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COVID-19 CONTRACT DISPUTES GUIDE

**Contract disputes risks
in the current climate**

June 2020

Introduction

Introduction

In addition to the global humanitarian crisis arising from the COVID-19 pandemic, there has been huge disruption to economic activity around the world. This disruption, combined with an uncertain future economic outlook, inevitably exposes businesses to heightened legal risk.

In particular, counterparties may seek to delay, avoid performance and/or terminate agreements. This may be either because COVID-19 has legitimately prevented them from performing their contractual obligations, or because they are seeking to use the pandemic as an excuse to extricate themselves from a bad deal.

The purpose of this brochure is to provide you with a general overview of the common bases for avoiding contractual obligations in commercial contracts including a comparison of the key rights and remedies.

OUTLINE

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We would be delighted to discuss any queries you may have in relation to this guide, or any legal issues arising from COVID-19 more generally. Please get in touch with your usual HSF contact, or see our list of [key contacts](#) at the end of this guide.

I. Rights and remedies comparison table



Rights and remedies comparison table

	Express termination*	Termination for repudiatory breach	MAC clause	Force majeure clause	Frustration
In a nutshell	A contractual right to terminate the contract in specified circumstances	A common law right to terminate the contract as a result of a sufficiently serious breach or a refusal to perform	A contractual right to terminate the contract where a material adverse change occurs after the contract date	A contractual right to suspend the parties' obligations without liability where a force majeure event occurs after the contract date, often with a right to terminate if the force majeure event continues for a specified time	A common law right to terminate the contract where a frustrating event occurs after the contract date
Legal basis	Contract	Common law	Contract	Contract	Common law
Usual trigger	Express contractual triggers, such as non-payment, insolvency events** etc.	A repudiatory breach of the contract, which requires breach of a condition, a sufficiently serious breach of another term, or a party being unwilling or unable to perform the contract	A "material" change, which has an adverse effect that is sufficiently significant or substantial; must not be merely a temporary blip	An event beyond the reasonable control of the parties (eg war or conflict) which prevents, hinders or delays performance of the contract	An event, not due to the fault of either party, which renders further performance of the contract impossible or illegal, or renders the obligations radically different
Market changes?	Unlikely to be included as an express trigger. The indirect effect of market changes (eg if market changes result in an insolvency event**) may trigger the clause	Market changes in themselves are very unlikely to amount to a repudiatory breach. The indirect effect of market changes (eg failure to make payment where time is of the essence) may trigger the clause	Market changes in themselves are unlikely to trigger the clause. Most MAC clauses require change to the relevant party's business and/or ability to perform the contract (although this may be an indirect result of market changes)	A change in economic/market circumstances making the contract less profitable or more onerous is not generally sufficient to trigger the clause. The indirect effect of market changes could trigger the clause, particularly where it is no longer possible to perform the contract in a lawful manner as a result of a change in law or regulation	A change in economic/market circumstances is not an established ground of frustration. The indirect effect of market changes could lead to a frustrating event, particularly where it is no longer possible to perform the contract in a lawful manner as a result of a change in law or regulation

*Other forms of express termination clause, aside from MAC clauses and force majeure clauses

**The new Corporate Insolvency and Governance Bill (published 20 May 2020) prohibits *ipso facto* clauses, which terminate a contract on the grounds of insolvency, subject to certain exceptions.

Rights and remedies comparison table

	Express termination	Termination for repudiatory breach	MAC clause	Force majeure clause	Frustration
Effect	Depends on contract. Typically an event of default giving the non-defaulting party the right to terminate	Non-defaulting party will have a right to terminate at common law	Depends on contract. Typically a MAC will be an event of default giving the right to terminate the contract	Depends on contract. Typically the parties' obligations are suspended without liability, with a right to terminate if the event continues for a specified period	Consequences are draconian. It brings the contract to an end, immediately and automatically. All future obligations will fall away, although any breaches occurring before a frustrating event still give rise to a right to damages
Financial consequences	Specified in the contract or claim for damages based on losses suffered up to the date of termination (cannot claim for loss of bargain damages on basis of contract being properly performed, ie future loss of profits)	Claim for damages based on losses suffered up to the date of termination, PLUS loss of bargain damages on basis of contract being properly performed (ie future loss of profits), subject to contractual exclusions or limitations of liability	Specified in the contract	Specified in the contract	Sums paid before the contract was discharged are recoverable. Sums payable (but not yet paid) are no longer payable. This is subject to the court's discretion to allow the payee to recover expenses incurred before the contract was discharged
Burden of proof	Party seeking to terminate	Party seeking to terminate	Party seeking to terminate	Party seeking to rely on force majeure event	Party seeking to rely on frustrating event
Notice	Required in accordance with the contract	Must be communicated, does not necessarily need to be in accordance with contractual termination clause	Required in accordance with the contract	Not necessarily a precondition to force majeure relief, but any notice given should be in accordance with the contract	No notice requirement
Typically argued by	Non-defaulting party	Non-defaulting party	Non-defaulting party	Prospective defaulting party	Prospective defaulting party

