

Live Performance Australia

Questions on force majeure and doctrine of frustration

Question 1

1. **If a contract includes a force majeure provision which operates to keep a contract on foot, and the force majeure definition specifies government intervention/restraint (or similar) (which we interpret to include the banning of indoor events over 100 people and outdoor events over 500 people), does the force majeure clause apply and keep the contract on foot?**
 - 1.1 If there is a force majeure clause in a contract, the first thing to consider is whether the definition of 'force majeure' in the contract covers the event in question. In our view, a force majeure definition that refers to government restraints or intervention would cover the current restrictions (which have been implemented by various state and territory governments under their respective public health legislation) to limit or prohibit mass gatherings.
 - 1.2 If the event in question falls within the definition of 'force majeure' then the particular terms of the force majeure clause in the contract will apply. Generally, they have the effect of suspending the contract for the period of time for which the force majeure event continues, but also often include a right to terminate the contract if the force majeure event continues for a specified period of time.
 - 1.3 In the case of the Sydney Town Hall contract (**Contract**), it would appear that the current restrictions on mass gatherings come within the definition of 'force majeure' as the definition includes "Government restraint, or any form of Governmental intervention". However, the definition also includes "any other cause which is not within the control of the party alleging it" and the current restrictions are not within either party's control.
 - 1.4 However, even though the current restrictions come within the definition, the clause in the Contract needs to be considered to determine how a force majeure event is to be dealt with. The Contract states that: "If the Hirer is rendered unable wholly or in part by force majeure to carry out its obligations under this Agreement, then this shall not affect the operation of the terms of this Agreement and the risk of frustration is to be borne by the Hirer". This indicates that even if there is a force majeure event and the Hirer cannot comply with its obligations as a result, this will have no effect on the operation of the Contract. Even though the term 'frustration' is referred to, it appears to be used in a descriptive sense rather than intending to invoke the common law doctrine of frustration. If the common law doctrine of frustration did apply, it would mean that the contract was incapable of being performed, it would come to an end and each party would bear its own losses. However, in the Contract it states that the Hirer will bear the risk. This could indicate that the Hirer bears the risk of both parties which is harsher than the common law position and would support an argument that the reference to 'frustration' was not intended to invoke the common law doctrine of frustration. There is legislation in NSW which addresses the harshness of the common law position of each party bearing its own losses to provide a more equitable outcome. However if the force majeure clause in the Contract applies and the doctrine of frustration does not, then neither would the NSW legislation.

Question 2

2. **If in the same Contract, a cancellation clause allows a deposit to be retained (for example for a venue hire for an event which is cancelled by the Hirer), does the Frustrated Contracts legislation in NSW, Vic and SA prevail (over the force majeure and cancellation clauses), thus requiring the return of the deposit?**

- 2.1 In the Contract, the deposit is forfeited by the Hirer if the Hirer cancels the hire of the venue but if the Council cancels the hire of the Venue, the deposit is to be returned to the Hirer. Therefore, it would obviously be a better outcome for the Hirer to let the Council cancel the hire of the Venue as the Council would not be permitted to hire the Venue for a mass gathering and therefore be forced to cancel.
- 2.2 However, under the Contract if the Hirer cancels the hire of the Venue, the deposit is forfeited. Even though the force majeure clause in the Contract covers the current restrictions on mass gatherings, the force majeure clause in the Contract provides no relief to the Hirer as set out under Question 1. If the Contract cannot be performed and as a result the contract is 'frustrated', the force majeure clause states that the Hirer bears the risk. This would support the argument that the Hirer forfeits the deposit.
- 2.3 As to whether the legislation prevails over the terms of the Contract, using NSW as an example, the *Frustrated Contracts Act 1978* (NSW) (**NSW Act**) provides that parties are able to agree that the NSW Act is not to apply (under section 6). It appears that the exclusion of the NSW Act does not need to be express. By including a definition of 'force majeure' that covers government restrictions or interventions and including a force majeure clause that states that the relevant force majeure event "shall not affect the operation of the terms of this Agreement" implies that the parties have agreed that the force majeure clause is to govern the current events. As a result, it seems that the NSW Act is not to have operation in relation to those matters covered by that force majeure clause. Therefore, it is unlikely that the Hirer could rely upon the doctrine of frustration or the provisions of the NSW Act and therefore the cancellation fee would not be returned.

Question 3

- 3. An event organiser has paid a deposit to a venue related to venue hire. Can the venue keep the deposit, or can the event organiser get back the deposit?**
- 3.1 If a force majeure clause is included in the contract and the definition of force majeure includes such things as pandemics, epidemics, government acts or directives or other circumstances outside the control of the parties, then the terms of the force majeure clause will apply to determine how a force majeure event is to be dealt with. This may also determine how the deposit is dealt with.
- 3.2 If no such force majeure clause exists or it does not cover the relevant events or go far enough to deal with termination of the contract, the doctrine of frustration and, where applicable, relevant legislation will apply (depending on whether the law of NSW, Victoria or South Australia applies).
- 3.3 If the contract is governed by laws other than NSW, Victoria or South Australia then the common law will apply. Under the common law, frustrated contracts are automatically discharged and come to an end and the parties bear their own losses. Therefore, as amounts spent by one party prior to a contract being frustrated are generally not recoverable, this would mean the event organiser would forfeit the deposit.
- 3.4 If the contract is governed by the laws of NSW, Victoria or South Australia, the applicable legislation would vary this position.

