LEVEL TWENTY SEVEN CHAMBERS

Impact of COVID-19 on Commercial & Construction Contracts: an Overview of Force Majeure and Frustration and Practical Issues

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A. Introduction

1. The COVID-19 virus has had a profound impact on social and economic life. Measures adopted by the Commonwealth and State governments to halt the virus's spread have suspended many aspects of civil society. Large sectors of the economy have been deliberately shut down. Those businesses still operating are experiencing significant disruptions and grappling with a substantial contraction in economic activity.

2. In the circumstances, commercial parties are inevitably considering whether they can perform their contractual obligations and, if not, what can be done about it?

3. The starting point under Australian law is somewhat unsympathetic: a party who fails to perform a contract due to an externally-caused event is in breach. However, two possible exceptions to this position have been at the fore of attempts to avoid liability: (1) *force majeure* clauses; and (2) the doctrine of frustration.

4. This note briefly explains these doctrines and their potential operation in these unprecedented circumstances.[1]

B. FORCE MAJEURE

(1) Introduction

5. The term "*force majeure*" translates literally from the French as "superior force". Although doctrines of *force* majeure are found in many civil law systems, the common law does not recognise any doctrine of *force majeure*.[2] However, commercial contracts commonly include *force majeure* clauses and common law courts give effect to such clauses in the usual way.

(2) Force *Majeure Events*

6. The ambit and effect of a *force majeure* clause is a matter of contractual interpretation. Accordingly, it is not possible to provide an analysis of *force majeure* clauses that applies in all cases. However, six issues are likely to recur.

7. ***First***, there must be an event that falls within the scope of the relevant *force majeure clause*. The following points may be noted in this regard:

   (1) Most sophisticated *force majeure* clauses list specific categories of event as falling within the clause. Notably, some clauses refer to epidemics,[3] although this is not universal.

   (2) There are respectable arguments that the COVID-19 pandemic would fall within general language in a *force majeure* clause, such as a clause referring to "*any other event beyond a party's reasonable control*", an "*act of God*" or simply "*an event of force majeure*". In *Nugent v Smith* (1876) 1 CPD 423 at 444, James LJ considered that an "*act of God*" occurred where the act "*is due to natural causes directly and exclusively, without human intervention, and… could not have been prevented by any amount of foresight and pains and care reasonably to be expected.*"[4] The COVID-19 pandemic arguably fits this description, as an unexpected, naturally occurring phenomenon that has caused widespread illness and death worldwide. Similarly, in *Lebeaupin v Crispin* [1920] 2 KB 714, McCardie J stated that the phrase "*force majeure*" encompassed "*war, inundations, and epidemics*" (underlining added).[5]

   (3) The *force majeure* clause may also refer to acts of government authorities, acts of third parties or an inability to secure facilities or supplies from third parties. In respect of such clauses, parties may wish to argue that the *force majeure* event is one or more measures introduced by the government, or taken by a third party, in response to the COVID-19 pandemic.

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[1] For more detailed discussion, see Treitel, *Frustration and Force Majeure* (3rd ed., 2014); and, specifically to building contracts, McInnis, "Frustration and Force Majeure in Building Contracts" in McKendrick (ed.), *Force Majeure and Frustration of Contract* (2nd ed., 1995).
[2] *Hyundai Merchant Marine Co Ltd* (2006) 236 ALR 115 at [61] (Kiefel J).
[3] See, e.g., *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 at 111; *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262 at [7].
[4] See also *Commissioner of Railways (WA) v Stewart* (1936) 56 CLR 520 at 528-529 (Latham CJ).
[5] *Lebeaupin v Crispin* [1920] 2 KB 714 at 719 (McCardie J).

8. ***Second***, it will invariably be necessary to identify a causal link between the event and the party's difficulty in performing the obligation. Commonly, the clause will require that the difficulty in performing arise "*by reason of*" or "*as a result of*" the *force majeure* event.

9. This requirement can be difficult to satisfy. A party seeking to rely on a *force majeure* clause must be careful to ensure that its inability to perform is caused by the relevant event, rather than by its own conduct – such as negligence or a commercial decision to allocate resources in a particular manner.