II. Common bases for avoiding contractual obligations



Express termination and termination for repudiatory breach



What is it?

Where a contract has become uneconomic or undesirable as a result of the COVID-19 crisis, a party may wish to limit its losses by terminating the contract. In these circumstances, it will be important to consider the express termination provisions under the contract and the entitlement to terminate under the common law as a result of any repudiatory breach by the defaulting party (ie a breach which has the effect of depriving the innocent party of substantially the whole benefit of the contract).



Common contractual form?

Express termination provisions vary widely between commercial contracts. The right to terminate under an express termination provision depends on the exact wording of the provision in question.

There is, of course, no clause providing for termination for breach at common law, but reference to the contractual terms will be relevant to determine whether there has been failure of performance, which might give rise to a right to terminate for repudiatory breach.

EXPRESS TERMINATION AND REPUDIATORY BREACH IN THE CONTEXT OF COVID-19



Many contracts contain express provisions for termination. The starting position for financial institutions might be to check whether the termination rights are invoked by the COVID-19 crisis or associated events.

In the absence of a specific clause giving rise to the right to terminate upon the declaration of a pandemic by the World Health Organisation (which is unlikely in most agreements), whether or not an express termination provision is triggered in the context of the COVID-19 pandemic should not present a particularly novel question. It will be a question of fact and contractual construction as to whether the circumstances that have occurred have triggered the relevant express termination right. The fact that a particular breach (if it is a breach) has its roots in the COVID-19 crisis should not affect this analysis.

Express termination and termination for repudiatory breach

However, it is important to keep in mind the interrelation of express termination clauses with Material Adverse Change (“**MAC**”) clauses, force majeure clauses and the common law doctrine of frustration (each of which is considered in a separate section below):

- Express termination clauses are an umbrella concept which includes MAC clauses and the termination element of force majeure clauses. While general express termination clauses are unlikely to cater specifically for a pandemic, in contrast, a pandemic may be specifically referenced as a trigger for a force majeure clause (see [Force Majeure section](#)). A pandemic in and of itself is unlikely to engage a MAC clause – see [Material Adverse Change section](#)).
- Generally speaking, MAC clauses and general express termination clauses will likely be on the “same side”, ie the same party would be arguing that these clauses have been engaged. For example, a lender may argue that a change in the financial position of a borrower (whose business has been adversely affected by the COVID-19 crisis) amounts to a MAC, accelerating the facility. Then, upon the borrower’s failure to make the next scheduled payment (for the same reasons), the lender may also argue that there has been an event of default and therefore express termination of the facility. Accordingly, the successful engagement of either clause would result in the acceleration of the loan.
- Force majeure (particularly where the clause provides for the suspension of obligations) and frustration are more likely to be the counter argument made by a defaulting party, where the non-defaulting party is arguing that an express termination clause has been triggered by a failure to perform the contract.

Key points you need to know:



Contractual right to terminate. How an express termination provision operates will depend upon the precise wording of the contract. Is there, for example, a right for one or both parties to terminate on notice and without cause? Or are there specific termination rights for one or both parties that are triggered in the circumstances that have arisen (putting aside force majeure or MAC provisions, which are considered below)? If so, then the entitlement to terminate will be relatively clear cut. In this context, it is relevant that the new Corporate Insolvency and Governance Bill (published on 20 May 2020) introduces a prohibition against an *ipso facto* clauses, which terminate a contract on the grounds of insolvency, subject to certain exceptions. (see the [analysis](#) prepared by our Restructuring, Turnaround and Insolvency team).

