

FRUSTRATION AND HARDSHIP IN COMMERCIAL CONTRACTS: A COMPARATIVE LAW PERSPECTIVE

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The common law doctrine of frustration and the civil law doctrine of force majeure are both doctrines of respectable antiquity that can trace their origins back to Roman law. The recent Coronavirus pandemic (and its unprecedented impact on business) has focused attention on the way in which these doctrines have been developed by courts in different jurisdictions and prompted debate as to whether such developments now strike the right balance between legal certainty on the one hand, and fairness to the contracting parties on the other. Given Jersey's unique status as a "mixed" civil and common law jurisdiction, a comparison of English law and French law in this area offers some interesting insights into the likely scope of a modern Jersey customary law doctrine of force majeure.

Introduction

1 The outbreak of the coronavirus pandemic has sparked much debate amongst legal practitioners and academics about the way in which different legal systems have grappled with the thorny question of when a supervening event will excuse the non-performance of or a delay in performance of a party's contractual obligations.

2 The threat posed to public health by the virus itself, coupled with the unprecedented measures taken by governments around the world to protect their citizens, has caused widespread disruption to many businesses and commercial enterprises. The kind of difficulties currently being encountered include the closure of workplaces, interruptions to supply and distribution channels (including the requisitioning by governments of certain goods),¹ the restriction of free movement of personnel and resulting shortage of labour, the

¹ For example, an article in the New York Times on 8 April 2020 reported that the United States' government was seizing exports of key protective medical gear until it could determine whether the equipment was required to be kept in the country to combat the spread of coronavirus.

cancellation or postponement of events and, last but no means least, severely weakened consumer demand.

3 Some of these difficulties are likely to prevent, or at least hinder, businesses from fulfilling their contractual obligations. And even if performance is not rendered physically or commercial impossible, it may still have become commercially disadvantageous.

4 Given this disruption, businesses will no doubt be asking whether such events are capable of operating to relieve them from the performance of their contractual obligations² and, if so, how this will impact on the rights of the other contracting party.

5 This article seeks to address these questions from a comparative law perspective. We shall therefore begin with an overview of the way in which French law and English law have approached the issue of how supervening events impact upon contractual obligations, both in circumstances where the parties' agreement makes express provision for such events (a so-called "*force majeure*" clause) and where it does not. We shall then look at how Jersey law has approached this question by reference to the existing case law and to other relevant sources of contract law. We shall conclude with some observations about how the Jersey courts might look to develop the law in this area.

Where the contract contains a *force majeure* clause

6 Many commercial contracts will contain an express clause covering the circumstances and effects of supervening and unforeseen external events affecting performance of the contract. Such *force majeure* clauses are generally part of the boilerplate provisions of most professionally drafted commercial contracts. In general terms, the objective of a *force majeure* clause is to allow parties to bring the contract to an end or excuse performance of the contract, entirely or partially, or suspend that performance, on the occurrence of specified circumstances beyond their control.³ They are thus a form of contractual safeguard against supervening and unexpected events.

7 It is possible to identify five major elements of a *force majeure* clause.

8 First, one finds the general definition of the *force majeure* doctrine, although the adoption of a broad, definitional aspect of the clause may be more commonly a feature of civil law/international drafting than common law contracts. Wording can of course vary but in general the

² Whether in whole or in part, and whether permanently or temporarily.

³ *Chitty on Contracts* (33rd edn), paras 15–152 – 15–169.

requirement is for an external supervening event which is unforeseeable and unavoidable. The ICC model clause for *force majeure* and hardship clauses thus requires it to be shown that the *force majeure* event presents three characteristics, as follows:

“[a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.”⁴

9 Second, the trigger event which actually activates the operation of the clause itself. In many common law contracts, the clause will list the specific events which trigger the clause. These typically include circumstances as many and varied as war, riot, natural disasters, acts of God, terrorist attacks, famine, strikes, embargo, epidemic, plague, civic disturbance and government action.

10 In common law systems, the contractual provisions concerning the triggering events are often long and comprehensive as the parties will be dependent upon the specific wording of the clauses, and will not be supplemented by any codified provisions. As a result, drafters will often choose to include non-specific language in the clauses designed to be a “catch-all” provision of such significant external events, though subject to the ordinary rules of construction.⁵ An example of such language would be “and similar events beyond the reasonable control of the parties” or “or any other such causes beyond the control of the parties.” Such attempts to broaden the ambit of the *force majeure* clause are not, however, always successful as the decision in *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC*⁶ illustrates.

11 The facts of that case were that Tandrin Aviation (“Tandrin”) had agreed to sell an executive jet to Aero Toy Store (“ATS”) for \$31.75m. ATS paid a deposit of \$3m to an escrow agent and the balance was due on delivery of the jet. The world financial crisis of 2008 then intervened. ATS refused to take delivery of the jet, and Tandrin exercised a contractual right to terminate the contract and claimed liquidated damages.

12 The contract between Tandrin and ATS contained a *force majeure* clause which included the following “catch-all” provision: “any other cause beyond the Seller’s reasonable control”. ATS sought to argue

⁴ *ICC Force Majeure and Hardship Clauses* (ICC, March 2020).

⁵ C Ambrose, “‘Force majeure’ in International Contracts—The English Law Perspective,” (2003) 3 *Bus L Intl* 234, at 238.

⁶ [2010] EWHC 40 (Comm).

that the “unanticipated, unforeseeable and cataclysmic downwards spiral of the world’s financial markets” was a “cause beyond the Seller’s control” and thus triggered the *force majeure* clause.

13 This argument was rejected by Hamblen J who held that that there was no basis for construing the wording on which ATS sought to rely as including a downturn in the economy.

14 In some civil law contracts, reference will be sometimes be made to the case law provided scenarios of *force majeure* (as per below) rather than a long list of specific events, a feature often associated with common law drafting.