New South Wales - Frustrated Contracts Act 1978 (NSW Act)

- 3.5 Section 12 of the NSW Act provides that, where a contract is frustrated and a party to the contract has paid money to another party as part of an agreed sum for performance of the contract by another party, that other party shall pay the same amount of money to the party who made the payment. In other words, the amount paid should be paid back.

3.6 However, this is subject to section 13(1), which provides for the adjustment of certain losses and gains by each party. Specifically, it states that where a contract is frustrated and, 'by reasonably paying money, doing work or doing or suffering any other act or thing' for the purpose of performing the contract (not being performance which has been received) the performing party has suffered a detriment, the performing 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. By way of example, if an event organiser pays a \$10,000 deposit to a venue owner for the hire of the venue under a contract that is ultimately frustrated and never comes to fruition, the event organiser is entitled to be paid \$10,000 back. However, if the venue owner has done work to the sum of \$5,000 in preparation for the event, it is entitled to be compensated for one-half of that amount, being \$2,500. The result would be that the event organiser would be entitled to receive \$7,500 back.

Victoria - Australian Consumer Law and Fair Trading Act 2012 (Victorian Act)

3.7 Section 36 of the Victorian Act provides that all amounts paid or payable to a party under a discharged (i.e. frustrated) contract before the time of discharge are recoverable. However, section 37 provides a wide discretionary power for the courts to adjust this amount as they see fit.

3.8 Section 39 provides that, in estimating the amount of any expenses incurred by any party to a discharged contract, the court may include an amount that appears reasonable for:

- (a) overhead expenses; and
- (b) work or services performed personally by the party.

3.9 Furthermore, section 38 provides that a party who has obtained a valuable benefit, other than the payment of money, is liable to pay the other party any amount that the court considers just having regard to all the circumstances.

3.10 In the circumstances of the event organiser's deposit, it stands to reason that the deposit would be recoverable under the Victorian Act, subject to any valuable benefit obtained by the event organiser or expenses or work performed by the venue owner that the court may consider when determining the final amount to be repaid.

South Australia - Frustrated Contracts Act 1988 (SA Act)

3.11 Section 7(1) of the SA Act provides that, where a contract is frustrated, there will be an adjustment between the parties so that no party is unfairly advantaged or disadvantaged in consequence of the frustration. In particular, the value of the following will be taken into account:

- (a) the value of contractual benefits received up to the date of frustration, where contractual benefits means:
 - (i) a benefit received by a party under the contract;
 - (ii) a benefit that is received by a party otherwise than under the contract but -
 - (A) at a cost to the party that is taken into account under this Act in calculating the value of the contractual performance of that party; or
 - (B) in circumstances in which the receipt of the benefit constitutes part of the contractual performance of that party;
- (b) the value of contractual performance up to the date of frustration, where contractual performance means the performance by the party of contractual obligations and includes anything done by the party preparatory to the performance of a contractual obligation;

(c) the aggregate amount arrived at under paragraph (b) will be subtracted from the aggregate amount arrived at under paragraph (a), and the remainder notionally divided between the parties in equal shares.

- 3.12 Therefore, a similar exercise would be undertaken in South Australia to that under the NSW Act and Victorian Act with the capacity to determine the equal distribution between the parties of the value of benefits obtained by the parties and the value of the contract performed.
- 3.13 It is also important to note that where a party to a contract purportedly performs an obligation or an act preparatory for performance after the frustration of contract, but the party did not, or could not reasonably be expected to have known, that the contract will be frustrated, then the value of the performance will be taken into account for the purposes of any adjustment (section 7(6)).

Question 4

4. A presenting venue has paid a deposit to a performing arts company/producer. Can the performing arts company/producer keep the deposit, or can the presenting venue get back the deposit?

4.1 The same issues set out above in relation to Question 3 apply here.

Question 5

5. An “inside” charge is usually included in the total ticket price represented to consumers. The “inside” charge usually relates to services provided by the ticketing agent on behalf of the event organiser. Does the event organiser still need to pay the ticketing agent these “inside” ticketing charges, even though full refunds have been issued to consumers due to an event cancellation?

5.1 Venue hire agreement usually address the payments that are to be made to the venue owner/ticketing agent if an event is cancelled and refunds of ticket money are to be made to consumers. The agreements usually specify the amount of a cancellation fee or ticket refund fee and therefore this amount is payable to the venue owner/ticketing agent rather than it being an issue of whether the inside charge is payable.

Question 6

6. In the above questions, event cancellations are referred to. What is the situation with the postponement of events and do deposits need to be returned?

6.1 If a contract is suspended under a force majeure clause, then the clause will address what is to occur in the circumstances. It will generally not provide for payments already made to be repaid but will just place the contract on hold until the force majeure event comes to an end and the contract can recommence. However, each contract may vary depending on the terms of each applicable force majeure clause.

6.2 The common law doctrine of frustration applies when a contract cannot be performed and it brings the contract to an end. Therefore, frustration of contract does not apply to postponement of events.