Express termination and termination for repudiatory breach



Material breach. Commercial contracts often provide a right to terminate for a counterparty's breach in circumstances that would not give rise to a right of termination at common law. For example, there may be a right to terminate for "material breach". What amounts to material breach will be a matter of interpretation in each case but, as a general rule, courts are willing to find that a material breach does not have to be repudiatory; something less will suffice.



Common law right to terminate for repudiatory breach. Regardless of whether the contract contains express termination provisions, a party may be entitled to terminate under the common law as a result of the counterparty's breach. There will be a right to terminate at common law if the counterparty is in repudiatory breach of contract (ie breach of a condition or a sufficiently serious breach of some other term) or has clearly demonstrated an intention not to perform the contract in some essential respect.¹



Consequences. The termination clause may specify particular consequences of termination. For example, it may provide for the return (or retention) of any advance payments, and may include a liquidated damages provision or a limitation or exclusion clause. Where a contract is terminated under an express contractual right, damages may be payable for any losses suffered up to the date of termination, but there will generally be no entitlement to claim damages for a "loss of bargain" damages arising from future non-performance (typically a claim for loss of profits). In contrast, where a party terminates for repudiatory breach at common law, there is a clear entitlement to loss of bargain damages (subject to any exclusions or limitations of liability under the contract). Generally speaking, it is possible to have the best of both worlds, by terminating under the contract and also for repudiatory breach, so as to claim loss of bargain damages.²



Notice. If exercising a contractual right to terminate, any contractual machinery (typically notice provisions) should be strictly observed. A notice requirement in a contractual termination clause may not apply where a party has terminated at common law for repudiatory breach.



Interaction with force majeure. Where a force majeure clause has been triggered, the question of whether the counterparty can still terminate for breach (under an express termination clause or at common law) will depend on the construction of the clause. In *SHV Gas v Naftomar*³, the fact that a breach of a condition was (or would have been, if it had occurred) caused by a force majeure event would not have prevented the counterparty from terminating the contract for that breach. The effect of the force majeure clause was to exclude liability in damages, not prevent the counterparty terminating. Each case will, however, turn on the facts and the construction of the clause in question.

¹ For more information on termination for breach, see sections 2 to 6 of [Issue 8 \(Termination\)](#) of our contract disputes practical guides series.

² There are exceptions, however, eg if the contractual rights are intended to displace the common law right to terminate for repudiatory breach, or if the consequences of termination under the contract and at common law are fundamentally inconsistent.

³ [2005] EWHC 2528 (Comm)

Material Adverse Change Clause



What is it?

A contractual provision that allows a party to refuse to proceed with a transaction if certain events constituting a material adverse change or having a material adverse effect occur after the contract date.

MAC clauses are commonly found in mandate letters and facility agreements to give the lender specific rights and protections. In the syndicated loan markets, a number of provisions are typically qualified by whether or not a material adverse effect may have occurred or may occur, and there may also be a stand-alone event of default, ultimately allowing lenders to accelerate a loan.

MAC clauses also appear in the context of the sale of a company or business (allowing the buyer to walk away if there is a MAC before the deal closes).



Common contractual form?

MAC clauses can be drafted in a number of different ways, although there are some market conventions in the syndicated loan markets. Most MAC clauses require a material and adverse change to or effect on the relevant party's (or group's) business and/or ability to perform its (or their) obligations under the finance documents, and it may be drafted objectively or subjectively.

As with any contractual term, the interpretation of a MAC clause will depend on the precise language used in the context of the contract as a whole, the background facts and commercial context.

MAC CLAUSES IN THE CONTEXT OF COVID-19



The key point to highlight is that – although the COVID-19 crisis is itself a significant change - it may be difficult to argue that the pandemic in and of itself constitutes a material adverse change (eg for the purposes of accelerating a loan). It may be possible to invoke a MAC clause if an event occurs which has a significant adverse effect in the context of the transaction. However, the bar to prove that a MAC has occurred is high, and there will usually be other events of default that can more clearly be relied upon.

Material Adverse Change Clause

Key points you need to know:



Pre-existing knowledge. A MAC clause cannot be triggered on the basis of circumstances known to the relevant party on entering into the agreement¹, although it may be possible to invoke the clause where conditions worsen in a way that makes them materially different in nature.