15 Third, there is the impact of the triggering event on the performance of the contract. Reference is generally made to events which render performance impossible. The flexibility of the contractual route allows however for a lower bar to be framed so that clauses may merely require that the performance becomes “impracticable”, “delayed” or “hindered”. There might also be an issue of causation, with certain clauses requiring the party relying upon the *force majeure* clause to show that the impact on performance was actually caused by the *force majeure* event in question, rather than some unconnected cause.

16 Fourth, there will be notification obligations whereby the other contracting party will need to be formally informed within a reasonable time of the occurrence of the triggering event, and of the impact that this will have on contractual performance. Evidence may also be required of the *force majeure* event. This is an important provision allowing the other side to react to the occurrence of a *force majeure* event and undertake counter-measures or activate contingencies. Indeed, the application of a *force majeure* clause might expressly be subject to the timely notification to the other side; in other words, failure to respect the notification procedure may result in the party forfeiting their right to rely on the clause. Linked to this, there may also be an obligation on the party who relies on the *force majeure* clause to ensure that its effect is mitigated by taking all reasonable measures to limit the effect of the triggering event.

17 Fifth, there is the issue of the effect of the *force majeure* event on the obligation under the contract. This obviously depends on the exact drafting but the general consequence of successfully invoking *force majeure* is that the party invoking the clause is relieved from its duty to perform and from responsibility for damages thereto from the date of occurrence of the event. A *force majeure* clause may allow a contracting party to terminate its contractual obligations, or alternatively, in case of a temporary event, provide that obligations are merely suspended until the impediment ceases. Another possibility,

illustrated by the French hardship procedure (examined further below) is an obligation to renegotiate, whereby the hardship event obligates the parties to discuss contractual modifications in light of the new circumstances.

18 From a practical perspective, various comments can be made about the operation of such clauses. (1) In most systems, the burden of proof falls on the party intending to rely on the *force majeure* provisions. In English law, it was held by Parker LJ in *Channel Islands Ferries Ltd v Sealink UK Ltd*:⁷ “it is for the party relying on a *force majeure* clause to bring himself squarely within that clause”. It will thus be beholden on that party to show that the circumstances in question make out the elements referred to above as outlined in the contractual clause on which they are relying.

19 (2) Issues of construction of the relevant clause may arise in practice. It seems in most systems that the provisions are construed narrowly against the party invoking the clause (in English law, by virtue of the *contra proferentem* rule). Problems can arise out of the fact that *force majeure* clauses are rarely bespoke provisions—they are often inserted by parties as boilerplate provisions as noted above, and may not always be tailored to the specific contractual context. As is well-known, in English law, there is a detailed set of rules relating to construction of contracts, underpinned by objective principles.⁸

20 Whilst many commercial contracts will of course include detailed *force majeure* provisions, where this is not the case and contracts are silent on such issues, then contracting parties will need to fall back on pre-existing doctrines, and so we will turn to examine that question now.

Where the contract does not contain a *force majeure* clause

21 In the absence of an express *force majeure* clause, the question arises as to whether a particular supervening event is capable of operating as a matter of law to excuse non-performance and/or a delay in performance.

22 In the next part of this article we shall consider this question first under French law, and then under English law.

Overview of position under French law

⁷ [1988] 1 Lloyd’s Rep. 323.

⁸ See further C Valcke, “Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric” in J. Neyers (ed) *Exploring Contract Law* (Oxford, Hart Publishing, 2008) 77.

23 *Force majeure* has long been a part of French law.⁹ The original 1804 version of the *Code Civil* set out in art 1148 that—

“*Il n’y a lieu à aucun dommages et intérêts lorsque, par suite d’une force majeure ou d’un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.*”¹⁰

24 No definition was given of the doctrine, and it was thus left to the case law to flesh out its constituent elements. Without entering into the subtle debate and fluctuating cases in detail,¹¹ it has long been a feature of French law that it must be shown that a *force majeure* event has the following characteristics: “irresistibility”, unforeseeability and exteriority. “Irresistible” means that the event is not one which the party could have prevented and that it renders the contractual performance impossible rather than just simply more onerous. The lack of foreseeability of the supervening event at the time of contracting is essentially a fact-sensitive issue to be decided by the trial judge. The fact that the *force majeure* event was “exterior” entails that it was beyond the control of the party invoking it, though certain cases cast doubt upon whether this element was always required.¹²

25 As for effects of the finding of a *force majeure*, the response was encapsulated by reference to the French principle, “*à l’impossible, nul n’est tenu.*”¹³ In case of a *force majeure* event of a temporary duration, the contract was simply suspended for the duration of the impediment. On the other hand, in case of a permanent impediment, the contract was subject to *résolution* (and thus discharged—see below), and the party in question was no longer under any duty to undertake its contractual obligations (due to impossibility),¹⁴ nor was he or she liable in damages.

⁹ See generally J Bell, S Boyron, and S Whittaker, *Principles of French Law* (2nd edn, OUP, 2013) pp 343–348.

¹⁰ “Damages and interest are not due when, because of a force majeure or a fortuitous event, the debtor either was prevented from giving or doing what he was obligated to give, or did what he was forbidden to do.”

¹¹ See generally J Bell, S Boyron, and S Whittaker, *Principles of French Law* (2nd edn, OUP, 2013) pp 343–348.

¹² Ass Plen, 14 April 2006, No 02-11168.

¹³ “No-one shall be held to an impossible obligation.” P Malinvaud, D Fenouillet and M Mekki, *Droit des Obligations* (LexisNexis, 13th edn, 2014) para 746.