10. Three points commonly arise:

    (1) First, a party accustomed to a particular mode of performance cannot rely on a *force majeure* clause merely because the usual mode of performance is no longer available. The party must exhaust any alternative modes of performance, even if they involve additional expense.[6] Failure to do so will mean that the party's non-performance is caused by its own failures rather than the *force majeure* event.

    (2) Second, a party with a shortage of supply will face a choice as to how to allocate that supply between multiple customers. Should it allocate the supply on a first-come, first-first served basis, with the result that some contracts are fulfilled completely and others not at all? Or should it allocate the supply proportionately, so that all customers receive something but less than they had contracted for? This issue has not been conclusively resolved. There is authority that permits a reasonable, proportionate allocation of supply on the basis that the effective cause of the failure to perform is what caused the shortage, not the seller's allocation.[7] But there is also authority to the contrary[8] and the safer course may be to fulfil contracts as they fall due for delivery in the ordinary course.[9]

    (3) Third, difficult issues of causation arise where the inability to perform results from two (or more) events, one of which is covered by the *force majeure* clause and the other of which is not. Recent English authority supports the view that the *force majeure* clause may not be relied upon in these circumstances because the *force majeure* event is not a "but for" cause of the inability to perform.[10]

11. ***Third***, the relevant event must cause the necessary level of disruption. Ordinarily, *force majeure* clauses require that the relevant event "*prevent*", "*hinder*" and/or "*delay*" performance.

12. The following points may be noted in this respect:

    (1) The term "*prevents*" has been construed narrowly to require that the further performance of the contract has become an impossibility.[11]

    (2) The term "*hinder*" has also been construed relatively narrowly. It has been said to involve, "*interposing obstacles which it would be really difficult to overcome*".[12]

    (3) Performance is ordinarily not hindered or prevented merely because the cost of performance has increased or performance has otherwise become unprofitable.[13]

    (4) Difficulties obtaining supply have been sufficient to "*hinder*" performance.[14]

13. ***Fourth***, *force majeure* clauses commonly contain a requirement that the parties take reasonable steps to mitigate the effects of the *force majeure* event.[15] In the absence of express provision, such a requirement will often be implied.[16] This is, in effect, a further application of the requirement for a causal link between the *force majeure* event and the affect on the party's performance. The event does not affect performance insofar as its effects can reasonably be avoided.[17]

14. ***Fifth***, a *force majeure* clause may not apply unless the party seeking to rely on it takes a positive step. It is common for *force majeure* clauses to provide that a party seeking to rely upon it must provide notice to the other party promptly,[18] or furnish the counterparty with a certificate attesting to the relevant event.[19]

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[6] *PJ Van der Zijden Wildhandel NV v Tucker & Cross Ltd (No 1)* [1975] 2 Lloyd's Rep 240 at 242 (Donaldson J); *Hyundai Merchant Marine Co Ltd* (2006) 236 ALR 115 at [62] (Kiefel J); *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153 at [72] (Handley JA, Santow JA agreeing); *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 128 at [26]-[44] (Fraser JA, Muir JA and Ann Lyons J agreeing).
[7] See, e.g., *Intertradax SA v Lesieur-Tourteaux SARL* [1977] 2 Lloyd's Rep 146 at 155 per Donaldson J, approved on appeal at [1978] 2 Lloyd's Rep 509 at 513 per Lord Denning; *Cobelfret (UK) Ltd v Austen & Butta (Sales) Pty Ltd* (Unreported, NSWSC, Brownie J, 24 February 1988).
[8] *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684 at 700 (Lord Morris of Borth-y-Gest); *Pancommerce SA v Veecheema SA* [1982] 1 Lloyd's Rep 645 at 652-653 (Bingham J).
[9] See Robertson, "Force Majeure Clauses", (2009) 25 JCL 62 at 81.
[10] See, e.g., *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) at [60]-[80] (Teare J); *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2018] EWHC 2389 (Comm) at [67]-[89] (Teare J).
[11] *Channel Island Ferries Ltd v Sealin Ltd* [1988] 1 Lloyd's Rep 323 at 327 (Parker LJ, Caulfield J agreeing).
[12] *Tennants (Lancashire) Ltd v CS Wilson and Company Ltd* [1917] AC 495 at 510 (Earl Loreburn).
[13] *Tennants (Lancashire) Ltd v CS Wilson and Company Ltd* [1917] AC 495; *Re An Arbitration Between Comptoir Commercial Anversois and Power, Son and Company* [1920] 1 KB 868 at 898 (Scrutton LJ); *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [93] (Spigelman CJ), [227] (Basten JA).
[14] *Tennants (Lancashire) Ltd v CS Wilson and Company Ltd* [1917] AC 495.
[15] See, e.g., *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm) at [28].
[16] *Channel Island Ferries Ltd v Sealin Ltd* [1988] 1 Lloyd's Rep 323 at 327 (Parker LJ, Caulfield J agreeing).
[17] Thomson, Warnick and Martin, *Commercial Contract Clauses: Principles and Interpretation* (3rd ed., 2019) at [70740].
[18] See, e.g., Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA [1978] 2 Lloyd's Rep 109; AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd [2009] QCA 262.
[19] See, e.g., *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404.