Material change. The change relied on must also be “material”, in the sense that it must be sufficiently significant or substantial, and it must not be merely a temporary blip.²



Contractual interpretation. MAC provisions are construed in accordance with the established principles of contractual interpretation.



Burden of proof. The party seeking to terminate the contract under a MAC clause has the burden (which is a difficult one to satisfy) of proving that a MAC has occurred.³



Guidance from case law. Previous case law is of limited assistance since the analysis will turn on the precise wording of the clause as against the background facts, and the different circumstances alleged to constitute a MAC. Further, there is very little case law in general. There do not appear to be any reported decisions considering a MAC clause in the context of a pandemic or other widespread outbreak, and only a few decisions arising from major global economic or political events, such as the 2008 global financial crisis.⁴



Notification. While a MAC clause will typically include obligations to notify the counterparty of the material adverse event, this does not apply to loan agreements where the obligation is for the borrower to notify the lender of a default.

¹ *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm), para 364.

² *Grupo Hotelero*, para 363.

³ Note, however, that some MAC clauses may be drafted subjectively.

⁴ See, for example, *Grupo Hotelero*

Force Majeure Clause



What is it?

The term "force majeure" does not have a standard or recognised definition in English law. However, a force majeure clause is generally understood to be a contract term which excuses one or both parties from performing their contractual obligations if they are prevented from doing so by circumstances outside their control. Its effect is usually to suspend the parties' obligations under the contract without liability while the impact of the force majeure event continues. Most force majeure clauses will also give a right to terminate if the event continues for a specified period of time.



Common contractual form?

Given the limited applicability of the doctrine of frustration (see [Frustration section](#) below), parties will often include a force majeure clause in their commercial contracts. A typical force majeure clause will provide that a party is excused where it is prevented or hindered or delayed from performing its obligations due to the occurrence of an event beyond the reasonable control of the parties. The contract may include a list of such events, by way of example or exhaustively, eg an Act of God, war or conflict. Such clauses may assume a variety of forms, and the term "the usual force majeure clauses to apply" has been held void for uncertainty.¹

FORCE MAJEURE CLAUSES IN THE CONTEXT OF COVID-19



Whether the COVID-19 pandemic (or events or restrictions related to the pandemic) will engage a force majeure clause will clearly depend on how the particular clause is drafted. Where the force majeure clause sets out a list of events which excuse a party from contractual performance, it may well include a pandemic, typically by reference to classification by the World Health Organisation (and of course COVID-19 has been classified as such). Other common categories of force majeure event that may be triggered by the COVID-19 crisis in particular circumstances include changes in law or regulation, acts of governmental authorities, the restriction or suspension of licences etc, and delays in transportation or communications.

¹ *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280

Force Majeure Clause

In any event, if (as is typical) there is a general “wrap-up” provision for events beyond a party’s control, the COVID-19 pandemic could trigger the clause even if it is not covered by any of the specific categories listed.

If, notwithstanding COVID-19, both parties remain able to fulfil their contractual obligations albeit the contract is less profitable for one of the parties, the force majeure clause is unlikely to be engaged. If, however, a party is prevented from performing, eg because of emergency legislation introduced to deal with the pandemic, this may lead to a stronger claim of force majeure.

Key points you need to know:



Event must prevent, hinder or delay performance. In addition to the requirement for an event which falls within the contractual definition of force majeure, the clause will generally be triggered only if the event prevents, hinders or delays a party performing its obligations under the contract. If there is more than one way in which a party can perform the contract, a claim of force majeure will not normally succeed.



Could a change in financial markets trigger a force majeure clause? A change in economic or market circumstances which makes the contract less profitable or performance more onerous is not generally regarded as sufficient to trigger a force majeure clause.²



Burden of proof. The burden of proving that an event falls within a force majeure clause falls on the party relying on it, who must also prove that non-performance of an obligation was due to that event.



Causation. What if, even without the force majeure event, a party would not have been able to perform the contract? This will ultimately depend on the construction of the particular clause. There is no general rule as to the causation requirements of a force majeure clause. For example, the contract may require the event to be the sole cause, or there may be a requirement for “but for” causation, or it may be sufficient to show that the relevant event made performance impossible (whether or not it would have been impossible anyway). This will depend on the drafting of the particular force majeure clause.

