Defence Guides

# Frustration and force majeure

## Frustration

**Frustration occurs when, without default of either party, the performance of a contract is rendered impossible or changes the party's principal purpose for entering into the contract so as to render it "radically different" (Davis Contractors V. Fareham UDC [1956] A.C. 696).**

What makes a contract "radically different" is a question of fact and will depend on a wide range of factors. The situation in which frustration can be invoked is tightly controlled by courts and the mere incidence of expense, delay or onerousness is not sufficient.

Among the factors which have to be considered are the terms of the contract, the contemplation of the parties (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 (The Sea Angel (2007) 2 LLR 517).

The fact that the event was contemplated by the parties at the time the contract was entered into is relevant and is likely to (though not automatically) negate a claim for frustration of the contract.

## Causation: fault, election and negligence

A frustrating event cannot be self-induced. If the alleged frustrating event is due to the deliberate act or choice of one of the parties, they will not be allowed to rely upon the doctrine of frustration. A party to the charter will not be able to rely upon the doctrine of frustration if an event which makes further performance impossible has been caused by their breach of the charter or their own negligence.

## Financial loss

Whilst a frustrating event would inevitably cause financial loss of a party if the charter was continued, financial loss does not in itself cause the charter to be frustrated. "The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound" (The Eugenia [1963] 2 Lloyd's Rep 381 ). For example, the fact that the contemplated route is not available will not generally frustrate the charter.

## An exception for commercial loss: damage to vessel

However, a line of older cases suggests an exception to this rule, which arises where a vessel sustains damage on voyage and the costs of repairing her to the extent necessary to enable her to complete the voyage (and the repair could thus be temporary) would exceed her repaired value, such that no reasonable owner would incur that cost. In that case the situation is treated in the same way as if a repair was physically impossible and is considered now to be a species of frustration (The Kyla [2012] EWHC 3522 (Comm).). The exception will not apply however where the charter contains an obligation on owners to maintain a certain level of hull insurance coverage, from the proceeds of which the cost of repair could be funded; in that case owners cannot claim that they could not reasonably be expected to fund the repair cost, so long as that cost is within the agreed sum insured (The Kyla).

## Delay

A charter may be frustrated if the performance of the charter is sufficiently delayed. The main factor is whether the interruption will be, (or likely to be) substantial in relation to the remainder of the charter period.

The length and effect of the interruption must be assessed at the time that the cause of the delay operates and without the benefit of hindsight. If at the outset of an event, the delay appears likely to be of short duration, the contract will be frustrated when subsequently it appears that the delay will be inordinately lengthy.

The type of delaying events capable of causing frustration are:

- Requisition
- War
- Strikes
- Ice

## The same event may frustrate a voyage charter but not a time charter

War, ice or strikes for example may not necessarily render the charter frustrated depending on the terms of the charter. A war or a general strike may frustrate a voyage charter whilst these may not have any effect on a time charter with a wider trading limit. It does not matter for example that a time charterer intended to trade the ship between the UAE and Yemen (a country now at war); if the charter permits the ship to trade between other places then the charter will not be frustrated even though the charterer may find it hard to find employment for the ship.

## Events covered in the charter

As seen above, strikes, ice and wars may lead the charter to be frustrated. What is the position where the charter already regulates these situations? Can the charter still be frustrated or the fact that the contract already deals with these events bars one party from claiming frustration? The established view is that it is relevant but not conclusive. Unless a clause specifically excludes the doctrine of frustration from operation and is a complete provision, a party will be able to claim frustration if the contract is rendered "radically different". As put in the case Fibrosa v. Fairbairn ([1943] AC 32 ): "*where supervening events, render the performance of the contract indefinitely impossible and there is no undertaking to be bound in any event, frustration ensues even though the parties may have provided for the case of a limited interruption*".

## Damage, delay in obtaining the cargo

A charterer owes an absolute and non-delegable duty to provide cargo for loading (The Nikmary [2003] EWCA Civ. 1715 ) and if they are able to do so because of their chosen supplier fails to supply a cargo, that event will rarely amount to a frustrating event or an event beyond the control of the charterer (The Mary Nour [2008] 2 Lloyd's Rep. 526).

If the intended cargo is damaged before shipment, the contract will not be frustrated unless it related to a specific cargo. Charterers will have to find another source of cargo. The same goes if charters are delayed in obtaining the intended source of cargo. However, if there are no other alternative cargo, the contract may be frustrated.

## Force Majeure

Force majeure is a civil law concept which does not exist at common law. It is very similar to frustration but has a wider scope. Under civil law a force majeure event will bring the contract to an end and parties will be released from their obligations. Three factors must be show in order to establish force majeure:

- Externality
- Irresistibility
- Unpredictability

Because force majeure is not a common law concept, parties will try to recreate it contractually and set out in advance a list of events where force majeure can be invoked. Most voyage charters will contain force majeure clauses such as: *"Strikes or lockouts of men, or any accidents or stoppages on Railway and/or Canal, and/or River by ice or frost, or any other force majeure causes including Government interferences, occurring beyond the control of the Shippers, or Consignees, which may prevent or delay the loading and discharging of the vessel, always excepted"* (Sugar charter party 1969).