15. A failure to comply with these provisions can have significant consequences. In *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262, the Court of Appeal held that compliance with an obligation to provide notice of a *force majeure* event "*without delay*" was necessary for a party to rely on the clause.[20]

16. ***Sixth***, the consequences of a *force majeure* event depend on the precise terms of the relevant contract. The consequences may include affording the party who cannot perform additional time to do so; suspending one or more contractual obligations; or relieving the defaulting party from liability for breach of contract.[21]

C. FRUSTRATION

(1) Introduction

17. The doctrine of frustration provides for the automatic termination of a contract where it becomes incapable of being performed due to an event beyond the parties' control. According to a widely-cited definition, the doctrine operates where, "*without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.*"[22]

18. The essence of frustration is, thus, that an event or series of events[23] results in "*a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.*"[24] The critical issue is, "*whether the situation resulting from the [allegedly frustrating event(s)] is fundamentally different from the situation contemplated by the contract on its true construction*".[25]

19. Although the doctrine of frustration operates at law, the terms of the relevant contract remain critical in determining whether a contract has been frustrated. There is no frustration if the parties have provided for (and thereby allocated the risk of) the event that occurs or the performance of the contract has not otherwise become radically different.[26]

20. It follows that parties should consider the operation of any *force majeure* clause before considering the doctrine of frustration. There are three reasons for this:

    (1) First, *force majeure* events are usually broader than those constituting frustration. An event may be sufficiently disruptive to fall within a *force majeure* clause yet insufficiently disruptive to frustrate the contract.

    (2) Second, the contract may not be frustrated if the event falls within a *force majeure* clause. The parties have provided for the event in their contract and allocated the risk of loss if the event occurs. The happening of the event does not render the contract radically different.[27]

    (3) Third, frustration is a blunt instrument. As explained below, the consequence of frustration is the automatic termination of the contract at the time of the frustrating event. Parties may not wish to produce such an extreme outcome.

21. The imperative to have close regard to the terms of the relevant contract means that is not possible to say how the doctrine of frustration might apply in all cases. However, further general observations can be made about three matters: *first*, what constitutes frustration; *second*, the bars to frustration; and, *third*, the consequences of frustration.

(2) Frustrating events

22. There is no limited class of frustrating event.[28] However, certain events are well-recognised as capable of amounting to frustration.

23. The most straightforward case is where performance has become impossible, for example because:

    (1) the subject-matter of the contract has been destroyed[29] or otherwise become unavailable to the parties;[30]

    (2) a person whose existence is essential to the performance of the contract may have died or otherwise become incapacitated;[31] or

