



LUPC and SUPC webinar Force Majeure, Frustration & Contract Management

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Introduction

- Examples of how is Covid-19 impacting contracts
- Two key themes
- We will cover:
 - Force majeure provisions in your contracts
 - Can the doctrine of frustration help?
 - Contract management, and avoiding (but preparing for) disputes
- Interface with the PPNs



Force Majeure and Frustration

- A scenario to keep in mind
- What are they?
 - Force Majeure - a contractual mechanism
 - Frustration – a legal doctrine

Force Majeure Clauses

What to look for in a force majeure clause

- Closed category of events?
- Anything outside of a party's reasonable control?
- Does the event affect performance?
- Which obligations are suspended?

Force Majeure Clauses

Typical features of a force majeure clause

- A requirement for notice
- Suspension of obligations
- A right to terminate
- Obligation to mitigate

Frustration

- What is frustration?
- Three types of frustration
- Some key points to consider





Consequences of Frustration

- Automatic discharge
- All further performance is excused
- Sums paid before the frustrating may become repayable
- Credit may be given for expenses already incurred or benefits provided



Contract Management and Practicalities for Minimising Risk

- Don't ignore the problem
- Do look at the contract

- Requirements for efforts to avoid non performance?
- Mitigate and minimise loss

- Termination - beware of:
 - unlawful termination;
 - Delay; and
 - Notice requirements

Contract Management and Practicalities for Minimising Risk

- Check trigger event
- Injunction needed?
- What is it worth: financially and reputationally
- Involve your comms team?
- Co-ordinate the team and avoid mixed messages

Contract Management and Practicalities for Minimising Risk

- Insurance
 - Check policies for any cover
 - Notify when “*become aware of circumstances which could reasonably give rise to a claim*”
 - In meantime, act as “*reasonably prudent uninsured*”
- Regulator notification?
- Contractual dispute resolution process

Contract Management and Practicalities for Minimising Risk

- Evidence
 - Preserve documents
 - Be careful creating new documents
 - Consider key witnesses
- Pragmatic negotiations
 - Without prejudice
 - Save costs & management time; minimise risk & gain certainty
 - Maintain relationships
 - Find a solution
 - Adhere to contractual variations requirements



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