¹⁴ And was thus liberated of the outstanding contractual obligations, with the contracting party also freed of his or her reciprocal contractual obligations

The modern test for force majeure under French law

26 The legal provisions concerning *force majeure* were updated when the contract section of the Civil Code was reformed in 2016. It is thereby stated in art 1218 that:

“*Force majeure* occurs in contractual matters when an event beyond the control of the debtor, which could not reasonably be expected at the time of the conclusion of the contract and the effects of which cannot be avoided using appropriate means, prevents the performance of the debtor’s obligation. If this situation is temporary, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If the difficulty is permanent, the contract is automatically terminated and the parties are released from their obligations as provided for under Articles 1351 and 1351–1.”

27 This new text was supposed to be a restatement of the current case law rather than a radical reform of the law, bringing together the aforementioned case law. However, one area where commentators have observed a change in the law is in respect of the now “automatic” termination on occasion of a permanent *force majeure* event. In other words, unlike in the previous regime where—despite doctrinal critique—termination/*résolution* for *force majeure* had to be ordered by the court,¹⁵ the new approach allows specifically for an automatic (*i.e.* non-judicial) *résolution* of contracts on occurrence of a *force majeure* event. This was said to have been inspired by the various international harmonisation projects:

“By providing for the termination (resolution) to occur ‘by operation of law’, in other words automatically, without a decision of the judge, the new law follows the solutions proposed by different European harmonisation projects.”¹⁶

It is also in line with a more general liberalising of the approach to non-judicial *résolution* found in the new Civil Code.¹⁷

due to the lack of *cause*: F Terré, P Simler, Y Lequette, F Chénéde, *Droit Civil: Les Obligations* (Daloz, 12th edn, 2019) para 759.

¹⁵ Civ 1, 13 Nov 2014, No 13-24.633. The court would thus verify whether the actual conditions of *force majeure* were made out, and that the impediment was permanent rather than temporary: see F Terré, P Simler, Y Lequette, F Chénéde, *Droit Civil: Les Obligations* (Daloz, 12th edn, 2019) para 760.

¹⁶ F Terré, P Simler, Y Lequette and F Chénéde, *Droit Civil: Les Obligations* (Daloz, 12th edn, 2019) para 760.

¹⁷ See notably art 1224 Civil Code.

28 The case of partial *force majeure* has been covered by the new provisions. In such a case, where the impossibility stemming from the *force majeure* event is only partial (*i.e.* only affecting part of the overall obligations), then the other non-affected obligations remain due by the debtor.¹⁸

Pandemic diseases under French law

29 In the rich and interesting French case law on *force majeure*, there have actually been many cases on pandemics. The French courts have indicated that an epidemic can constitute a *force majeure* event,¹⁹ though most such claims have not however been successful. In certain cases, the French courts have found that the pandemic was not a *force majeure* event as it was foreseeable given that the disease was already present/predicted in the area in question;²⁰ or where the disease is minor or treatable then various courts have determined that the *force majeure* event is not irresistible.²¹

30 French commentators have thus concluded that it can be difficult to show that a disease/pandemic will have the necessary features to constitute a *force majeure*.²² The coronavirus pandemic may however be different, given the characteristics of the current crisis: the new strain of the coronavirus, its highly contagious nature and the speed with which it has spread worldwide, the severity of the disease it causes and lack of any treatment as yet and, crucially, the stringent governmental measures that have been taken in reaction to it, such as lockdowns, social distancing and enforced closure of certain businesses.²³ Much of this suggests that the triggering event itself, namely the pandemic and the ensuing governmental measures, are likely to satisfy the criterion of lack of foreseeability given its sudden

¹⁸ Article 1351 Code Civil.

¹⁹ Paris Court of Appeal, 17 March 2016, no. 15/04263 (Ebola might have been a *force majeure* event, but in this case—concerning the non-payment of social security amounts—the defence of *force majeure* was nonetheless rejected as it had not been shown that the non-payment was caused by the *force majeure* event).

²⁰ Besançon Court of Appeal, 8 January 2014, no. 12/02291: (H1N1); Saint-Denis de la Réunion, 29 December 2009, No 08/02114 (the chikungunya outbreak).

²¹ Basse-Terre, 17 December 2018, no 17/00739 (chikungunya); Nancy, 22 November 2010, No 09/00003 (dengue).

²² “Contractual (non-)performance and coronavirus”, Briefing Note, Signature Litigation Paris.

²³ *Ibid.*

nature and global scope (unless the contract was concluded since the outbreak of the disease) and, depending upon the exact contract and sector of commercial activity, in many cases also irresistibility, because many contracts will become impossible to perform due to the closure of business and restrictions on movements (*e.g.* in the hospitality and tourist sector).

Hardship

31 The 2016 reform of the French Civil Code also ushered in a new doctrine of hardship (*imprévision*) in art 1195 of the Code. Inspired by the European and international projects,²⁴ this provision allows for the revision of a contract “[i]f an unforeseeable change of circumstances at the time of the conclusion of the contract renders the performance excessively onerous for a party that had not accepted to bear the risk.”

32 As Professor Fauvarque-Cosson, one of the key academics behind the reform of the Code, has acknowledged—

“Article 1195 of the *Code Civil* is one of the most striking illustrations of the phenomena of hybridisation across legal families and is also a testimony to legal pluralism within Europe. It draws its inspiration from the European and international environment, whilst differentiating itself from them in several respects.”²⁵

33 The mechanism of the hardship/*imprévision* provisions operates incrementally in different stages. The first part of the provision sets out the conditions for the operation of the doctrine: where a “unforeseeable change of circumstances” entails that the contract becomes “excessively onerous” for one of the parties. The notion of “excessively onerous” has not yet been tested extensively in the case law, but one commentator has drawn the parallel—interestingly from a Jersey context²⁶—with the Roman law doctrine of *laesio enormis* (*i.e.* the doctrine of *lésion*)—

²⁴ See B Fauvarque-Cosson, “Does Review on the Ground of *Imprévision* Breach the Principle of the Binding Force of Contracts” in J Cartwright and S Whittaker, *The Code Napoléon Rewritten* (Hart Publishing, 2017).