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[20] *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262 at [34]-[38] (Muir JA), [94]-[113] (Chesterman JA).
[21] See Heydon, *Heydon on Contract* (2019) at [23.130] for references to cases where the relevant force majeure clauses have provided for these various consequences.
[22] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729 (Lord Radcliffe), quoted with approval in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 360 (Mason J, with whom Stephen and Wilson JJ agreed) and 408 (Brennan J).
[23] See *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 738, 744 (Lord Diplock).
[24] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The "Sea Angel")* [2007] 2 Lloyd's Rep 517 at [111] (Rix LJ).
[25] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 360 (Mason J, with whom Stephen and Wilson JJ agreed).
[26] *Horlock v Beal* [1916] 1 AC 486 at 525 (Lord Wrenbury); *Ocean Tramp Tankers Corp v V/O Sovfracht (The "Eugenia")* [1964] 2 QB 226 at 239 (Lord Denning MR); Claude Neon Ltd v Hardie [1970] Qd R 93 at 98; Ange v First East Auction Holdings Pty Ltd (2011) 284 ALR 638 at [78] (Sifris JA, Neave and Tate JJA agreeing).
[27] Heydon, *Heydon on Contract* (2019) at [23.370].
[28] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [41] (Smith J).
[29] *Taylor v Caldwell (1863) 3 B & S 826* (music hall destroyed by fire); *Nemeth v Bayswater Road Pty Ltd* [1988] 2 Qd R 406 at 412 (contract to hire a chattel frustrated by destruction of chattel).
[30] *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497 (time-chartered vessel requisitioned).
[31] *Groser v Equity Trustees Ltd* (2008) 19 VR 598 at [43] (Habersberger J); see further Heydon, *Heydon on Contract* (2019) at [23.40].

(3) the contract becomes illegal during the course of its performance, or its performance would involve commission of illegal acts.[32]

24. In these categories of case, it is necessary to consider whether there are alternative methods of performance. There is no frustration where an intended means of performance becomes unavailable but other permissible means of performance remain.[33]

25. Frustration may also occur where performance remains possible but is "pointless" because the common object or purpose of the parties has been frustrated.[34] However, the ambit of this principle is closely confined. There is no frustration merely because the parties' expectations are disappointed. The facts must involve the cessation or non-existence of a "*condition or state of things, going to the root of the contract, and essential to its performance*".[35]

26. Difficult questions of degree may arise in determining whether the parties' obligations have become radically different. For example:

(1) Performance may remain possible but have become burdensome or uncommercial. In principle, it is possible for frustration to occur where performance has become "*impracticable in a commercial sense*".[36] However, the mere fact that performance has become more onerous does not constitute frustration.[37] As Lord Radcliffe observed in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729, "*it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*"

(2) An event that causes some delay in performance, or renders performance at the appointed time impossible, may not result in a radical difference of obligation such as to constitute frustration.[38] But a lengthy delay may prevent any or any sufficient performance[39] or result in performance requiring conduct entirely different from that contemplated by the contract.[40]

(3) Similarly, a permanent or prolonged change in circumstances may result in frustration where a transient change would not.[41] In *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, a contract to construct a reservoir over a 6 year period was frustrated by an order of the Ministry of Munitions that required the contractor to cease work for the greater part of 2 years and possibly the duration of the First World War. By contrast, in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 a 10-year lease was not frustrated when an order closing access to the street was expected to last for around 18 months, allowing the lease to run for 3 more years after the street re-opened.

27. This point is likely to be important in determining whether the events surrounding COVID-19 frustrate a contract. It is unclear how long the measures introduced to control the spread of the virus will be in force, but they are likely to be temporary. An interruption of weeks or even months may not be sufficient to frustrate a long-term contract.

28. This is borne out by a decision arising from the outbreak of SARS. In *Li Ching Wing v Xuan* [2003] HKDC 54, the Hong Kong District Court granted summary judgment against a defendant who argued that his 2-year lease had been frustrated by an isolation order made following the outbreak of SARS that prohibited him from returning to his flat for 10 days. The Court said that "*an event which causes an interruption in the expected use of the premises by the lessee will not frustrate the lease, unless the interruption is expected to last for the unexpired term of the lease, or, at least, for a long period of that unexpired term*".[42]

29. That is not to say that a party whose performance has become temporarily impossible will be without recourse. The party may, for example, be able to establish an implied term that performance is suspended during the period of impossibility;[43] or that the obligation to perform has been suspended for the period of the temporary illegality.[44] However, in these cases the right to relief from performance arises outside the doctrine of frustration.

