COVID-19: Contracts in the Live Performance Industry
Force Majeure and Frustration of Contract

Force Majeure

What is the law relating to force majeure?

There is no general law of 'force majeure'. For 'force majeure' to apply to a contract, there must be a clause in the contract dealing with force majeure. Therefore the legal effect of a force majeure clause is entirely dependent on the particular drafting of the clause in a contract.

How is force majeure defined?

When a contract includes a force majeure clause, it will usually define what constitutes an event of force majeure. It is generally an event which is unforeseeable at the time of entering into the contract and/or beyond the control of one or all of the parties to the contract. However often there is a specific list of events that constitute a force majeure event and such a clause will only be invoked if the particular event comes within the definition.

Therefore, in the case of COVID-19, to invoke a force majeure clause, you would be looking for a definition that includes 'pandemic' or 'epidemic'. Furthermore, COVID-19 need not be the direct source of the force majeure event in instances where COVID-19 results in other events occurring which satisfy the definition. For example, a definition of force majeure may include an 'act or directive of government' or 'travel restriction' or other event 'beyond the reasonable control' of any or all of the parties. Therefore, this would cover other events arising from COVID-19 such as government restrictions or prohibitions on large gatherings or travel restrictions, so long as there was a connection between the force majeure event and the inability to perform the contract.

What does a force majeure clause do?

A force majeure clause in a contract may: provide for one or more parties to be excused from performing their obligations under the contract for the period of the force majeure event; provide for an extension of time for performance of the contract; allow for a party to terminate the contract if the force majeure event continues for a specified period; and set out the agreed allocation of risk between the parties if such an event occurs.

Do force majeure clauses allow for termination of the contract?

The right to terminate a contract is not always included in a force majeure clause. However, some force majeure clauses allow for a party to terminate the contract if the force majeure event continues for a specified period of time.

How is force majeure different to frustration of contract?

As the parties to a contract can include any form of force majeure clause that they agree on, force majeure clauses usually deal with a broader range of events and deal with a broader range of consequences than events which may invoke the doctrine of frustration of contract.

A force majeure clause performs a different function to the doctrine of frustration in the following main respects:

- Where an event causes a contract to be frustrated, it brings the 'whole' contract to an end however, a force majeure clause will usually keep the contract alive and put it on hold for the period during which the force majeure event continues.

- As force majeure events, as defined in a contract, may not be events that cause the contract to be frustrated, a force majeure clause may provide a broader range of options to deal with unexpected events rather than terminating the entire contract. It may relieve the parties from performing their obligations for a period of time and then extend the term of the contract for a corresponding period of time once the force majeure event has ended. In addition, it may allow a party to terminate if the force majeure event continues for a specified period and set out the liabilities of each party on termination.

- As a force majeure clause relieves a party from performing its obligations under the contract when a force majeure event has occurred, another party to the contract will not be able to commence an action against that party for breach of contract.

How does force majeure fit in with the doctrine of frustration of contract?

Where a contract contains no force majeure clause, the parties will have to fall back on the common law doctrine of frustration. A force majeure clause will not necessarily exclude the operation of the common law doctrine of frustration. If a force majeure clause does not fully or adequately deal with the situation created by the force majeure event, it will still be open for the doctrine of frustration to apply. For instance, if the force majeure events in a contract were defined so that they didn't include any events related to or arising out of COVID-19 such as epidemics, pandemics or government acts and directives, the provisions of the force majeure clause may not be triggered. In that case, if the contract could not be performed, the doctrine of frustration would apply. Alternatively, the force majeure clause may put the contract into suspension but not provide for it to be terminated if the events continue for a specified period. In that case, the doctrine of frustration could also apply to bring the contract to an end if the contract became incapable of being performed.

Frustration of Contracts

What is the common law doctrine of frustration of contract?

The common law doctrine of frustration applies to discharge a contract or bring it to an end when, without fault of any party, the contract has become incapable of being performed because performance in the circumstances would render the contract radically different from that intended by the parties. Although the doctrine of frustration arises from common law, legislation exists in three States of Australia that also deals with frustration of contracts.

What events constitute a frustration of contract?

For an event to constitute a frustration of contract, it must not be the fault of any party to the contract and it must be severe (and not merely alter the circumstances under which the contract is performed). The doctrine of frustration was once based upon the contract being impossible to perform. However, over time, the courts have moved towards considering the 'commercial impracticality' of performing the contract rather than 'impossibility of performance'.

The doctrine of frustration has been applied where:

- a contract for the use of gardens and a music hall was frustrated by the destruction of the hall;

- a contract for a musical performance was frustrated by the incapacitating illness of a performer;

- a contract for the use of a venue was frustrated where the venue was deemed to be unsafe - in this case the promoter entered into an agreement with an artist to promote the artist's concert and had paid the artist significant advance payments to do so. Subsequently, engineers found the venue to be structurally unsound and future use of the venue was banned. The promoter sought to recover the advance payments to the artist under the doctrine of frustration and the applicable UK legislation. The contract was found to have been frustrated and the promoter was able to recover the amounts paid under the UK legislation.

What is the effect of frustration under common law?

Under the common law, a frustrated contract is automatically discharged and comes to an end and the parties bear their own losses. For instance, amounts spent by one party prior to a contract being frustrated are not generally recoverable.

How is this varied by legislation?

Legislation in three States of Australia has varied the common law position and addresses the harshness of the common law approach to provides more equitable outcomes. In NSW there is the *Frustrated Contracts Act 1978*, in Victoria there is the *Australian Consumer Law and Fair Trading Act 2012* and in South Australia, the *Frustrated Contracts Act 1988* (SA). However, the legislation can be contracted out of so contracts need to be checked for any such exclusion. Some examples of ways in which the legislation changes the common law position are set out below:

- acts performed and money paid by the parties to the contract are taken into account to fairly apportion loss between the parties.
- where an obligation under a frustrated contract was due to be, but was not, performed before the time of frustration, the obligation does not need to be performed.
- where a contract is frustrated and a party has performed all or part of its obligations under the contract before the time of frustration, the other party must pay the performing party the agreed amount for all or the part of the obligations performed.
- where a contract is frustrated and a party has paid money to another party in return for performance of the contract by that other party which can no longer be performed, those amounts are recoverable and any amounts to be paid in the future cease to be payable.
- a party to a frustrated contract to whom amounts were paid or payable before time of discharge and who has incurred expenses under the contract before the time of discharge, may retain or recover an amount equal to those expenses incurred.
- if a party to a frustrated contract obtained a valuable benefit before the time of discharge because of anything done by another party to the contract, the party receiving the benefit may be liable to pay the other party for the benefit received.
- where a contract is frustrated and a party has suffered a detriment (by paying money, doing work or doing any other thing for the purpose of performing the contract) that party shall be paid by the other party to the contract an amount equal to one-half of the amount that would be fair compensation for the detriment suffered. This provision seeks to address the common law position under the doctrine of frustration that expenditure prior to frustration is not recoverable. For example, if A agrees to design and build a set for B for $100,000, and A spends $10,000 in the design and preliminary build of the set before the contract is frustrated, A would be entitled to $5000. Furthermore, if B payed $50,000 to A in advance, B would be entitled to be paid that amount back, less the $5,000 that A is entitled to retain.

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