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Contracts: performance release due to force majeure, frustration or other?

By Sean Lynch, 1 May 2020

In recent weeks, many business people will have been looking over their contracts to assess whether performance by them or another party is required due to the Covid-19 crisis.

Whether any relief from performance exists can only be determined from a careful review of the contract terms, the commercial and factual circumstances, and the law. Looking for a *force majeure* clause or 'unforeseen circumstances' clause will be the first step. Those are usually located towards the end of contracts. Even if such a clause does not exist, a careful review of the terms of the contract and the related circumstances may give rise to one or more arguments that either party is excused from performance on other grounds.

If a force majeure clause exists, the next step is to read it carefully to assess whether the actual wording fits the particular Covid 19 circumstances relevant to that contract. If the clause refers to pandemics, epidemics or outbreaks, then the clause may well be applicable to relieve performance liability. Even so, the next issue is 'for how long' and 'to what extent', because parties to contracts have a general obligation to mitigate any loss they suffer, and to take reasonable steps or measures to mitigate any loss suffered by the other party where say a force majeure clause exists for that party's benefit, but to the extent reasonably possible in the circumstances.

If the terms of the contract do not assist, then it is possible that the law of contractual frustration may apply. The threshold for this legal doctrine to apply is high, otherwise parties to contracts would invoke it when performance becomes more costly or difficult for them. It is important that the Courts generally try to uphold contract terms between parties to preserve the sanctity of contracts principle as otherwise the value of contracts and the Rule of Law would be undermined.

However, if extraneous circumstances arise after a contract has been agreed, which make performance of the contract either impossible or something 'radically different' to that which was intended, then the law applicable to contractual frustration may assist either party. If it does, then the contract is effectively cancelled (not suspended) from the date on which either party gives notice that frustration applies. Giving formal notice claiming contractual frustration needs to be carefully considered first because if issued incorrectly, the party doing so could be up for significant damages if a Court finds later that the grounds for claiming contractual frustration did not exist at the time claimed (or at all).

For the future, for new contract terms, parties may wish to consider in more detail, the inclusion or exclusion (as desired) of force majeure terms, and closely consider all contract terms which could be construed as enabling one party to seek to avoid its contractual obligations. Careful

drafting will be required either way. If it is critical to one party that the other party performs, then that should be made very clear, as well as the consequences of non-performance too, possibly with the application of some form of security.

There are many legal cases relating to *force majeure* and contractual frustration claims and some may assist an argument in a given scenario. The reality though is that these areas of contract law are heavily dependent on the actual contract wording, the transaction circumstances, and the factual circumstances within which a claim is made. It is not as simple as just finding the leading New Zealand case and 'running with that'. Even a brief review by the right lawyer can progress or close these issues either way.

If you require any commercial legal assistance, please contact Sean Lynch at sean@lynchandco.co.nz, or ph 09 948 8433. The above article is not intended as legal advice because each set of circumstances will differ. Specific legal advice is required for any particular case.

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