

# AIFC Court & IAC Webinars Programme 2020: WEBINAR 12: Dispute resolution during and after the pandemic: some substantive law and procedural issues and implications

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# What I will cover

- Introduction 1 - the impact of Covid-19
- Introduction 2 - The significance of English and other common law decisions in the AIFC Court and AIFC IAC
- Commercial and property law issues and implications
  - Frustration and force majeure: The law; Public event contracts; Supply contracts; Leases
  - Insurance claims: a practical example
  - Consideration: will Covid-19 produce a change in English law?
  - Cryptoassets and smart contracts: early global legal developments
  - Financial service contracts: Material Adverse Change Clauses; LIBOR
- Impact on court processes - Remote court hearings

# Introduction 1 - Covid-19 Impact

- Direct effect of the disease
- Government restrictions –
  - e.g. in the UK: The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350:
    - Reg. 4 – closure of certain businesses
    - Reg 6 – restrictions on movement
    - Reg 7 – prohibition on gatherings
- Absence of employees
- Disruption of supply chains
- Prohibition on public gatherings
- Substantial drops in turnover and increases in insolvency

# Introduction 2 - The significance of English and other common law decisions in the AIFC Court and AIFC IAC

- Contracts governed by English law
- Contracts governed by AIFC law
  - AIFC Constitutional Statute, Article 13(6) and Court Regulations, Regulation 29(2):
    - *“In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.”*
    - *“The Court, as provided by Article 13(6) of the AIFC Constitutional Statute, in determining a matter or proceeding, shall be guided by decisions of the Court and decisions made in other common law jurisdictions.”*
  - Specific AIFC laws, e.g:
    - Contract Regulations – some similarities to English law but different in some important respects
    - Implied Terms in Contracts and Unfair Terms Regulations
    - Damages and Remedies Regulations
    - Trust Regulations (NB Reg 7(1) – *“The common law of Trusts and principles of equity applicable in England and Wales supplement these Regulations, except to the extent modified by these Regulations or any other AIFC Act or by the Court.”*

# Commercial and property law issues and implications

- Frustration and force majeure:
  - The law
  - Public event contracts;
  - Supply contracts;
  - Leases
- Insurance claims: a practical example
- Consideration: will Covid-19 produce a change in English law?
- Cryptoassets and smart contracts: early global legal developments
- Financial service contracts:
  - Material Adverse Change Clauses;
  - LIBOR

# Frustration and force majeure: the law

- Frustration:
  - English common law doctrine
  - National Carriers v Panalpina [1981] AC 675, 700 per Lord Simon:
    - *“Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerosness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance”*
- Force majeure:
  - English law approach – contractual construction is key
  - AIFC Contract Regulations, Regulation 82

# Frustration and force majeure: Covid-19 examples (1)

- Sports event or concert example:
- Supply contract examples:
  - Supply chain interference example
  - Economic shock example
  - Choice example
- Leases

# Frustration and force majeure: Covid-19 examples (2)

- **Sports event or concert example:**
  - e.g. cancellation of Olympic Games, or of Grand Slam tennis event, or of a rock concert at Wembley Stadium in London, or a major opera at the Opera House in Astana
  - Issues may arise in multiple contractual contexts:
    - event contract itself between venue and promotor of event
    - media broadcasting contract between promotor and broadcasters
    - sponsorship contracts between companies all round the world and the promotor and also the participating teams or sportsmen or women or musical performers taking part
    - supplier contracts (hospitality, accommodation etc)
  - If any or all of these contracts are governed by English law, must consider: doctrine of frustration and application of any force majeure clauses; if governed by AIFC Law must consider Regulation 82
  - Business interruption insurance claims are also likely



# Frustration and force majeure: Covid-19 examples (3)

- Supply chain example:
  - Contract for supply of a mechanical device (“Device X”) to a buyer, which requires the supplier of Device X to source a key component (“Component Y”) to enable Device X to be manufactured. The source used for Component Y is a factory in Hubei, which is shut under Chinese government regulations and cannot export. Can the manufacturer and supplier of Device X be discharged from his Device X supply contract with the buyer?
- Economic shock example:
  - Contract for supply of Component Y to be used to help manufacture Device X. Precipitous drop in demand for Device X for reasons relating to pandemic. Can the manufacturer of Device X rely on frustration to get out of accepting delivery and paying for the Component Y that it no longer needs?
- Choice example:
  - Here the manufacturer/supplier of Device X decides to shut the Device X manufacturing factory for the safety of employees, despite not being required to do so by the government and seeks to be excused from having to take delivery of and pay for any further supplies of Component Y and/or from performing the supply contract for Device X to the buyer.

