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# Frustrating Events: Are Your Contracts Brexit-Proof?

By **Rebecca Dipple and Wayne Hofer** (March 4, 2019, 4:34 PM EST)

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In one of the most high-profile cases of early 2019, the English High Court has determined that the United Kingdom's withdrawal from the European Union will not have the effect of discharging a lease of business premises in Canary Wharf T1 Limited and Others v. European Medicines Agency.[1] The tenant, the European Medicines Agency, argued that Brexit — and the EMA's consequent relocation to Amsterdam — would have the effect in law of frustrating the lease such that the EMA would no longer be bound by its lease covenants and other obligations. The landlords, Canary Wharf Group, preemptively sought a declaration from the court to the effect that Brexit would not be a frustrating event, which the High Court granted.

While the High Court's decision will be of primary relevance to the real estate market, it raises issues for other industries, such as whether Brexit will prevent a party from performing its pre-existing contractual obligations or, conversely, will Brexit provide an opportunity for a party to escape from an onerous contract? In this article, we discuss some of the key issues that businesses should consider when auditing their existing contracts in light of Brexit.

**Express Contract Terms — Force Majeure Clauses**

The first question is whether Brexit could trigger any express provisions of the contract, such as early termination provisions, hardship clauses, force majeure clauses or material adverse change clauses. It is unlikely that contracts entered into before the 2016 referendum will make express reference to Brexit. For the purposes of this article, we will focus on force majeure provisions.

A force majeure clause is a common type of contract term which excuses one or both parties from performance of the contract upon the occurrence of a specified event or events. The effect of such a clause may be to entitle the party to terminate the contract, or to excuse the party from performance of the contract, in whole or in part, or to suspend performance or allow an extension of time.

The party seeking to rely on the force majeure clause will have the burden of proving that:

- An event within the scope of the clause has occurred;

- That party has been prevented, hindered or delayed from performing the contract due to that event;

- Nonperformance was beyond the party's control; and

- There were no reasonable steps that the party could have taken to avoid or mitigate the event or its consequences.

Whether Brexit, or a specific consequence flowing from Brexit, is an event within the scope of the clause which triggers a force majeure provision will depend on the drafting and proper construction of the particular clause. Boilerplate force majeure clauses commonly include a nonexhaustive list of specific examples of events containing common items (acts of God or war) and certain events pertaining to the nature of the contract (e.g. drought in a contract for the provision of grain) followed by a generic reference to "any other cause beyond the parties' control" or similar wording.

While there is no requirement to construe a force majeure provision in a commercial contract by applying the maxim of ejusdem generis, the court is unlikely to be persuaded that Brexit is a force majeure event if it has no connection to the preceding list of specific examples.[2]

Further difficulties for parties seeking to invoke a force majeure clause include:

***Restrictive Interpretation***

If the clause provides that the relevant triggering event must "prevent" (rather than merely hinder or delay) performance, it will be necessary to show that performance is legally or physically impossible, not just difficult or commercially unviable.[3] Events or circumstances that have been held by the courts not to be force majeure include a change in economic and market circumstances; insufficient financial resources; a rise in cost or expense; and/or an increase in the market price as compared with the contract price.[4] As a result, a force majeure clause is unlikely to assist where a contract ceases to be commercially viable due to, for instance, introduction of tariffs on EU trade, changes in tariffs on trade outside the EU, or currency fluctuations.

***Causation***

While it is ultimately a question of construction of the particular contract, the force majeure event will generally need to be the sole effective cause of preventing performance of the contract.[5]

From a contractual perspective, Brexit was unexpected. As a result, the large majority of force majeure clauses are unlikely to have specific events listed similar enough to Brexit so that the court could construe the wording to include Brexit and invoke the clause. For the above reasons, and while each agreement should be considered on its own terms, it seems that many contractual force majeure clauses are unlikely to be triggered by Brexit.

Against that, there may be specific events listed in the clause that are similar enough to Brexit, such as “governmental actions” which was a specified event in the Tandrin Aviation case above. With such items listed in the force majeure clause and in circumstances that performance of the contract is no longer possible (rather than just expensive or difficult), it is arguable that the force majeure clause should apply and such a case may well be successful.

**Frustration of Contracts**

Where no express force majeure clause was included in the contract, a party might, in limited circumstances, be able to argue that the common law doctrine of frustration excuses them from performing the contract. This doctrine originally emerged in the context of cases where the subject-matter of an agreement has physically been destroyed, for instance by fire.[6] However, the court's approach has since evolved and other types of events that have been found to be capable of frustrating contracts include unavailability of the subject-matter of the contract, cancellation of an expected event, delay, changes in the law or subsequent illegality, and acts of state such as a declaration of war.

The courts do not appear at present to have formulated a single, definitive version of the test for frustration of contracts. However, generally speaking, the requirements are that a frustrating event:

- Must occur after the contract was formed;
- Must make performance impossible and/or radically different from what was promised;[7]
- Should not be due to the fault of either party and should not be sufficiently provided for in the contract.[8]

More recent case law has suggested a move towards a broader, "multi-factorial" approach where the court takes into account all the facts and circumstances of the case, including the terms of the contract, its context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at the time of contract, the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.[9] Adopting this approach, the court in Canary Wharf v. EMA noted that the foreseeability of the relevant event will be a factor relevant to this analysis, in so far as it informs the parties' knowledge, expectations, assumptions and contemplations.

