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solicitors

together is better

Contract Performance in an emergency

When the unexpected happens

Force Majeure and the Doctrine of Frustration



Meet the team.

	<p>Jon Esner Partner, Commercial E: Jon.Esner@naphthens.co.uk DD: 01772 904261</p>	<p>Jon heads up our commercial team, having joined Naphthens in February 2018. Prior to joining Naphthens, Jon spent 24 years working in private practice and in senior legal positions in house for some of the UK's best known businesses.</p> <p>Jon has spent many years managing the legal needs of well known businesses including IT procurement, outsourcing arrangements, cross border arrangements and agency terms as well as providing compliance and regulatory advice, intellectual property management and e-commerce.</p>
	<p>Rachel Atherton Senior Associate, Commercial E: Rachel.Atherton@naphthens.co.uk DD: 01772 904252</p>	<p>Rachel joined Naphthens in October 2018 after working in house for a multi national travel company and prior to that in private practice.</p> <p>Rachel is an experienced commercial lawyer who offers a practical approach to the preparation and negotiation of a range of commercial agreements. Rachel has a particular interest in IT and data protection law.</p>
	<p>Claire Hynes Solicitor, Commercial E: Claire.Hynes@naphthens.co.uk DD: 01772 904301</p>	<p>Claire trained with Naphthens and now specialises in commercial contract law.</p> <p>Claire advises clients in all sectors and industries on a variety of contractual arrangements and has a particular interest in supply and purchase agreements, business to consumer contracts and regularly offers training to clients in these areas.</p>

About Napthens

- Napthens is a leading provider of commercial legal services in the North-West, acting for clients locally, regionally and nationally from offices located across the region including Preston, Blackburn and the Fylde coast in Lancashire, Kendal in Cumbria, Southport and Liverpool.
- With over 240 staff including 29 partners, Napthens provides true strength in depth across a range of disciplines, ensuring our clients receive the personalised, tailored service they need from specialists in their field.
- In a service based upon relationships, we believe our strength is our people. Professional, yet approachable, we provide the level of experience and expertise you might expect from a national law firm, whilst providing local knowledge, local connections and practical 'know-how'.
- **Our range of services includes:**
 - Commercial contracts
 - Commercial property
 - Commercial property disputes
 - Construction
 - Corporate
 - Business immigration
 - Business recovery
 - Debt recovery
 - Dispute resolution and commercial litigation
 - Employment and HR
 - Health and safety
 - Intellectual property and trade marks

Commercial, Regulatory and Training

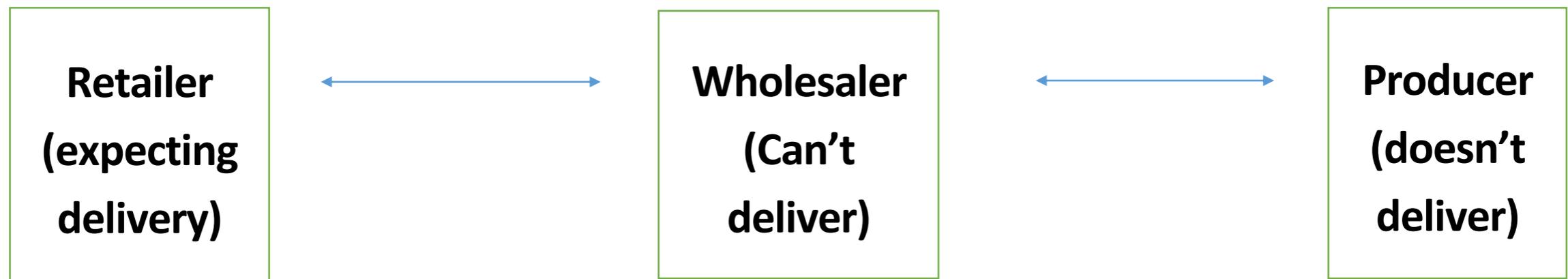
- Napthens' specialist Commercial team provides an insight and technical expertise to benefit businesses across industry sectors.
- Recognised by legal industry 'bible' The Legal 500, team members have spent a significant amount of time in industry which means they see things from the business' perspective and are widely recognised for their practical commercial advice.
- With clients ranging from local businesses through to regional players, household names and world leading multi-nationals, the team has particular expertise in a number of sectors including IT and technology, ecommerce, retail, travel and tourism, manufacturing and transport.

So what on earth happens now ?

