a contract to be discharged when an unforeseen event occurs that renders the performance of the contract impossible. If I have booked a holiday cottage for Easter, or chartered a yacht in the Mediterranean, is the contract frustrated by the global measure introduced to combat COVID-19? If so, who is to bear the financial consequences?

### C1 Requirements for frustration

7. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700,<sup>10</sup> Lord Simon held that to establish frustration, it must be proven that:
  - (1) there was a supervening event (i.e. an event taking place after the contract was concluded);
  - (2) the said event significantly changes the nature of the outstanding contractual rights and/or obligations from what was reasonably contemplated by the parties at the time of contracting; and
  - (3) it would be unjust to hold the parties to the literal sense of the contract’s stipulations in the new circumstances.
8. Ultimately, whether or not any given contract is frustrated will depend on the provisions and circumstances particular to that contract. However, parties may wish to note the following two key points:
9. **First**, a contract can be frustrated by “*supervening illegality*” i.e. when a change in the law makes it illegal to perform the contract. In *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, the construction of a reservoir became illegal following a 1916

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<sup>10</sup> “Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.”

Order of the Ministry of Munitions. The House of Lords held that the contract was frustrated, as the interruption to the works was “*of such a character and duration that it vitally and fundamentally changed the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made*”.

10. As a result of restrictions imposed by the Government (summarised above), one can readily imagine a court concluding that contracts relating to events due to be held in the near future are likely to have become frustrated on this basis.
11. Parties to contracts relating to events to be held in the medium term are in a more difficult position. It is currently impossible to say whether it will be illegal to host a large-scale event in 6 months’ time. However, parties should bear in mind that this is a developing situation, and the situation will become clearer over time.
12. **Second**, contracts contingent upon a major event may become frustrated as a result of that event being cancelled. For example, in a series of “*coronation cases*” following the cancellation of the coronation procession of King Edward VII in June 1902, many contracts were held to have been frustrated. In *Krell v Henry* [1903] 2 KB 740, a contract for the hire of rooms on Pall Mall for the purpose of viewing the processions was held to be frustrated by the cancellation of the Coronation procession.<sup>11</sup>
13. Practically speaking, parties to contracts affected by the cancellation or postponement of major events (such as the Tokyo Olympics) should consider whether their contracts have been frustrated.

## C2 Effects of frustration

14. If a contract has been frustrated, it will be brought to an end automatically. That is to say that no action needs to be taken by parties to the contract, and all parties are immediately released from further performance. If there is a dispute as to whether a contract has been frustrated, parties may wish to bring proceedings for a declaration as to whether the contract has been frustrated, as well as consequential relief.
15. Many airlines, theatres and the like who have cancelled are providing refunds. No doubt they will claim on their insurance (where possible). However, many other suppliers are

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<sup>11</sup> The hire of a boat in *Herne Bay Steam Boat Company v Hutton* [1903] 2 KB 683 was held not to be frustrated – apparently, one could glide down the Thames without a coronation.

not. For example, a business such as a company letting out holiday accommodation may not be able to afford to provide a refund and takes the view that, given the property is ready and available, the risk should like with the customer – no doubt in the hope that the customer will claim on their insurance. One could debate the merits of where, in such circumstances, the loss should like from a commercial perspective; the legal answer, however, is clear. Where a deposit has been paid under a frustrated contract, the deposit may be recovered—subject to deductions for expenses incurred by the other party—under the Law Reform (Frustrated Contracts) Act 1943, s1(2).

#### D FORCE MAJEURE

16. *Force majeure* is a term regularly bandied about as if it had a settled meaning. However, it is not a term of art; on the contrary, it is a creature of contract and therefore arises only where contained in the parties' contract. A *force majeure* clause is “*a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control*”: *Chitty on Contracts*, §15-152.
17. The following is an example of a force majeure clause typically found in a contract for the hire of a hotel ballroom:

*“If acts of God or government authorities, natural disasters, or any other event beyond a party’s reasonable control make it illegal or impossible for such party to perform its obligations under this Agreement, such party may terminate this Agreement upon written notice to the other party without further liability. For the avoidance of doubt, any deposit paid by Group before the event shall be reimbursed in circumstances where the Hotel suffers the event of a force majeure and is unable to perform its obligations.”*
18. It is impossible to provide a ‘one-size-fits-all’ analysis of *force majeure* clauses, since there is no standard *force majeure* clause, and the ambit and effect of any given *force majeure* clause is a matter of contractual interpretation. That said, parties may wish to consider three main issues.
19. **First**, whether there has been a *force majeure* event.
  - 19.1. The COVID-19 global pandemic may constitute an “*act of God*”. In *Nugent v Smith* (1876) 1 CPD 423, 442, Baron Cleasby held that “*wherever there is that unusual*

*violence of nature, against which, in the opinion of the jury, precautions would be considered unavailing, and could not be expected to be taken, I should say the case would come within the [act of God] exception*". Applying this definition, the COVID-19 pandemic is likely to be considered an act of God as it is:

- (a) A naturally occurring phenomenon;
- (b) That has resulted in the "*unusual violence*" of widespread deaths worldwide; and
- (c) That was outside the expectation of the general public.

19.2. Further, *force majeure* clauses may also refer to acts of government authorities. In respect of such clauses, parties may wish to rely on the measures imposed by the UK Government as *force majeure* events.

19.3. Alternatively, *force majeure* clauses frequently contain a "*catch-all*" provision e.g. referring to "*any other event beyond a party's reasonable control*" and, to that extent, tend towards the same analysis as would apply to cases of frustration. Parties may wish to argue that the COVID-19 pandemic or the measures taken by the UK Government fall within this wording.

20. **Second**, whether it has become illegal or impossible to perform the contract as a result of the *force majeure* event (depending on the terms of the clause in question). This requirement is likely to be satisfied, given the "*draconian*" nature of the measures imposed by the UK Government so far.<sup>12</sup>

21. **Third**, what the consequences that follow are. In this regard, the *force majeure* clause may provide that the Contract is terminated and/or that deposits paid under the contract must be returned. Again, unlike cases of frustration, this will all depend upon the precise terms of the contract.

## E CONCLUSION

22. Regrettably, in addition to the human tragedy that it has wrought, the COVID-19 pandemic has put many contractual parties in a difficult position. As a result of

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<sup>12</sup> <https://www.bbc.co.uk/news/uk-52012432>

cancellations, many contracts are likely to have become frustrated, with significant financial implications. Those organising events in the medium term now face considerable uncertainty and may be forced to take difficult decisions to cancel or postpone their events. Whatever course of action is being taken, parties should be mindful of their legal rights and obligations, and the effect that frustration and *force majeure* clauses may have on them.

This note does not constitute, and should not be relied upon, as legal advice.

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