# Frustration and force majeure: Covid-19 examples (4)

- **Supply chain example:**
  - Contract for supply of a mechanical device (“Device X”) to a buyer, which requires the supplier of Device X to source a key component (“Component Y”) to enable Device X to be manufactured. The source used for Component Y is a factory in Hubei, which is shut under Chinese government regulations and cannot export. Can the manufacturer and supplier of Device X be discharged from his Device X supply contract with the buyer?
- **Force majeure**
  - Is there a relevant clause in the supply contract between the manufacturer and supplier of Device X and the buyer?
  - Does the event fall within the definition of force majeure contained in the clause?
  - If such an event occurs, what effect does it have to have on contractual performance (and on whose performance)
- **Frustration:**
  - Does the contract specify the source of supply of Component Y?
  - *Howell v Coupland* (1876) 1 QBD 258 (contract for supply of crop from a particular field stipulated)
  - *The Mary Nour* [2008] EWCA Civ 856 (contract for supply of cement - no source stipulated)

# Frustration and force majeure: Covid-19 examples (5)

- **Economic shock example:**
  - Contract for supply of Component Y to be used to help manufacture Device X. Precipitous drop in demand for Device X for reasons relating to pandemic. Can the manufacturer of Device X rely on frustration to get out of accepting delivery and paying for the Component Y that it no longer needs?
- **Force majeure:**
  - Thames Valley Power v Total Gas & Power [2005] EWHC 2208 (Comm)
  - Tandrin Aviation v Aero Toy [2010] EWHC 40 (Comm) ([depending on the particular force majeure contractual provision the general position is that] “a change in economic/market circumstances, affecting the profitability of a contract or the ease with which the parties’ obligations can be performed, is not regarded as being a force majeure event”)
- **Frustration:**
  - Economic harshness of performance is generally insufficient to make performance obligations “radically different”: see, e.g., Davis Contractors v Fareham [1956] AC 696

# Frustration and force majeure: Covid-19 examples (6)

- Choice example:
  - Here the manufacturer/supplier of Device X decides to shut the Device X manufacturing factory for the safety of employees, despite not being required to do so by the government and seeks to be excused from having to take delivery of and pay for any further supplies of Component Y and/or from performing the supply contract for Device X to the buyer.
- Force majeure:
  - As per supply chain example – is there a relevant clause in either the Component Y or the Device X supply contracts and, if so, is it engaged and with what effect?
- Frustration:
  - The traditional approach, if applied to our example, would hold that the inability of the manufacturer/supplier of Device X to take delivery of Component Y and/or to supply Device X to the buyer results from his choice and so would not engage the doctrine of frustration.
  - *The Super Servant Two* [1990] 1 Lloyd's Rep 1 - Contract provided for one of two ships, the SS1 and SS2 to carry oil rig. Carrier had also entered other carriage contracts with other parties. SS2 was lost. SS1 had been allocated to other contracts. Carrier unsuccessfully sought to argue frustration.
  - Would traditional approach apply if manufacturer/supplier of Device X was acting under a duty to protect his factory employees from physical harm?

# Frustration and force majeure: Covid-19 examples (7)

- Leases

- Historical reluctance of English courts to hold that the doctrine of frustration is engaged in the case of leases.
- National Carriers v Panalpina [1981] AC 675
- Canary Wharf (BP4) T1 Ltd v European Medicines Agency [2019] EWHC 335 (Ch); [2019] EGLR 17
- In the context of Covid-19, key factors may be the reason for the disruption to occupation of the premises (e.g. government restriction), the length of the disruption and the time left to run under the lease.

# Insurance claims

Example of business interruption clause in retail business premises insurance policy:

*“3) Denial of Access Clause:*

*Loss as Insured by this Section resulting from Prevention or Hindrance of Access to or the use of the premises solely in consequence of*

*a) damage to property in the immediate vicinity of such premises*

*b) restrictions imposed by order of a Civil Authority consequent upon any other sudden and unforeseen emergency which is likely to endanger life or property in the vicinity of such premises except that*

*i) no claim shall be payable unless the restrictions shall be in force for a period of more than four consecutive hours*

*ii) this shall not include loss resulting from strikes, picketing or notifiable diseases or from any event of which the Insured had prior knowledge*

*iii) the Indemnity Period shall be the actual period during which the restrictions are in force but not exceeding the maximum Indemnity Period*

*shall be deemed to be loss resulting from damage to property used by the Insured at the premises.”*

Is the “notifiable diseases” exclusion is engaged in circumstances where: Covid-19 was not a notifiable disease when the policy was entered into, it became a notifiable disease on 6 March 2020 and retail shops were ordered to close on 23 March 2020?