Force majeure under English law only shares two of the three elements of the civil law concept.

## Externality

A force majeure clause can only be invoked if the event occurs without the intervention of any other parties. A party relying on force majeure must show that the non-performance was due to circumstances beyond it's control.

## Irresistibility and party's obligation to take reasonable steps to overcome the hinderance

A party relying on force majeure must show that there were no reasonable measures that it could have taken to avoid or mitigate the circumstances or its consequences and must use reasonable means to overcome the hindrance, whether or not this causes a loss on the party relying on the force majeure clause. For example, if the port authority orders the suspension of loading at a berth but there is another berth where the cargo can be loaded, albeit to do so would be at extra time and expense to the charterer, then the clause will not be of any protection.

This was recently illustrated in a case Classic Maritime Inc v. Limbungan Makmur SDN BHD [2019] EWCA Civ 1102 . The charterers had long term supply contracts in place with two Brazilian mining companies, Samarco and Vale. Under the COA, charterers had the option to either ship from the port where Samarco exported, or another port where Vale exported. Following a dam burst, production at the mine operated by Samarco stopped and as a result charterers were unable to procure any cargo from this supplier. Charterers could not procure cargo from Vale. The court held that all charterers had to do was to make all reasonable efforts to ship out of the other port instead. If charterers took reasonable steps to provide cargo but still failed, then force majeure was the cause of charterers' failure to perform and in that event the force majeure clause would have given charterers a defence to owners claim for damages for failure to provide a cargo, such that owners had no claim for an award of substantial damages.

## Unpredictability and narrow interpretation by the courts of such clauses

This where English law defers from civil law. Force majeure will only be invoked if the event is listed in the force majeure clause i.e. a foreseeable event. Force majeure clauses will be construed against the party claiming the benefit under the charter and will be strictly construed. Any ambiguous clause will offer no protection. Broadly speaking they will be interpreted like any exception clauses in a voyage charter.

## Effect of a force majeure event

Unlike the doctrine of frustration where the contract will come automatically to an end, the effects of force majeure will depend on the wording of the clause. The clause may for example suspend the contractual obligations until the event ceases or give the parties an option to cancel the contract.

## Force majeure as an exception clause and the "but for" test

A lot of force majeure clauses are drafted as an exceptions clause (as opposed to a frustration clause where causation does not have to be proven). This will be a matter of construction. The distinction is important as, in order to rely on an exceptions clause, the party relying on the clause has to show that, but for the event, performance would have occurred (i.e. causation). If the force majeure clause is drafted as a frustration clause, then the relying party can invoke the clause without needing to show it could have otherwise performed its side of the bargain.

This was recently illustrated in the "Classic Maritime" case described above. The force majeure clause was held to be drafted as an exception clause and as such charterers were required to show that, if the dam had not burst, it would have performed its obligations under the COA. It was unable to do so as charterers had previously defaulted on its obligations under the COA due to a weak market. The Court therefore concluded that charterers could not rely on the clause to excuse its failure to ship cargoes.

## Damages – Compensatory principle

In the event that the defaulting party is unsuccessful in fulfilling the "but for test", damages will be calculated in the basis of the compensatory principle.

The compensatory principle is a fundamental concept in contract law. It provides that parties claiming compensation for breach of contract can only recover their actual loss and requires parties to take into account events occurring after termination in assessing damages where those events might affect the loss actually suffered (Bunge SA v Nidera BV [2015] UKSC 43).

As of the date of this Guide, the "Classic Maritime" case did not follow this approach on appeal. The Court of Appeal distinguished this case from the Bunge SA v Nidera BV case, which was concerned with assessing damages for an anticipatory breach. By contrast, the "Classic Maritime" case was concerned with an actual breach. This is arguably a new development, though the decision is subject to appeal.

## About the Author

**Julien Rabeux**
Head of Claims (Singapore)
**T** +65 9666 2684
**E** Julien.Rabeux@westpandi.com

Julien is Head of Claims in West's Singapore Office. He studied law in France and England and subsequently qualified as a solicitor in a London shipping law firm. Julien was based in West of England's Hong Kong Office for 5 years, before moving to Singapore when the Club launched its office there. Prior to joining the Club, Julien worked for another IG Club in London for 7 years.

**Get in touch**
West of England Insurance Services (Luxembourg) S.A.

**Singapore Office**
#12-01, 61 Robinson
61 Robinson Road
Singapore 068893

**London Office**
One Creechurch Place
Creechurch Lane
London EC3A 5AF

**T** +44 20 7716 6000
**E** publications@westpandi.com
**W** www.westpandi.com