² *Tandrin Aviation Holdings v Aero Toy Store* [2010] EWHC 40 (Comm)

Force Majeure Clause



Mitigation. A force majeure clause will typically include an obligation on the party seeking to rely on the clause to mitigate the effects of the force majeure event. The clause may not be effective to prevent liability arising to the extent that the required efforts to mitigate have not been made. Even if there is no express obligation to mitigate, such an obligation may well be implied. For example, where a force majeure clause requires that the event was “beyond the reasonable control of the relevant party”, the party relying on it must show that there were no reasonable steps that it could have taken to avoid or mitigate the event or its consequences.³



Notification. A force majeure clause will typically include obligations to notify the counterparty of the force majeure event. Where the requirement to notify is specified, it will be important for a party wishing to rely on force majeure to comply with these obligations, as a failure to do so may mean that a claim of force majeure is not available (although in some cases the court has found that notice is not a pre-condition to force majeure relief). The particular form of notice stipulated in the contract must be used in order to give effective notice.



Burden of proof. The burden of proving that an event falls within a force majeure clause falls on the party relying on it, who must also prove that non-performance of an obligation was due to that event.⁴



Effect. Typically, where a force majeure clause is successfully invoked, its effect is that the parties' obligations under the contract are suspended without liability while the impact of the force majeure event continues. Most force majeure clauses will also give a right to terminate the contract if the force majeure event continues for a specified period of time. However, depending on how it is drafted, successful reliance on a force majeure clause may have some or all of the following consequences:

- non-liability for the non-performance or delay in performance while the force majeure event continues;
- extensions of any deadlines under the contract while the event continues (eg for completion of a project); or
- a right to terminate the contract if the force majeure event continues for a specified period.

³ Paragraph 15-164, Section 8, Ch. 15, Part 4, *Chitty on Contracts Vol. 1* (Sweet and Maxwell, 33rd ed, 2019)

⁴ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19

Frustration



What is it?

Frustration is a common law doctrine that applies where an event occurs after the contract has been entered into, which is not due to the fault of either party, and which renders further performance impossible or illegal, or makes the relevant obligations radically different from those contemplated by the parties at the time of contracting. The consequences of frustration are draconian. It brings the contract to an end, immediately and automatically. All future obligations will fall away, although any breaches occurring before a frustrating event still give rise to a right to damages. All sums paid before the contract was discharged are recoverable and all sums payable (but not yet paid) are no longer payable. This is subject to the court's discretion to allow the payee to recover expenses incurred before the contract was discharged.



Common contractual form?

Frustration does not require the presence of a particular form of contractual clause because it is a common law doctrine (although it may interact with other contract terms – see below).

FRUSTRATION IN THE CONTEXT OF COVID-19



It is possible that the COVID-19 pandemic, or events associated with it, may amount to a frustrating event if they render performance impossible or illegal or “radically different” in the sense discussed below.

It seems that market movements which make performance more onerous or more expensive will not be sufficient. Whether practical restrictions on performance amount to a frustrating event will depend on whether those restrictions “significantly change the nature of the outstanding contractual rights or obligations”. This will in turn depend on the factual circumstances, such as the nature and duration of those restrictions versus the duration of the contract.

Frustration

For example, there may be a stronger argument that a contract has been frustrated by the closure of a stock exchange than by restrictions on the movement of individuals, particularly given the business continuity plans which have been put in place by many companies in response to COVID-19. Emergency legislation introduced to deal with the pandemic may also amount to a frustrating event, again depending upon the factual matrix.

Key points you need to know:



Interaction with other contract terms. A contract cannot be frustrated where it expressly provides for the event that has occurred.¹ For the same reason, the presence of a force majeure (or possibly MAC) clause reduces the practical significance of the doctrine of frustration, as it makes express provision for circumstances that may otherwise lead to frustration of the contract. The doctrine of frustration may, however, be significant if there is no force majeure clause or if the clause does not cover the event in question (eg if the list of force majeure events is narrowly and exhaustively defined).



Narrow application. The courts have tended to apply the doctrine of frustration narrowly, emphasising that it is not lightly to be invoked to allow a contracting party to escape from what has turned out to be a bad bargain. Events which make performance more onerous or more expensive will not necessarily be sufficient to frustrate the contract. The requirement is that performance has become impossible or been rendered radically different from what was envisaged.