²⁵ *Ibid*, pp 187–188.

²⁶ The principle of *lésion / déception d’outre moitié de juste prix* is present in Jersey (see generally D Fairgrieve, *Comparative Law in Practice* (Hart Publishing, 2016) pp 113–120) and is said to have roots in the Roman law of *laesio enormis* (see WJ Zwolve, “Snell v. Beadle: the Privy Council on Roman law, Norman customary and the *ius commune*” in *Viva Vox Iuris Romani* (2002) 379–386).

“the generally accepted idea is that the gap between what one party receives and what the other provides must be so great that a parallel is sometimes made . . . with *laesio enormis*.”²⁷

34 The second stage, which these pre-conditions activate, is that the contracting party affected can ask the other party to renegotiate the contract. This has no effect on the contract, which continues to apply.

35 The third stage, set out in the second paragraph of art 1195, is that if that renegotiation is not successful (“in case of a refusal or failure of the renegotiations”), the parties (jointly) can ask the court to terminate or adapt the contract. Finally, if all else fails, the one of the parties can instead seise the court and request that it intervenes to revise or terminate the contract.

36 These developments in French contract law can be seen as a shift in policy in favour of “contractual justice”, and away from a strict adherence to the traditional doctrines of sanctity and the binding nature of a contract. As Professor Fauvarque-Cosson has observed: “The traditional conception of the judge, a simple servant of the contract, gives way to a new ‘contractual morality’ based on good faith and fairness.”²⁸ The reform was however supported by business with the Chamber of Commerce being one of the driving forces behind the change due in part to the “desire for greater flexibility and adaptability in the face of economic developments, and of the fact that contractual relations are themselves becoming more and more long-term.”²⁹

37 This hardship remedy could be relevant to the current circumstances (though applicable only to contracts concluded after 1 October 2016). Its scope is much broader than that of the *force majeure* doctrine, as can be seen from the constituent elements outlined above. Its obligatory ADR aspect, namely that of a compulsory renegotiation by the contracting parties seems also to be well adapted to the current circumstances of a global pandemic to which pragmatic solutions will be necessary between economic operators, rather than simply a flood of commercial litigation.³⁰

Overview of English doctrine of “frustration”

²⁷ *Ibid*, p 198.

²⁸ *Ibid*, p 188.

²⁹ *Ibid*, p 194.

³⁰ See the call of a number of senior retired judges and academics to look to creative legal solutions including ADR: <https://www.biicl.org/breathing-space>

38 Prior to the decision of the English court in *Taylor v Caldwell*,³¹ English common law did not regard a supervening event as an excuse for non-performance of contractual obligations.³² Instead, the courts applied the rule³³ that, once a contracting party had assumed an obligation, he was bound to fulfil it.

39 The application of this rule of so called “absolute” contracts is illustrated by the decision in *Paradine v Jane*.³⁴ The defendant lessee was sued for arrears of rent. He defended the claim on the ground that he had been evicted from the property and kept out of possession by an “alien enemy”.³⁵ This state of affairs, which the defendant could neither have foreseen nor prevented, had deprived him of the income he had expected to receive from the property and thus the source from which the rent was to be paid.

40 These arguments cut no ice with the court, which held that he was liable to pay the arrears in full. The ground for the court’s decision was as follows:

“... where the law creates a duty or charge and the party is disabled to perform it and hath no remedy over, there the law will excuse him ... but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract”.

41 The “absolute” contract rule continued to be applied by the English courts for some 200 years until its scope was substantially reduced by the decision in *Taylor*. The plaintiff in that case had entered into a contract for the use of a music hall on four days for the purpose of giving four “grand concerts”. After the contract was concluded, but before the first day on which a concert was to be given, the hall was completely destroyed by a fire. It was accepted that neither party was responsible for the fire.

42 Unfortunately, the plaintiff had incurred substantial costs in preparing for the concerts and, following their cancellation, found himself significantly out of pocket. He therefore brought a claim

³¹ 8 LT 356.

³² It seems that the rationale for this approach was that parties could provide for such eventualities in their contract if they wished.

³³ Which was seemingly a rule peculiar to English law.

³⁴ 1646 AL 26.

³⁵ The “alien enemy” in question was Prince Rupert of the Rhine, a grandson of King James I and a Cavalier cavalry commander during the English civil war.

against the defendant seeking compensation. The issue which the court was therefore required to determine was who should bear the losses that had been incurred.

43 The court began by noting that the “parties when framing their agreement evidently had not present to their minds the possibility of such a disaster”, and accordingly that they had not made any express stipulation with regard to it. The court acknowledged that, where a contract was “positive and absolute”, the usual rule was that the contracting party must perform its terms even if, in consequence of an unforeseen event, the performance had become unexpectedly burdensome or even impossible.

44 Significantly, however, the court went on to hold that this rule did not apply to contracts which were subject to a condition, whether express or implied. Further, where it appeared from the nature of a contract that the parties must have known that it could not be fulfilled unless some particular object continued to exist, it followed, the court said, that when entering into contract they must have contemplated such continuing existence as the “foundation” of the contract. In those circumstances, and in the absence of any express or implied warranty that the object would continue to exist, the contract was to be construed as subject to an implied condition that the parties would be excused from performance if performance became impossible because the object had perished without any fault on the part of the contracting parties. The plaintiff’s claim for damages was therefore dismissed.

45 What is interesting about this decision from a comparative law perspective is that, in reaching the conclusion that it did, the English court drew heavily on principles adopted by the civil law. The court cited provisions of the *Digest*³⁶ which showed that Roman law had implied the same term which the court had implied into the contract between the parties in *Taylor* into every obligation classified as an “*obligation de certo corpore*” (*i.e.* an obligation which has something certain as its object). The court also cited commentary in Pothier’s *Traité des Obligations*³⁷ to the effect that a contracting party is freed from his obligation when the subject matter of the obligation has perished through no fault of his own, unless he has taken on himself the risk of the particular misfortune which has occurred.