- Many suppliers and customers are likely to be in uncharted territory as a result of current events
- Impossible to cover all bases
- But 3 typical examples to consider:-
 1. A supplier of goods (wholesaler) who wants to cancel (or delay) a contract it can't currently perform (perhaps because it cannot source raw materials – maybe Chinese manufacturer).
 2. A restaurant (or other retail business) which has been ordered by govt to close and wants to cancel an order it has already placed
 3. A travel business faced with *customers* who want to cancel and *suppliers* (eg cottage or villa owner) who can't provide accommodation (eg because they have been ordered to close)

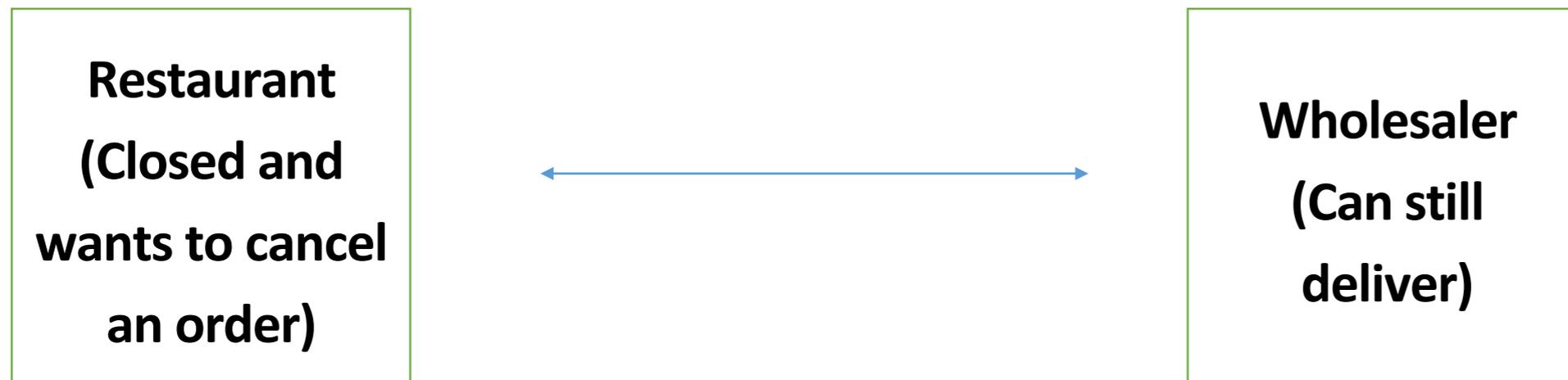
Scenarios

- 1. - *Wholesaler Can't deliver as agreed*



Scenarios

- 2. – *Restaurant* Closed and wants to cancel an order



Scenarios

- 3. Travel Provider who can't honour current bookings and customers who are looking to cancel Summer bookings



What are the legal options ?

- Number of questions to ask :-
- First question should always be – *Do you have a written agreement ?*
- If so, what does it say about these kind of situations – especially breaches ?
- Breach - there may be specific provisions about what will happen in the case of delays – eg “liquidated damages” clauses or (for a party faced with a breach) rights to terminate.
- Customers may have specific cancellation rights (very common in consumer/travel bookings)
- **What about the party that finds itself unavoidably in a position where it needs to avoid a commitment it has made (all 3 examples given) – HOW CAN A BREACH BE AVOIDED ?**

“Force Majeure”

IF THERE IS A WRITTEN CONTRACT

- **Force Majeure Clauses** – French civil law (Code Napoleon) long provided a legal “escape clause” where a party was unable to perform because of “Superior Force”
- Adopted in English law because background law on “*Frustration*” was felt to be inadequate to cover many practical situations.
- Not a clear term – depends on what the clause says
- **Do you have a Force Majeure clause ?**
- **What does it say ?**



Force Majeure Clauses

- **All Different**
- Generally a list of (bad) events and an outcome is given
- Does the list cover the event ? – Generally wide and likely to cover an epidemic
- Does it apply to **both parties** or just to **one** ? Typically Standard Terms just help the provider and other party has little redress (A risk for our restaurateur ?)
- What do you have to do – eg give notice in a specific way at a specific time. May be very short – Just looked at one with a 3 day limit .
- What happens ?

Example 1 – Long, Negotiated Clause – B2B (Scenario 1 – wholesaler- and possibly 2)

- 20. **FORCE MAJEURE**

- 20.1 Force Majeure Event means any circumstance not within a party's reasonable control including, without limitation:

- (a) acts of God, flood, drought, earthquake or other natural disaster;
- (b) epidemic or pandemic;
- (c) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
- (d) nuclear, chemical or biological contamination or sonic boom;
- (e) any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary licence or consent;
- (f) collapse of buildings, fire, explosion or accident; and
- (g) any labour or trade dispute, strikes, industrial action or lockouts (other than in each case by the party seeking to rely on this clause, or companies in the same Group as that party);
- (h) non-performance by suppliers or subcontractors (other than by companies in the same Group as the party seeking to rely on this clause); and
- (i) interruption or failure of utility service.

- 20.2 Provided it has complied with clause 20.4, if a party is prevented, hindered or delayed in or from performing any of its obligations under this agreement by a Force Majeure Event (Affected Party), the Affected Party shall not be in breach of this agreement or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.

Example 1 –Long Clause – B2B (Scenario 1 – wholesaler- and possibly 2)

- 20.3 The corresponding obligations of the other party will be suspended, and its time for performance of such obligations extended, to the same extent as those of the Affected Party.
- 20.4 The Affected Party shall:
 - (a) as soon as reasonably practicable after the start of the Force Majeure Event, **notify the other party** in writing of the Force Majeure Event, **the date on which it started**, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under the agreement; and
 - (b) **use all reasonable endeavours to mitigate** the effect of the Force Majeure Event on the performance of its obligations.
- 20.5 If the Force Majeure Event prevents, hinders or delays the Affected Party's performance of its obligations for a continuous period of **more than three months**, the party not affected by the Force Majeure Event may terminate this agreement by giving **six weeks'** written notice to the Affected Party.