Established grounds of frustration. A party might seek to argue one or more of the following established grounds operate to found a claim that a contract has been frustrated by the COVID-19 outbreak:

- **Frustration due to an epidemic or pandemic.** There do not appear to be any reported English cases within this bracket. In a 2003 SARS epidemic-related case *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 754, a Hong Kong court rejected a tenant's claim that a tenancy agreement was frustrated because the premises were affected by an isolation order by the Department of Health due to the outbreak of SARS, which meant that it could not be inhabited for 10 days. The court held that a 10 day period was insignificant in view of the two year duration of the lease, and that whilst SARS was arguably an unforeseeable event, it did not “*significantly change the nature of the outstanding contractual rights or obligations*” of the parties in the case. However, that is not to say that an epidemic or pandemic, or events associated with it, cannot amount to frustration.

¹ *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)

Frustration

- **Frustration due to changes to law or regulation.** This is a well-recognised head of frustration and there are a number of English cases considering this question. This includes contracts of service and therefore a change in the law affecting employment may be a frustrating event.
- **Frustration due to illegality.** If a contract becomes illegal to perform due to a change in the law, subsequent to the contract being entered into, this may be an instance of frustration. This cannot be contracted out of for public policy reasons. Generally speaking, illegality under a foreign law will not trigger the English law doctrine of frustration (where the contract is governed by English law).
- **Frustration due to cancellation of an expected event.** This can, in exceptional circumstances, frustrate a contract, as per the so-called “coronation cases” arising out of the postponement of the coronation of King Edward VII. It seems the answer will depend on whether the cancellation frustrates the commercial purpose of the contract.
- **Frustration due to delay.** A contract may be frustrated by the temporary unavailability of a person (or object) that is essential for performance of the contract, or some other delay affecting performance, if it is sufficiently serious as to make the ultimate performance “radically different” from what was anticipated.² This would most obviously frustrate a contract where the contractual terms dictate that it was to be performed only at, or within, a specified time period, and that the time of performance was the essence of the contract.
- **Frustration due to method of performance impossible.** If a contract provides for a specific method of performance that becomes impossible, the contract may be frustrated. However, if the method is not stipulated in the contract, the courts have held that a contract will not be frustrated where performance was planned by one method, but possible by a different method, and the difference between the two methods of performance is not sufficiently fundamental.³



Assessing whether a frustrating event has occurred in real time. Where an event has caused a delay to a contract, it can be difficult to determine in real time (as opposed to with hindsight) whether that event has crossed the line to amount to a frustrating event. As above, the key question is whether the delay will make ultimate performance of the relevant contractual obligations “radically different” from what was anticipated. The English courts have recognised that commercial parties should not have to wait until the end of a long delay to make a judgment call as to whether or not the contract has been frustrated, but are entitled to know where they stand at the time and make a decision on the basis of the evidence of what has occurred and what is likely to occur.⁴

² *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724

³ See the Suez cases, in particular: *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] A.C. 93

⁴ *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724

Frustration



Effect of frustration. It is helpful to understand the effect of frustration by considering separately what this means for future vs past performance:

- **Future performance.** Frustration brings the contract to an end, immediately and automatically. It releases both parties from any further performance of the contract. This means future payment obligations will fall away.
- **Past performance.** Loss does not lie where it falls. The Law Reform (Frustrated Contracts) Act 1943 provides that:
 - All sums paid before the contract was discharged are recoverable.
 - All sums payable (but not yet paid) before the contract was discharged are no longer payable.
 - If the party to whom sums were paid or are payable incurred expenses before the contract was discharged, the court has the discretion to allow that party to recover/retain those expenses. Whether the payee is entitled to 100% of its expenses, or something less than that to reflect the fact that loss caused by the frustrating event should be divided equally between the parties, is difficult to predict on the case law and a matter for the court's discretion.
 - Breaches occurring before a frustrating event still give rise to a right to damages.

It is possible to exclude the operation of the 1943 Act by making separate provision for the consequences of frustration.



Notice. The frustrating event will bring the contract to an end with no requirement for an act by the parties to the contract. Accordingly, no notice is required in order to engage the doctrine and its effects. However, in practice, it would be necessary to communicate an intention to rely upon the allegedly frustrating event to terminate the contract.

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