46 The court then went on to hold as follows:

³⁶ The *Digest*, also known as the *Pandects*, is a compendium of juristic writings on Roman law compiled by the Emperor Justinian in the 6th century CE.

³⁷ Part 3, chap 6, art 3, para 668.

“Although the civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.” [Emphasis added.]

47 The principle laid down in *Taylor* was soon applied in other cases. It was also incorporated into statute.³⁸

48 Then, barely a decade after the doctrine was first introduced into English law, its ambit was significantly extended in the case of *Jackson v Union Marine Ins Co Ltd*³⁹ to encompass situations where the parties’ “commercial adventure”⁴⁰ had been fundamentally impacted in some way by events beyond their control.

49 *Jackson* concerned a dispute between the parties to a charter party agreement. Before the charter began, the ship ran aground. The resulting repairs took nearly eight months to complete. The court held that the charterer should be discharged from its obligations under the agreement because “a voyage undertaken after the ship was sufficiently repaired would have been a different voyage . . . different as a different adventure”. [Emphasis added.]

The modern test for frustration under English law

50 The modern test for frustration was laid down by the House of Lords in *Davis Contractors Ltd v Fareham UDC*⁴¹:

“So frustration occurs whenever the law recognises that, 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. *Non haec in foedera veni*. It was not this that I promised to do . . .

³⁸ The current provision is s 7 of the Sale of Goods Act 1979. This provides that “Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.”

³⁹ (1873) 7 WLUK 44.

⁴⁰ These categories of cases are referred to in both the UK and the US as “frustration of purpose” cases. Whether that is an apt description is debatable, not least because it is clear that the parties’ subjective intentions/reasons for contracting have no bearing on the question of whether the contract has been frustrated or not.

⁴¹ [1956] AC 696.

There must be . . . such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.”⁴²

“The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.”⁴³

51 The test laid down in *Davis* was approved in *National Carriers Ltd v Panalpina (Northern) Ltd*⁴⁴:

“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 (but 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 cases the law declares the parties to be discharged from further performance.”⁴⁵

52 More recent authorities suggest that, when applying the tests described above the courts will generally adopt what is sometimes referred to as a “multi-factorial” approach. This requires the court to have regard to a variety of matters, including the terms of the contract itself, construed against the relevant factual matrix; the parties’ knowledge, expectations, assumptions (and in particular their assumptions as to risk at the time of the contract) at least so far as these can be ascribed mutually and objectively;⁴⁶ the nature of the supervening event; and the parties’ reasonable and objectively ascertainable assessments of possibilities of future performance in the new circumstances.

The relevance of foreseeability

53 The occurrence of an event which was actually foreseen by the parties will generally exclude the operation of the English doctrine of frustration.⁴⁷ Where a supervening event was foreseeable (albeit not

⁴² *Ibid* at 728-729 (*per* Lord Radcliffe).

⁴³ *Ibid* at 721 (*per* Lord Reid).

⁴⁴ [1981] AC 675.

⁴⁵ *Ibid* at 700 (*per* Lord Simon of Glaisdale).

⁴⁶ Note that, as a matter of English law, the parties’ purely subjective intentions have no bearing on the question.

⁴⁷ This is because the court will generally construe the contract as providing implicitly for the risk of occurrence of the event

actually foreseen by the parties) the issue the court has to consider is whether one or other of the parties should, nonetheless, be taken to have assumed the risk of the occurrence of the event as a matter of construction of the contract.⁴⁸

54 However, the degree of foreseeability required to exclude the doctrine would seem to be a high one, namely whether the event was one which any person of ordinary intelligence would regard as “likely” to occur.⁴⁹

Illustrations of the scope of the modern English doctrine of frustration

55 It will be clear from the way in which the test for frustration has been framed by the English courts that the application of the doctrine is highly fact specific. Previous decisions of the courts are therefore likely to be of limited assistance in predicting the outcome of future cases. However, examples of cases in which the doctrine of frustration has been successfully invoked may offer some guidance as to the likely scope of the doctrine.

56 Thus, the courts have held contracts to be frustrated where:

(i) performance of the contract has become unlawful for one party by reason of a supervening change in the law or as a result of a supervening change of circumstances which rendered unlawful that which was previously lawful;

(ii) the subject matter of the contract has been destroyed;

(iii) in the case of a contract for personal services, the performing party has died or has otherwise become incapable of performing;

(iv) there has been a delay in performance which is sufficiently long to frustrate the parties’ “commercial adventure”.

57 The cancellation of an expected event may also operate to frustrate a contract. In *Krell v Henry*,⁵⁰ the defendant agreed to hire rooms in the plaintiff’s flat in Pall Mall on 26 and 27 June 1902 in order to see the coronation processions of King Edward VII. The written contract made no reference to the processions but it was clear from the relevant factual background that both parties regarded the viewing of the

⁴⁸ Because, if so, this will plainly exclude the doctrine of frustration.

⁴⁹ *Mishara Construction Co Inc v Transit-Mixed Concrete Corp* 310 N.E 2d 363. Chitty cites this decision in support of the test, albeit that it is decision of the Supreme Judicial Court of Massachusetts, Middlesex.

⁵⁰ [1903] KB 740.

processions as the sole purpose of the hiring.⁵¹ Unfortunately, the King fell ill and the processions were postponed. The defendant refused to pay the balance of the rent and sought to be discharged from his obligations under the agreement.

58 The Court of Appeal upheld his refusal to pay on the grounds that “[t]he Coronation procession was the foundation of this contract and *that the non-happening of it prevented the performance of the contract*”. [Emphasis added.]

59 However, a different result was reached in *Herne Bay Steamboat Co v Hutton*⁵² and the cases are not entirely easy to reconcile.