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[32] See, e.g., *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 (injunction prevented performance of construction contract in manner contemplated by the contract).
[33] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93; *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1 at 9 (Bingham LJ), 13-14 (Dillon LJ).
[34] See *Krell v Henry* [1903] 2 KB 740, in which a contract to licence a flat to view the processions connected with the coronation of King Edward VII was frustrated when the coronation was postponed because the commercial object of the contract – viewing the processions – could not be achieved.
[35] *Krell v Henry* [1903] 2 KB 740 at 748 (Vaughan Williams LJ, with whom Sterling LJ agreed).
[36] *Horlock v Beal* [1916] 1 AC 486 at 492 (Earl Loreburn).
[37] *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 231 (Williams J); *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 724 (Lord Reid), 729 (Lord Radlciffe); *Wates Ltd v Greater London Council* (1983) 25 BLR 1 (unexpectedly high inflation insufficient to frustrate building contract).
[38] *Ringstad v Gollin & Co Pty Ltd* (1924) 35 CLR 303 at 315 (Isaacs J); *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 724 (Lord Reid).
[39] See, e.g., *Countess of Warwick Steamship Co v Le Nickel Societe Anonyme* [1918] 1 KB 372 (vessel under 12-month time charter requisitioned with five months to run and no prospect of requisition ending in that period).
[40] See, e.g., *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 (prolonged delay after vessel ran aground necessitating repairs).
[41] See *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221 at 236 (Lord Wright).
[42] *Li Ching Wing v Xuan* [2003] HKDC 54 at [10] (HH Judge Lok).
[43] See, e.g., *Re Ronim Pty Ltd* [1999] 2 Qd R 172 at [18]-[21] (the Court).
[44] *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 772 (Staughton J).

(3) Self-induced frustration

30. The doctrine of frustration cannot be invoked if the alleged frustrating event was self-induced, i.e., caused by the default of the party who relies on the event.[45]

31. For example, a party who allocates finite resources in a way that prevents it from fulfilling its contractual obligations cannot rely on frustration. In *The Super Servant Two* [1990] 1 Lloyd's Rep 1,[46] a party agreed to carry a drilling rig using one of two barges and allocated one barge to the job. The allocated barge sank and the party failed to use the alternative barge, which had been allocated to other contracts. The Court held that this was self-induced frustration: the defendant could have performed using the alternative barge but elected not to do so.[47]

32. The ambit of the principle against self-induced frustration remains somewhat uncertain in two respects.

33. The **first** respect concerns the nature of the "default" that prohibits a party from relying on what would otherwise be a frustrating event. The most straightforward case is where the frustrating event is caused by a breach of contract; the party in breach cannot invoke the doctrine of frustration.[48] It is also tolerably clear that the notion of self-induced frustration applies where a party is negligent.[49] Moreover, the authorities suggest that any deliberate act or omission may suffice. It has been said that frustration is unavailable where the event is "*due to the act or election of the party seeking to rely on it*"[50] or "*at all times within [the] control*" of the party relying on it.[51]

34. The **second** area of uncertainty concerns whose conduct is relevant. Does the principle against self-induced frustration apply only where the defaulting party invokes the doctrine of frustration, or does it also apply where the counterparty causes the frustrating event? There are general statements in the authorities that support both positions but the need to distinguish between the two rarely arises. There is at least one case where the innocent party was entitled to rely on a frustrating event caused by the counterparty's wrongful conduct. In *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301, an employer was able to rely on the employee's imprisonment as frustration. There was no fault on the part of the employer and the employee could not rely on his own criminal conduct to deny that his employment contract had been frustrated.

(4) Consequences of frustration

35. The occurrence of a frustrating event automatically discharges the parties from the outstanding obligations to perform the contract. There is no need for any decision, act or election by either party.[52]

36. There are four points to highlight in this regard:

(1) First, it is irrelevant whether the parties themselves act on the basis that the contract has been frustrated.[53] That said, a party that considers that a contract may have been frustrated is well-advised to exercise caution before communicating that to its counterparty. An incorrect assertion that the contract has been frustrated may constitute a repudiation of the party's contractual obligations, rendering it liable for breach of contract. Alternatively, if the counterparty acquiesces in an incorrect assertion that the contract has been frustrated the parties may be treated as having abandoned or terminated the contract by mutual agreement.[54]

(2) Second, the effect of frustration is not to suspend the parties' contractual obligations but to terminate them.[55] However, as noted above, suspension may occur where the disruption to the parties' performance falls short of frustration; for example, if performance becomes temporarily illegal.[56]

