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COVID-19 RESOURCE CENTER

Force Majeure and Frustration

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Businesses with obligations that are becoming difficult to meet due to COVID-19 are increasingly looking at force majeure provisions and, where such provisions are absent, considering "frustration of contract" arguments.

This page gives an overview of where these two legal concepts come from and how they generally operate. The information below is background to assist you in spotting the potential issues.

A party alleging frustration or force majeure is seeking to be absolved of contractual obligations to others, by reason of exceptional events beyond their control. As one might expect, the onus is on them to establish that their decision to suspend or terminate their performance is legally and factually justified.

Although the same kinds of external events may drive parties to consider invoking either force majeure or the doctrine of frustration, the two concepts are very different.

It is important to seek legal advice on the application of these legal concepts to your particular circumstances.

Force Majeure

This concept is contractual. At the time the parties negotiate the contract, they may seek to predict types of triggering events, and decide in advance how such events will affect the contract, in what is typically referred to as a force majeure clause. Common examples of triggering events include "acts of God", natural disasters, civil unrest, war, labour strikes, and government acts or regulations.

Force majeure clauses sometimes expressly include "epidemics" or "quarantines" as triggering events. Force majeure clauses may also have a "catch-all" provision for other unforeseen events beyond the parties' control which render performance impossible or illegal.

Whether a force majeure clause applies to a given set of facts will turn primarily on the proper interpretation of the words chosen by the parties in their particular contract, as applied to the facts which are preventing the contract from being performed.

It is crucially important for a contracting party to understand, before deciding whether to claim force majeure, not only the strength of their argument that the clause is in fact triggered, but also the risks to their legal position if they are wrong. Wrongly invoking force majeure incurs risk of liability for wrongful breach or repudiation of the contract.

Frustration of contract

What if there is no force majeure clause? In that case, the common law doctrine of frustration may apply if a supervening event has occurred which:

a) Was the fault of neither party, was unforeseeable, and was not self-induced; and

b) Has rendered performance of the contract practically impossible, or has caused such a radical change in the nature of the contractual obligation that performance would be a fundamentally different thing than what the contract originally contemplated.

The bar for invoking the doctrine of frustration is very high, and higher than for most force majeure clauses. Performance as envisioned in the contract must be practically impossible, not merely more difficult, costly, inconvenient or fruitless. The impossibility must also be permanent, not transient or temporary.

Unlike force majeure clauses, which are tailored to the parties' business relationship and represent the negotiated allocation of risk, the doctrine of frustration is the common law result of unforeseen and extreme facts. It is also a blunt instrument: it provides only for discharge of the contract. It does not allow for more nuanced consequences (e.g., postponing performance) as a force majeure clause might.

Partly performed contracts

If a contract terminates by reason of either force majeure or frustration, related issues include what happens with deposits, or pre-payments for goods or services not yet delivered. If there is a force majeure clause it may speak to the issue. If the contract ends by frustration, the rule is often that "prior performance stands", but this may vary depending on (among other things) the application of legislation such as British Columbia's *Frustrated Contract Act* ("FCA"), which allows for restitution of benefits conveyed by one party to the other prior to the frustration, unless the contract itself, or if the larger relationship between the parties, has already allocated the risk of loss arising from the frustration.

Looking forward

Force majeure and frustration are longstanding legal concepts, but they are rarely invoked. The practical implications of COVID-19 in our society are unprecedented, which means that, in a common law system which relies heavily on precedent, it is very hard to predict how the courts will apply these principles to COVID-related issues going forward. These challenges are exacerbated by the fact that the courts in British Columbia and many other jurisdictions have presently suspended regular operations due to the pandemic, meaning that judicial guidance will be sparse for the foreseeable future.

Parties may find themselves called on to take – or respond to – positions in respect of their contractual rights which carry with them legal risk, business risk, or both.

Seek legal advice on your particular circumstances, the particular risks, and whether potential mitigation measures and strategies exist, to contend with a contractual relationship impacted by COVID-19.

Questions to think about and discuss with counsel:

1. Can the contract still be performed?

2. Is there anything in the contract that speaks to what is happening right now?

    a) If “yes”, does the clause:

        i. Excuse performance temporarily? Or

        ii. Bring the contract to an end altogether?

    b) If “no”, then:

        i. Have extraordinary and lasting changes nevertheless rendered performance practically impossible, not merely more difficult, costly, inconvenient or fruitless? and

        ii. Is the impossibility permanent, as opposed to transient or temporary?

Contact one of the lawyers below to discuss your situation.

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