**“Give Me Just a Little More Time”**

**Olympics v Wimbledon and the Legal Problems arising from the Deferral as Opposed to Cancellation of Sporting Events**

***Bianca Balmelli and Nicholas Siddall QC analyse the legal issues arising from the differing responses of sporting events to the Covid-19 pandemic***

Sport is a matter of big business. All events spread their web widely into the commercial sphere. Beyond an event’s simple ticket sales a complex matrix of contractual obligations exist such as sponsorship, image rights, TV deals and advertising.

Responses to the pandemic have varied. It is well publicised that the Tokyo Olympics have been deferred for a period of one year. By contrast the All England Championships at Wimbledon have been cancelled for the first time since WW2.

This article examines the legal position of obligations regarding sporting events as a matter of contract and then addresses the extent to which that analysis varies depending on the approach of the event.

**The Legal Position**

The obligations as regards any particular sporting event shall arise from a contractual relationship. Thus the first port of call in assessing where the risk falls shall be its wording.

This requires recognition of three related concepts:

1. Force Majeure Clauses (“FM”).
2. Material Adverse Change Clauses (“MAC”)
3. Frustration

(1) FM

Most contracts will contain an FM which defines situations where performance of the contractual obligations is excused where the events giving rise to the failure to perform are outside of the control of the parties.[[1]](#footnote-2)

An FM can be framed in a number of different ways to cater for different situations. Some FMs may excuse performance where a party was ‘prevented’ from performing, others may excuse performance where a party was ‘hindered’ from performing, whereas others may provide for an extension of time for performance where it was ‘delayed’.

A detailed analysis of these three concepts is beyond the scope of this article; however, it should be noted that where performance must be ‘prevented’, the mere fact that performance has become unprofitable or difficult will not excuse the party from rendering the same.[[2]](#footnote-3)

War, strikes, exceptional adverse weather, pandemics and government action are all possible force majeure events. However an FM may also employ more general wording; for instance referring to acts or events beyond the reasonable control of either party.

A detailed analysis of the FM, applying normal rules of contractual interpretation, will therefore be necessary to determine where the risk falls.[[3]](#footnote-4)

A party invoking an FM shall need to establish the following:

1. that the event falls within the scope of the clause, as construed;[[4]](#footnote-5)
2. that their non-performance was by reason of that event;[[5]](#footnote-6)
3. that their non-performance was due to circumstances beyond their control;[[6]](#footnote-7) and
4. that there were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.[[7]](#footnote-8)

Typically such clauses excuse future performance but do not discharge the contract in toto. Therefore payments already made are not likely to be the subject of recovery.

(2) MAC

MACs are typically found in M&A and finance documents. Typically, they permit a purchaser not to complete an acquisition in the event of a material adverse change, or they permit a lender to decline to advance any further lending or call an event of default. MACs are infinitely varied and the circumstances in which they will be triggered are a matter of construction and careful evaluation of the change in question.

As a MAC is a contractual clause, it will be subject to the normal rules on construction. Therefore, whether something amounts to a material adverse change will ordinarily be assessed on an objective basis by the courts, however the agreement can provide that this requirement can be met where a specific party subjectively believes that the event had a material adverse effect.[[8]](#footnote-9)

Useful guidance on how a MAC could be interpreted can be found in *Grupo Hotelero Urvasco SA v Carey Value Added SL & Anor [2013] EWHC 1039 (Comm)*. In *Grupo* Blair J made some helpful observations:

1. If the change relates to *“financial conditions”*, such financial condition should be determined by reference to a company's financial information, however other compelling evidence may be taken into account [para 351 & 352];
2. For a change to be material it must affect a company's ability to perform its obligations under the relevant agreement [para 357];
3. A party cannot trigger an event of default on the basis of circumstances of which it was aware at the time of entry into the agreement [358]; and
4. The material change cannot be merely temporary [para 363].

(3) Frustration

Where an FM or MAC is inapplicable, the final bolthole of a defaulting party is the common law doctrine of frustration. In the international business of sport, defaulting parties must thus determine the proper law of the contract to assess its potential availability.