60 Later commentators have tended to regard *Krell* as the “exceptional” case; and in *Maritime National Fish Ltd v Ocean Trawlers Ltd*,⁵³ Lord Wright said that it was “certainly not” an authority to be extended.

Partial frustration

61 English law has great difficulty in dealing with cases where part of a contract (but not the whole contract) has become impossible of performance.

62 There are certain cases, however, where the English courts have permitted a contracting party to rely on a partial excuse for non-performance of a contractual obligation. Thus, in *Cricklewood Property & Investment Trust Ltd v Leightons Investment Trust Ltd*⁵⁴ it was held that although temporary war-time restrictions did not operate to frustrate a long-term lease, whilst those restrictions were in effect they did provide a temporary excuse for not complying with a covenant in the lease.

63 The precise limits of the doctrine of “partial frustration” are, however, difficult to discern, and the authorities do not always speak with one voice.

Legal consequences of frustration

64 Frustration operates to “kill” the contract and to discharge the parties from further liability under it. The contract is brought to an end

⁵¹ This included the fact that the licence only extended to daytime and not to night time.

⁵² [1903] KB 683.

⁵³ [1935] AC 524.

⁵⁴ [1945] AC 221.

“forthwith, without more and automatically” (*dicta* of Bingham, LJ in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*).⁵⁵

65 The approach of the English common law was, broadly, to let losses lie where they fell. Thus, a party who had paid money pursuant to the contract prior to the happening of the frustrating event would have no grounds for recovering such payment.

66 The unsatisfactory nature of this principle led to the passing of the Law Reform (Frustrated Contracts) Act 1943 (“the LRA”). The LRA only applies to contracts which are governed by English law. A detailed analysis of its provisions is outside the scope of this article, but in brief summary:

(i) There is provision⁵⁶ for (i) recovery of payments paid prior to the frustrating event (ii) relieving payer from liability to make payments payable prior to frustrating event but remaining unpaid;

(ii) The payee is entitled to set off “the amount of any expenses incurred before the time of discharge . . . in or for the purpose of the performance of the contract”;

(iii) The court has power to award a sum of money payable in respect of any “valuable benefit” received by the paying party prior to the discharge of the contract;⁵⁷

(iv) “Where a contract can be divided into severable obligations, the LRA has no application to any obligation which has been completely performed”;⁵⁸

(v) The parties may “contract out” of the LRA.⁵⁹

The impact of supervening events on contractual obligations under Jersey law

67 The extent of the authority in Jersey as to the circumstances in which a supervening event will operate to excuse a party from non-performance of his contractual obligations is, unfortunately, rather scant.

68 The construction of a *force majeure* clause was, however, touched upon in the case of *Mobil Sales & Supply Corp v Transoil (Jersey)*

⁵⁵ [1990] 1 Lloyd’s Rep 1.

⁵⁶ Section 1(2).

⁵⁷ Section 1(3).

⁵⁸ Section 2(4).

⁵⁹ Section 2(3).

Ltd,⁶⁰ a case which concerned a contract for the supply of oil. The contract had been concluded orally and there was a dispute about whether a *force majeure* clause was an express or implied term of the oral contract.

69 The Royal Court confirmed the use of such clauses in commercial contracts and went on to provide the following overview of such clauses:⁶¹

“It is clear from the authorities that a ‘force majeure’ clause is frequently to be found in commercial contracts, that such clauses vary in their terms and that where such a clause is included in a contract it must be construed with due regard to the nature and general terms of the contract and in particular with regard to the precise terms of the clause.”

70 On the particular facts of this case, the court held that the contract did not contain a *force majeure* clause in the terms contended for by the defendant, but that even if it had the events that had occurred would not have triggered it.⁶²

71 The court then went on briefly to consider the question of whether the contract was “frustrated”. Somewhat surprisingly, the court proceeded on the basis that the principles to be applied were those of the English doctrine of frustration. It went on to hold that, on the particular facts of the case, the defendant had failed to show that the parties’ “commercial venture” had been frustrated.⁶³

72 The *Mobil Sales* case is also well-known for having adopted an “objective” approach to the contract in question, whereby the perspective of a reasonable person was to predominate over that of the subjective understanding of the actual parties.⁶⁴ However, care needs

⁶⁰ 1981 JJ 143, at 159.

⁶¹ *Ibid*, at 164.

⁶² The defendant argued that the terms of the contract excused him from performance of his obligations if he was unable to obtain oil from a particular refinery. The court rejected that argument, but in any event also went on to hold that the defendant had failed to show that it was impossible for him to obtain the oil from the refinery in question.

⁶³ At para 160 of the judgment, the court stated: “We have considered whether [doctrine of frustration] is applicable to this case by reference to the very clear and full exposition of the doctrine in Cheshire & Fifoot’s *Law of Contract*, 8th ed., Chapter 3 entitled ‘Discharge under the Doctrine of Frustration’, at 540 (1972), and we are satisfied that it is not.”

⁶⁴ The Royal Court thus held that in terms of determining whether an agreement had been reached, “[t]he question which the Court has to

to be taken as this approach in *Mobil Sales* has been doubted in later cases.⁶⁵ The question of whether an objective or subjective approach should be adopted in contract law has divided legal opinion in Jersey,⁶⁶ and the Jersey courts have yet to adopt an authoritative position on this issue.⁶⁷

73 Subsequent to the decision in *Mobil Sales*, the effect of a supervening event on a contract governed by Jersey law arose again for determination in the case of *Hotel de France (Jersey) Ltd v Chartered Institute of Bankers* (21 December 1995, unreported).

74 The facts of that case were that the Chartered Institute of Bankers (“CIB”) entered into a contract with the Hotel de France (“the Hotel”), pursuant to which it was agreed that the CIB would hold their annual dinner in a room at the hotel known as the “Empire Room”. Two days before the dinner was due to take place, a fire broke out at the hotel. The Empire Room was badly damaged. Although the hotel offered the CIB the use of an alternative room, the CIB decided not to proceed with the dinner. The hotel then brought a claim against the CIB for breach of contract.