# Consideration

- **Two lines of cases in English law:** will Covid-19 help push forward a case which causes an appellate court to reconsider whether there is any principled justification for the distinction?
  - (1) Part payment of an existing debt does not amount to good consideration for a creditor's promise to accept a lesser sum in full settlement of the debt: Foakes v Beer (1884) 9 App. Cas. 605
  - (2) The promise to pay more than originally agreed for the performance of an existing contractual obligation may amount to good consideration where some 'practical benefit' accrues to the parties through this further agreement: Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 (“there was clearly a commercial advantage to both sides from a pragmatic point of view”)
- **Not an issue under AIFC Law:**
  - Regulation 35 of the AIFC Contract Regulations: Validity of mere agreement - "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements."



# Cryptoassets & smart contracts: early global legal developments

- “*Legal Statement on Cryptoassets and Smart Contracts*” issued in November 2019 by the UK Jurisdiction Taskforce chaired by Sir Geoffrey Vos (Chancellor of the High Court)
- New Zealand case: *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited (in liquidation)* [2020] NZHC 728
  - Cryptopia is an exchange platform for cryptocurrency. Accountholders were able to trade pairs of cryptocurrencies and Cryptopia profited by charging fees for transactions. By January 2019, the platform had around 800,000 accountholders.
  - In January 2019, Cryptopia’s servers were hacked. The hackers transferred a significant proportion of the cryptocurrencies on the platform to an undisclosed external exchange, effectively stealing cryptocurrency then worth around NZD c.30 million. Shortly thereafter, Cryptopia went into liquidation.
  - In order to distribute Cryptopia’s assets, estimated at NZD c.170 million, the liquidators had to understand the nature of the cryptocurrencies held on the platform and the basis upon which they were held. Consequently, the liquidators applied to the court for guidance and directions.
  - If the accountholders had a proprietary interest in the cryptocurrencies the assets remaining in the insolvency pool would be such that personal creditors would recover less than 50% of amount of their claims, whereas if the accountholders had only a personal interest in the cryptocurrencies, personal creditors would recover over 85% of the amount of their claims.



# Financial Services Contracts: potential litigation

- **Material Adverse Change Clauses**

- Example (*Grupo Hotelero v Carey* [2013] EWHC 1039 (Comm)): “*There has been no material adverse change in its financial condition (consolidated if applicable) since the date of this Loan Agreement [21 December 2007]*”
- What is a “*material*” change and what is the meaning of “*its financial condition*”?

- **LIBOR transition**

- LIBOR will be discontinued from 31 December 2021. This is a global issue
- Numerous legacy contracts were entered at a time when the parties did not foresee a permanent cessation of LIBOR. As a result, many contracts have no fallbacks covering unavailability of LIBOR. Many others contain fallbacks that were intended to apply in a scenario of temporary LIBOR unavailability, and so have unintended consequences upon permanent cessation. This is not what the parties typically bargained for. Absent a unilateral right by parties to amend rates or a statutory solution, the parties must agree to any variation. There are issues with most if not all of the suggested alternatives.
- Therefore, even before Covid-19, parties were deploying, or contemplating deploying a range of legal arguments to allege that LIBOR’s demise means they are discharged from future obligations under an unfavourable contract. Covid-19 has exacerbated the issues with LIBOR, slowed down the transition process, increased the probability that an unfavourable replacement rate will tip a company into distress into default and increased the prospects of litigation.

# Impact on court processes – Remote hearings (1)

- **Feasibility and appropriateness of hearing cases remotely**
  - Conventional hearings during Covid-19
  - Remote hearings during Covid-19 (and afterwards?)
- **Legal and procedural framework**
  - Covid-19 legislation (e.g. in UK - Coronavirus Act 2020, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020)
  - Civil Procedure Rules (e.g. the new CPR PD 51Y on video and audio hearings; CPR PD 32 on examination of witnesses remotely)
  - English court “Protocol Regarding Remote Hearings” (e.g. paragraph 12: *“It will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.”*)
  - English court case management decisions: e.g. *Re One Blackfriars* [2020] 4 WLUK 89
  - AIFC Court Regulations (e.g. Regulation 33) and Court Rules (e.g. Parts 1, 3 and 18.7)
- **Issues**
  - “Open justice”
  - Bundles of documents and other practical issues

## Impact on court processes – Remote hearings (2)