The doctrine of frustration operates to bring a contract prospectively to an end because of the effect of a supervening event. The two classic formulations of the test for frustration are as follows:[[9]](#footnote-10)

*“… 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...”*[[10]](#footnote-11)

*“Frustration [occurs] 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 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...”[[11]](#footnote-12)*

Impossibility of performance would clearly meet either definition.

The fact that the parties may have defined their response to particular situations through an FM or MAC is likely to affect and circumscribe the application of the doctrine. Further, foreseen occurrences are unlikely to amount to frustrating events.[[12]](#footnote-13)

It should be noted that the doctrine of frustration is more likely to be successfully invoked in certain types of contracts as to others. For example the courts have shown a reticence to apply the same as regards personal contracts of employment.[[13]](#footnote-14)

Considerations of cancellation or delay shall impact on whether the doctrine of frustration can be invoked. Mere delay, of itself, may not constitute a frustrating event. This is because the performance of the contractual obligation may still remain possible in a recognisable form. A party asserting frustration must demonstrate that the delay would result in the ultimate performance being something *“radically different”* from that which was envisaged under the contract[[14]](#footnote-15).

For example, the delay of the Premiership football season means that ticket holders shall still be able in due course to watch their teams play and will be hard-pressed to rely on the doctrine of frustration. On the other hand, certain rights may tie to specific dates rather than the sporting season and in such event the doctrine of frustration may be applicable. This might apply if, for example, UEFA chose to cancel the 2019/20 Champions’ League.

Once frustration is established the legal consequences thereof are provided for in terms of the *Law Reform (Frustrated Contracts) Act, 1943*; alternatively, in terms of the common law.

The *Law Reform (Frustrated Contracts) Act, 1943* allows, in summary, for the following remedies:

1. Recovery of advance payments (section 1(2));
2. Set off of expenses incurred in performing the contract before discharge against monies paid in advance or recovery of those expenses from monies that are payable; however, this will only be possible in certain instances (section 1(2)); and
3. Recovery of non-monetary benefits (section 1(3)).

The *Law Reform (Frustrated Contracts) Act, 1943* wasdrafted to cater for defects in the common law and would therefore be the first point to consider when looking for redress. If it is not applicable, then the common law remedy would be a claim for unjust enrichment, likely a total failure of consideration.[[15]](#footnote-16) However, the difficulty in this regard is that a partial failure of consideration would not give rise to a right of recovery. [[16]](#footnote-17) Therefore parties would, for example, not be able to recover pre-payments made before the frustrating event.

**Analysis**

We would suggest that the cancellation of sporting events is likely to be a matter addressed in well drafted contracts in terms of an FM or MAC. Should that not be so it appears that the cancellation of the event (as in the case of Wimbledon) is one where the doctrine of frustration is likely to be the subject of successful reliance. The consequences of such frustration are likely to governed by the statutory provisions discussed above and may well involve the recovery of advance payments.

Delay of events (as in e.g. the Olympics) involves more nuanced consideration. It is suggested that this is an eventuality less likely to be governed by the terms of an FM or MAC. In such circumstances the guidance to parties which we proffer is:

1. Begin with an analysis of the relevant contract. For what precisely have the parties contracted?
2. What is the factual matrix and context of the contract?
3. What are the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as regards the obligation?
4. What is the importance of timing to the performance of the obligations under the contract?
5. Does a delay materially alter the nature of the relevant obligation and, if so, why?
6. What is the effect of the delay on the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances?
7. Bar expense, delay and increased onerousness is there any impact on the performance of the relevant obligation?
8. Is the extent of the delay so severe that it goes beyond that which the parties reasonably contemplated?

Consideration of the above will inform the question of whether the performance of the obligation is radically different such that the defaulting party is relieved of their obligations of ongoing performance post the frustrating event and may allow the statutory remedy of the recovery of prior payments.