75 The Royal Court rejected the hotel’s claim. Without providing any reasons, it simply held that “[t]he fire was a ‘*cas fortuit*’ which threw the contract into a position where it was not possible to perform the contract in the Empire Room”.⁶⁸ So, although the judgment is helpful in clarifying that the doctrine of *force majeure* does indeed form part of Jersey contract law, there is little guidance to be derived from it as

determine is not what the parties had in their minds, but what reasonable third parties, ‘disinterested spectators’, would infer from their words or conduct.” (1981 JJ 143, at 159, 163).

⁶⁵ The Court of Appeal in *O’Brien v Marett* explicitly ruled that *Mobil Sales* and *La Motte Garages* “must now be considered *per incuriam* on this specific point in the light of *Selby v Romeril*.” (*O’Brien v Marett* 2008 JLR 384, at para 55.)

⁶⁶ See D Fairgrieve, *Comparative Law in Practice*, pp 44–47.

⁶⁷ A range of different opinions have been expressed in recent cases, see *Calligo Ltd v Professional Business Systems CI Ltd* 2017 (2) JLR 271; *Home Farm Devs Ltd v Le Sueur* [2015] JCA 242, 2015 (2) JLR N [16]; *Foster v Holt* 2018 (1) JLR 449; *Booth v Viscount* [2019] JCA 122.

⁶⁸ Modern French law regards the terms “*force majeure*” and “*cas fortuit*” as interchangeable. The Royal Court was clearly of the same view (see para 10 of the judgment).

to the scope of that doctrine or the nature of its constituent elements.⁶⁹ Instead, the court confined its analysis to the question of whether the CIB should have made an application to court for an order for *résolution*. It held an application did not have to be made in cases of real urgency,⁷⁰ but that such cases were “exceptional”.

76 In the absence of any meaningful guidance to be derived from case law, the Jersey courts have frequently turned to the writings of Pothier when seeking to determine questions of Jersey contract law. Indeed, as every student of Jersey law knows, Pothier has often been described by the Jersey courts as the “surest” guide to contract law in the Island.⁷¹

77 Pothier deals with the doctrine of *force majeure* at various points in his *Traité des Obligations*.⁷² He states that a party who has assumed an obligation to give a particular object or thing (“*corps certain*”) to another will not be held to that obligation in the case of a *cas fortuit* or *force majeure*. There are, however, three exceptions to this rule: the first is where the obligor is already in breach of his obligation and has been called upon to perform by the other party (“*mis en demeure*”); the second is where there is an express agreement to the contrary; and the third is where the obligor is at fault for the “*force majeure*” having occurred in the first place.

78 Pothier illustrates the application of the doctrine with the example of a person who borrows a horse from another and is then set upon by robbers who steal or kill the horse. This event will relieve the borrower from his obligation to return the horse to the lender, unless the reason he was set upon because he had imprudently chosen to take a road which was known to be rife with robbers.

The future development of Jersey doctrine of *force majeure*

79 Although the principles expounded by Pothier provide a clear framework for the doctrine of *force majeure* in Jersey law, the Jersey

⁶⁹ It seems reasonable to infer from this that the court did not regard these questions as contentious or difficult and thus that it must have assumed that the position was broadly the same as under French law.

⁷⁰ As noted above, this issue has also been the subject of much debate in France. The position is now addressed by art 1218 of the *Code Civil* which provides for automatic termination of the contract.

⁷¹ See for example *dicta* of Bailhache, Bailiff in *Selby v Romeril* 1996 JLR 210.

⁷² At Part I, chap II, art I, paras 142 and 143; and at Part II, chap VI, art 3, para 668 (the latter being the passage cited by the English court in *Taylor v Caldwell* (*supra*))

courts will inevitably have to refine those principles and indeed to flesh them out so that they are capable of application in new circumstances never conceived of by Pothier. As the Royal Court frankly acknowledged in *Selby v Romeril*,⁷³ Jersey customary law cannot “be set in the aspic of the 18th century”.⁷⁴ It must be flexible and capable of application to new circumstances as society itself develops and changes. This does, however, beg a rather contentious question: to what sources should the Jersey courts look when developing the Jersey doctrine of *force majeure*?

80 An obvious answer is the most recent version of the French *Code Civil*⁷⁵ together with decisions of the French courts interpreting those provisions. It is right, however, to acknowledge that the modern French doctrine of *force majeure* only applies to the situation where a supervening event has made the performance of a contractual obligation impossible.⁷⁶ As such, it is narrower in scope than the modern English doctrine of frustration, which as we have seen extends to the situation where the parties’ “commercial adventure” has been frustrated.⁷⁷ It was in order to address this perceived lacuna that France introduced the statutory right for parties to re-negotiate contracts in case of “hardship” to which we have referred above.

81 Given the narrowness of the French doctrine,⁷⁸ there may be those who argue that Jersey law should simply adopt the modern English law of frustration. However, we would caution against such an approach, not least because there are aspects of the English doctrine which are problematic.

82 For example, an unforeseen event which rather than preventing the performance of an obligation merely *delays* its performance will not operate to discharge the contract on the grounds of frustration, unless

⁷³ 1996 JLR 210.

⁷⁴ *Ibid* at 218.

⁷⁵ In other words, the version which includes the 2016 “restatement”.

⁷⁶ Although the doctrine is sufficiently broad to encompass temporary impossibility as well as permanent impossibility.

⁷⁷ Note though that even the modern English doctrine is fairly narrow in scope. In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1, the court held that the doctrine of frustration cannot be “lightly invoked” but must be kept within “very narrow limits and ought not to be extended”. In particular, it is well settled as a matter of English law that performance will not be excused simply because it has become more onerous or less profitable.