If frustration can be established, the contract will immediately come to an end and both parties will be released from their obligations. Whether advance payments made before the frustrating event are recoverable will depend on whether the Law Reform (Frustrated Contracts) Act 1943 or the common law applies.

The decision in Canary Wharf v. EMA confirms that the English law doctrine of frustration is narrowly confined and that the courts are not inclined to extend its scope. In its submissions, the EMA relied on two classes of frustration: frustration by supervening illegality and frustration of common purpose. The court rejected both arguments.

With regard to frustration by supervening illegality, the court accepted that, were the EMA to remain in London after Brexit, there would be a significant degradation of the legal protections applying to it under EU law. This did not, however, mean that the EMA would lack legal capacity to use and/or dispose of the leased premises or to pay rent or perform its other continuing obligations under the lease. Even if the EMA were to lack capacity under EU law, the court held that this was not a matter that the English law of frustration could take into account, since the case did not fall into one of the limited exceptions where illegality under foreign law was relevant.

Further, even if the lease were frustrated, the frustration was self-induced; that is, the alleged frustrating event was not beyond the EU's control. The legal requirement to relocate had been imposed, not by the U.K.'s withdrawal from the EU, but by EU Regulation in 2018. While there were compelling policy reasons for the decision to relocate the EMA, the court considered that the EU could have made provision in the regulation to ameliorate the legal effects on the EMA but had not done so.

The court also concluded that there had been no mutual contemplation between the parties that one of the purposes of the lease was to provide a permanent headquarters for the EMA for the term of the lease and that, if this could not be achieved, the common purpose of the lease had failed. On the contrary, the lease contained detailed alienation provisions which contemplated that the EMA might need to leave the premises before the expiry of the term. Moreover, the parties had approached negotiations from their own commercial standpoint and the lease represented the outcome, not of a common purpose but of rival negotiations driven by different objectives. This last observation by the court suggests that it will be very difficult to argue frustration of a common purpose in relation to a negotiated commercial contract.

While the Canary Wharf decision demonstrates the heavy burden that a party must satisfy to show frustration of a contract, it does not exclude the possibility that Brexit might amount to a frustrating event in different circumstances. As the court noted, preparations for the U.K.'s exit remain in a state of flux.

Depending on the nature and terms of the U.K.'s exit, potential consequences could include currency fluctuations; imposition of tariffs on goods passing to and from the EU and/or changes in existing tariffs on trade outside the EU and/or VAT changes; delays to supply chains; labor shortages due to restriction of free movement; relocation of counterparties; legal changes; and/or civil unrest. The extent to which any of these consequences affects a particular contract will depend on the sector, purpose and terms of the agreement. Each case will need to be treated on its own facts.

For instance, there are a number of frustration cases concerning disruption and/or delay caused by international unrest, such as the outbreak of war. While there are obvious differences, it could be argued that there are some similarities between the disruption of trade in a "no-deal" Brexit scenario and the disruption of trade by another governmental act such as a declaration of war. Where delay merely makes a contract more difficult to perform, there is unlikely to be a frustrating event, but the contract may have been frustrated where delay renders performance radically different to what was contemplated.

The closure of the Suez Canal in 1956 was found not to have frustrated an agreement for sale of goods for shipment, notwithstanding that the alternative route for shipment of goods was three times longer and freight was more expensive.[10] However, the House of Lords indicated in that case that it was a fact-sensitive question and that the decision could have been different if, for instance, the goods were perishable and would not have survived. There might, therefore, be an argument that significant delays to shipping of perishable goods following Brexit might frustrate a "just-in time" contract. A court would be likely to look at the whole picture including the length of delay as compared to the length of the contract and whether the contract could have been performed by other means.

One potentially useful aspect of the decision for parties seeking to allege frustration of a contract is the High Court's conclusion that the U.K.'s withdrawal from the EU was not relevantly foreseeable until "rather later than" 2011. The court therefore held that it could draw no inferences from the parties' failure to provide for that specific possibility in the lease.

**Conclusion**

It is clear that both force majeure and frustration are fact-sensitive areas of law and that their application to Brexit is uncertain. However, as the fallout of Brexit crystallizes for companies over the coming months and years, we expect to see more such arguments being employed like that in the Canary Wharf Group case. In our view, force majeure and frustration are unlikely to be relevant in the majority of scenarios where the consequences of Brexit would merely make performance of a contract more difficult or expensive. In any case, parties need to take a cautious approach and not take steps on the assumption that they are excused performance without taking legal advice.

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[1] Canary Wharf (Canary Wharf (BP4) T1 Limited and Others v. European Medicines Agency [2019] EWHC 335 (Ch))

[2] See for instance Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC ([2010] EWHC 40 (Comm))

[3] Tennants (Lancashire) Ltd v C.S. Wilson & Co. Ltd [1917] AC 495

[4] Thames Valley Power Ltd. v. Total Gas & Power Ltd. [2006] 1 Lloyd's Rep. 441; Tandrin Aviation Holdings Ltd)

[5] Seadrill Ghana Operations Limited v. Tullow Ghana Limited [2018] EWHC 1640 (Comm)

[6] Taylor v. Caldwell (1863) 3 B. & S. 826)

[7] (Davis Contractors v. Fareham UDC [1956] 2 All ER 145);

[8] (National Carriers Limited v. Panalpina (Northern) Limited [1981] 1 All ER 161).

[9] (Edwinton Commercial Corp v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel) ([2007] EWCA Civ 547))

[10] (Tsakiroglou & Co Ltd v Noblee Thorl GmbH ([1962] A.C. 93)