Force Majeure and Frustration of Contracts due to COVID-19

BACKGROUND

The outbreak of COVID-19 has had a significant effect on a number of commercial contracts.

In a number of cases, restrictions on gatherings of people and travel have made performance of the contracts difficult, if not impossible.

This has raised the issue of whether the contracts have been the subject of our force majeure event or have been frustrated.

FORCE MAJEURE

Many contracts contain what are commonly known as Force Majeure clauses.

The Force majeure clauses commonly provide that performance of a contract might be postponed or cancelled if there is an occurrence beyond the control of the parties.

Despite the widespread use of these clauses, the prevailing view is that there is no legal doctrine of force majeure under Australian law.

However, the Australian courts have usefully sought to give the phrase “force majeure” a judicial meaning so that the mere use of the words “force majeure” will usually be taken as a reference to an event which is:

1. Irresistible;
2. unforeseeable;
3. external to the party claiming relief; and
4. rendering performance of the contract impossible and not merely onerous or difficult.

It is the last requirement which is likely to be contentious. In a number of cases, a significant event might make the performance of a contractual obligation less attractive to the parties but not strictly impossible.

For example, just a couple of weeks ago, COVID-19 was of major concern but they had not yet been a ban on gatherings of more than 500 people. At that time, a concert featuring a prominent artist could have proceeded, even if the likelihood at that time was of reduced revenue from ticket sales. Performance of the promoter’s contractual obligations at that time was unattractive but not impossible and arguably not subject to force majeure.

Today, in what everyone likes to call an “evolving situation” the same contract would almost certainly be subject to its force majeure provisions.

Under Australian law, the parties are able to vary or supplement the usual judicial meaning of force majeure with specific contract wording.

Therefore, the determination of the legal position will usually require an interpretation of the contractual terms, when viewed against the particular force majeure event.

FRUSTRATED CONTRACTS

Unlike Force majeure, the doctrine of frustration is a recognised standalone concept at common law.

In New South Wales and Victoria, amongst other Australian states, it is also the subject of specific legislation.

It is important to note that the law of frustration generally will not apply in circumstances where a contract contains an applicable force majeure clause.

However, in common with most force majeure situations, frustrated contract arises where there is impossibility of performance in the normal course, rather than just an undesirable set of circumstances for either party.

Whereas Force majeure clauses often contemplate the postponing of obligations, the consequence of frustration is often that the contract is simply terminated at the time of the frustrating event.

The usual consequence of such termination is that any damages lie with the parties at the time of the frustration and there is no further course as a result of the termination of the contract

CONCLUSION

in the current environment, there are real prospects that contracts which relied on free movement and assembly of individuals have been frustrated or that Force majeure clauses in contracts may have been enlivened.

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