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1. [*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No. 3) [2002] EWHC 2210(Comm)*](https://uk.practicallaw.thomsonreuters.com/Document/IED8E14A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk) at [53]. [↑](#footnote-ref-2)
2. [*Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm)*](https://uk.practicallaw.thomsonreuters.com/Document/I9A21DDC0BC9311E091D7A20F02DA1062/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk)at [29], [32]. [↑](#footnote-ref-3)
3. Further aspects to consider when analysing FMs are the possible applicability of section 3 of the *Unfair Contract Terms Act, 1977* and part 2 of the *Consumer Rights Act, 2015*. [↑](#footnote-ref-4)
4. [*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No. 3) [2002] EWHC 2210(Comm)*](https://uk.practicallaw.thomsonreuters.com/Document/IED8E14A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk) at [54]. [↑](#footnote-ref-5)
5. [*Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm)*](https://uk.practicallaw.thomsonreuters.com/Document/I9A21DDC0BC9311E091D7A20F02DA1062/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk)at [18], [32]. [↑](#footnote-ref-6)
6. [*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.3) [2003] EWCA Civ 1031 (CA)*](https://uk.practicallaw.thomsonreuters.com/Document/IED8D9F70E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk) at [32]. [↑](#footnote-ref-7)
7. [*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No. 3) [2002] EWHC 2210(Comm)*](https://uk.practicallaw.thomsonreuters.com/Document/IED8E14A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=pluk) at [53]. [↑](#footnote-ref-8)
8. [*Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd [2016] AC 923 (PC)*](https://uk.practicallaw.thomsonreuters.com/Document/I725055E09AE311E6A9D0859E1792F573/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&navId=FC6B00E9584E2702C3E0177C188A0166&comp=pluk) at 45. [↑](#footnote-ref-9)
9. [*Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335 (Ch)*](https://uk.practicallaw.thomsonreuters.com/Document/I5515E880A28511E9B46DD6875D040B73/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=wluk)at 21 – 23. [↑](#footnote-ref-10)
10. [*Davis Contractors v Fareham Urban DC [1956] AC 696 (HL)*](https://uk.practicallaw.thomsonreuters.com/Document/I955A9510E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.DocLink%29&comp=wluk) at 729. [↑](#footnote-ref-11)
11. [*National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 (HL)*](https://uk.practicallaw.thomsonreuters.com/Document/I0A7C8B50E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.DocLink%29&navId=67A3BA31D2716CB5561419B79B837450&comp=books) at 700. [↑](#footnote-ref-12)
12. [*FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd [1916] 2 AC 397 (HL)*](https://uk.practicallaw.thomsonreuters.com/Document/IA527FE10E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&navId=7D3F819846B6EFBF2F9982DF80FB8948&comp=books) at 426 – 428. [↑](#footnote-ref-13)
13. [*Warner v Armfield Retail and Leisure Ltd 2014 ICR 239 (EAT)*](https://uk.practicallaw.thomsonreuters.com/Document/I236742D0AB9A11E3AB58BBAF4CDEDC4B/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&navId=E8BE372FF981C8169B8F73C8A1C05162&comp=books)*.* [↑](#footnote-ref-14)
14. [*Pioneer Shipping Ltd and Others v B.T.P. Tioxide Ltd [1982] AC 724 (HL)*.](https://uk.practicallaw.thomsonreuters.com/Document/I22E74EA0E42811DA8FC2A0F0355337E9/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017135a61456e2539e29%3FNav%3DRESEARCH_COMBINED_WLUK%26fragmentIdentifier%3DI22E72790E42811DA8FC2A0F0355337E9%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=4b4160e21a3404638bd02a6aed4a4bb9&list=RESEARCH_COMBINED_WLUK&rank=1&sessionScopeId=9f74873d41d114e674cc24e334182add37eb4d8ca2b8a89906ba09e44555ece0&originationContext=Search+Result&transitionType=SearchItem&contextData=%28sc.Search%29&navId=1BFEFD57E26124B1E305099097FB8541&comp=wluk) [↑](#footnote-ref-15)
15. [*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (HL)*](https://uk.practicallaw.thomsonreuters.com/Document/IA66E87D0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&navId=65C929A63E34545028486565E97F711B&comp=books) at 49. [↑](#footnote-ref-16)
16. [Whincup v Hughes (1871) LR 6 CP 78](https://uk.practicallaw.thomsonreuters.com/Document/IF8D58AE0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.CommentaryUKLink%29&comp=books) at 86. [↑](#footnote-ref-17)