⁷⁸ Which could only be mitigated in Jersey by legislation, as it has been in France.

the delay is such as to change the nature of the contract: *Jackson*. It follows, therefore, that in the absence of a suitably worded *force majeure* clause,⁷⁹ the performing party may find himself liable in damages for the delay even though it arose by reason of factors outside his control and which he could not have foreseen. By contrast, as noted above, the French doctrine of *force majeure* is sufficiently broad to encompass cases of delay, as long as the other relevant conditions are made out (and in which case the contractual obligations will merely be suspended).

83 Similarly, English law has struggled to deal with what happens where an unforeseen event leads to partial, but not total, non-performance of an obligation. Thus, in *Cricklewood*,⁸⁰ although the court did eventually hold that the parties' obligations under the lease were suspended during the period when the tenant was prevented from occupying the property, the legal basis for the finding remains uncertain. The court also expressly held that the contract was not frustrated. Again, the French doctrine is sufficiently broad to encompass such cases.

84 A further significant area of difficulty with the English doctrine of frustration is that, although the test for "frustration of purpose" has been set out by the English courts on many occasions (most recently in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*),⁸¹ it remains extremely difficult to apply in practice. The authors of *Chitty*⁸² note that the doctrine of frustration has an "affinity" with the doctrine of mistake. This is because both doctrines seek to address the question of whether a promisor should be held to his promise in circumstances where the background against which the contract was originally negotiated has changed fundamentally. In the case of frustration, the change has come about by reason of a supervening and unforeseen event; in the case of mistake, it has come about because the promisor was mistaken as to the true position from the outset. Both cases, however, raise the question of whether the promisor can justifiably say "It was not this that I promised to do".⁸³ In seeking to define the ambit of the doctrine of frustration the English courts have therefore encountered the same problems that they have encountered when

⁷⁹ The clause must deal not only with impossibility of performance but a delay in performance.

⁸⁰ *Supra*.

⁸¹ See section B of the judgment of Marcus Smith, J, in particular paras 22 and 23.

⁸² At para 23–002.

⁸³ *Dicta* of Lord Radcliffe in *Davis, supra*.

deciding what constitutes an operative mistake.⁸⁴ By contrast, however, the scope of the French doctrine (whilst narrow) is at least—relatively!—clear and well defined.

85 Finally, in terms of remedies, the English common law broadly let losses lie where they fell. It was in order to mitigate this unsatisfactory situation that the LRA came to be passed. Similarly, the French Civil Code was modified by legislative intervention to introduce the notion of hardship to allow for the courts, in the absence of successful renegotiation by the parties, to have the power to revise the contract.

Conclusion: proposals for reform?

86 We began this article by posing a simple question: will the impact of the coronavirus pandemic operate to excuse the non-performance, or delay in performance of contracts governed by Jersey law?

87 The short answer is that it depends. Most professionally drafted commercial contracts will contain an express *force majeure* clause. Although the precise scope of such a clause will be a matter of construction in each case, the nature and scale of the disruption being caused by the pandemic should trigger a typical *force majeure* clause.

88 Where a contract does not contain a *force majeure* clause, the customary law doctrine will come into play. Although each case will turn very much on its own facts, it is possible to state some general propositions.

89 First, given the wholly unprecedented scale and severity of the pandemic and of the measures being taken to contain it, it seems unlikely that the Jersey courts would hold that it was a foreseeable event so as to preclude the application of the doctrine of *force majeure*.

90 Secondly, a party is likely to be entitled to invoke the Jersey doctrine of *force majeure* if he can show that the pandemic (or the government restrictions imposed in order to contain it) has made performance of his obligation impossible.⁸⁵ Such cases might, for

⁸⁴ Indeed, the English law concept of an “operative mistake” (which arises not only in the context of contract law but also in the law of restitution/unjust enrichment and the setting aside of unilateral transactions in equity) is bedevilled by inconsistency, a lack of clarity and the absence of any clear juridical basis.

⁸⁵ Although the only example Pothier gives of a *cas fortuit* or *force majeure* is the loss or destruction of the subject matter of the contract, we think that the Jersey courts would be likely to follow French law in holding that the

example, arise in the hospitality and entertainment sector, where events such as weddings and concerts have had to be cancelled at short notice due to unforeseen circumstances, such as unprecedented levels of staff absence.

91 Thirdly, it will not be enough to show that the contract has become more onerous or less profitable for the performing party. Nor is it likely to be enough to show that there has been a radical change in the nature of the performing party's obligations.⁸⁶ For example, the fact that the purchaser under a supply contract can no longer achieve the margins he was hoping to achieve due to a lack of consumer demand will not, of itself, excuse him from performing his obligations. If the contract can be performed, it must be performed.

92 In recent years, the perceived narrowness of the doctrine of *force majeure* in France has led to calls for reform. As noted above, this culminated in 2016 in the introduction of the new doctrine of hardship (*imprévision*) in art 1995 of the Code. It seems that the advent of the coronavirus pandemic is now prompting similar discussions in England. Thus, in April of this year, The British Institute of International and Comparative Law hosted a meeting attended by senior retired members of the English judiciary, academics and members of the English Bar.⁸⁷ The purpose of the meeting was to consider whether there was a case for adopting "a more creative, graded, but nevertheless rigorous approach" to businesses and individuals unable to fulfil their contractual obligations due to the pandemic. The likely outcome of these discussions is of course yet to be known, but no doubt there will be many in Jersey who will follow these developments with considerable interest.

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doctrine encompasses impossibility of performance more broadly. For the same reason, we also think that the Jersey courts would be likely to hold that even a temporary impossibility of performance will enable the Jersey doctrine of *force majeure* to be invoked.

⁸⁶ Note though that this was the test applied by the Royal Court in *Mobil Sales*. However, later decisions have questioned the court's reliance in that case on English law.

⁸⁷ Further see: <https://www.biicl.org/breathing-space>

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