(3) Third, frustration generally discharges the whole, not part, of the contract,[57] although some limited exceptions to this have been suggested.[58]

(4) Fourth, frustration discharges the parties' rights *in futuro*. It does not rescind the contract *ab initio*. Accordingly, rights and liabilities of the parties that accrued prior to the frustrating event remain enforceable.[59]

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[45] *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 186 (Latham CJ); *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1 at 8 (Bingham LJ).
[46] *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1.
[47] See also *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.
[48] *Ocean Tramp Tankers Corp v V/O Sovfracht (The "Eugenia")* [1964] 2 QB 226 at 237 (Lord Denning MR).
[49] *Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 166 (Viscount Simon LC); *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 at [316] (Newey J).
[50] *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1 at 8 (Bingham LJ).
[51] *Paal Wilson & Co v Partenreederei Hannah Blumenthal (The "Hannah Blumenthal")* [1983] 1 AC 854 at 882 (Griffiths LJ), 920 (Lord Diplock). See also *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 186 (Latham CJ); *DGM Commodities Corp v Sea Metropolitan SA (The Andra)* [2012] 2 Lloyd's Rep 587 at [18]-[20] (Popplewell J).
[52] *Re Continental C&G Rubber Co Pty Ltd* (1919) 27 CLR 194 at 201 (Knox CJ and Barton J); *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1 at 8 (Bingham LJ).
[53] *Ardee Pty Ltd v Collex Pty Ltd* [2001] NSWSC 836 at [53] (Palmer J).
[54] See *Paal Wilson & Co v Partenreederei Hannah Blumenthal (The "Hannah Blumenthal")* [1983] 1 AC 854 at 915-916 (Lord Diplock).
[55] *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221 at 232 (Viscount Simon LC).
[56] *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 772 (Staughton J).
[57] *Aurel Foras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202 at 206-208 (Menhennitt J).
[58] See *Carter on Contract* (Looseleaf) at [39-570].
[59] *Re Continental C&G Rubber Co Pty Ltd* (1919) 27 CLR 194 at 201 (Knox CJ and Barton J); *Baltic Shipping Co v Dillon (The "Mikhail Lermontov")* (1993) 176 CLR 344 at 356 (Mason CJ).

37. A consequence of the fourth point is that, generally, any losses suffered or gains made by the parties prior to the frustrating event lie where they fall. No adjustments to the parties' rights can be made.[60]

38. This general principle is subject to two exceptions:

(1) First, the common law principles of restitution may allow a party to recover the value of any benefit conferred on a counterparty where there has been a total failure of consideration (in the sense of performance by the counterparty) as a result of the frustrating event.[61]

(2) Second, in New South Wales, Victoria and South Australia the consequences of frustration of certain contracts are regulated by statutes that seek to ameliorate some of the unjust consequences that may follow from the common law principles outlined above.[62] Practitioners dealing with a contract governed by the laws of one of these States will need to have regard to the applicable statutory provisions.

D. CONCLUSIONS

39. There are good reasons why force majeure clauses and frustration have been at the fore of attempts by parties to avoid liability for non-performance in recent months. A party struggling to meet its contractual obligations would be well-advised to consider whether a force majeure clause or the doctrine of frustration is available in the circumstances confronting them.

40. However, there are equally good reasons why a party without the benefit of a force majeure clause would hesitate to rely on the doctrine of frustration. Frustration is difficult to establish and, if established, may produce consequences that are commercially undesirable.

41. It seems likely that parties unable to resolve their differences on a commercial basis will demand more creative arguments from their lawyers.

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[60] *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056 at 1108 (Lord Brandon of Oakbrook).
[61] See *Fibrosa Spolka Akcyjna v Fairbarn Lawson Combe Barbour Ltd* [1943] AC 32; *Baltic Shipping Co v Dillon (The "Mikhail Lermontov")* (1993) 176 CLR 344 at 355 n55 (Mason CJ), 375-379 (Deane and Dawson JJ) and 389 (McHugh J).
[62] *Frustrated Contracts Act* 1978 (NSW); *Australian Consumer Law and Fair Trading Act* 2012 (Vic); *Frustrated Contracts Act* 1988 (NSW).

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