Example 2 – Short Clause/Standard Terms - B2B -Scenario 2 (restaurant) and possibly 1 (wholesaler – many large businesses on standard terms)

15. FORCE MAJEURE

The Maintenance Contractor shall be under no liability for any failure to perform any of its obligations under this agreement if and to the extent that the failures are through any circumstances beyond its reasonable control, including, but not limited to, war, riot, government requisitions of any kind, suspension or loss of means of transport, strikes, lockouts, labour disputes, fire, explosion, flood, accident, failure of any third party to supply, breakdown of machinery or anything directly or indirectly interfering with the raw materials or manufacture, supply, shipment, arrival or delivery of goods or any other matter (whether or not similar to the foregoing) outside the control of the Maintenance Contractor.

Example 3 - Travel Supplier – Consumer Facing Clause

- **9 Events beyond our control**

Unfortunately we will not be legally responsible or have any liability to you either jointly or individually if we are prevented or delayed from carrying out our responsibilities under this contract as a result of events beyond our control and the inability or delay in carrying out such responsibilities will not be treated as a breach of these booking conditions. This means an event we or they could not, even with all due care, avoid, including but not limited to:

- natural disaster;
- acts of terrorism, war, riot or civil commotion;
- malicious damage;
- keeping to any law or governmental order, rule, regulation or direction, including, for example, advice from the foreign office or other health or governmental or local authority to avoid or leave a country or a regional area within a country;

Example 3 - Travel Supplier – Consumer Facing Clause (Scenario 3)

- significant risk to human health such as the outbreak of a serious disease;
 - accident;
 - insolvency or bankruptcy of an owner or service provider;
 - fire, flood, snow or storm;
 - difficulty or increased cost in getting workers, goods or transport; and
 - other circumstances affecting the supply of goods or services.
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- **May Not be reasonable to take a consumer's money and not return it**

Cancellation Rights – Travellers cancel

- Number of days before the start date of your trip that we receive your notice to cancel (or on which you are deemed to have cancelled)
 - More than 70 days :Full deposit (including any balance of the deposit due)
 - 57 to 70 days : 50% of the total cost or full deposit (including any balance of deposit due), whichever is greater.
 - 43 to 56 days 60% of total cost
 - 29 to 42 days 75% of total cost
 - 8 to 28 days 80% of total cost
 - 7 days or less 85% of total cost
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- **Summer Canx probably ok**
 - **BUT – would these be unreasonable if enforced on a consumer ?**
 - **Likely that supplier would want to make a fair offer – eg to transfer a booking OR cancel and make a charge – May be a clause on cancellation by the supplier**
 - **Likely to see a lot of claims**

So – For each of the examples above

- What is in the contract ?
- What is covered ?
- Who is covered ?
- What action has to be taken ? Do it quickly !
- What happens ?
- Background Law
- Practical reality



No Provision in Contract For These Circumstances - or No Written Contract – the *Doctrine of Frustration*

Common law doctrine and the **Law Reform (Frustrated Contracts) Act 1943**

- Not applicable if the contract makes provision (i.e. has an applicable force majeure clause).
- Operates to discharge the contract forthwith. Contract ends. No delay.
- Obligations up to the point of frustration still stand.

Common Law

- Frustration is an exception to the rule that failure to perform allows the other party to claim damages.
- Test is strict :
 - Event takes place after contract formation
 - So fundamental it goes to the root of the contract and is beyond the contemplation of the parties at contract formation
 - Neither party's fault
 - **Renders further performance impossible, illegal or radically different** Unlikely to help the restaurateur who has placed an order or the wholesaler whose own supplier has let them down. Could help the travel supplier ?

No Provision in Contract or No Written Contract – the doctrine of Frustration

Law Reform (Frustrated Contracts) Act 1943

- Sets out the consequences of frustration - how money paid/ payable is dealt with when a contract is frustrated.
- Does not apply to some contracts (incl. insurance contracts)
- Need to act immediately
- **Contract Ends – no delay**
- Sums paid **before** discharge **recoverable** by other party and no further sums payable (eg deposit)
- But if payee **incurred expenses** prior to discharge in performing the contract payee may: i) retain them, or ii) recover payable sums. So travel supplier could deduct costs.
- **So – A Supplier who can't supply would not be obliged to supply but would have to repay any money received less costs**
- Takes into account who paid what and who obtained what benefit prior to discharge.
- Takes into account what insurance is available to each party in the circumstances.

Summary

- Check your contract
 - Follow any force majeure (or other) provisions that do apply
 - If there are no force majeure provisions consider the doctrine of frustration and the Law Reform (Frustrated Contracts) Act 1943 to deal with the consequences.
 - Negotiate/Talk/Offer
 - Take advice.
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- **Questions – contact or message**
 - **Webinar will be on LinkedIn and Napthens' Website**

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