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INSIGHTS: The Impact of COVID-19 on Contractual Obligations

Force Majeure clauses, the doctrine of frustration & COVID-19

The worldwide public health emergency from the COVID-19 epidemic has caused uncertainties and severe disruptions to businesses, particularly to those reliant on cross-border travel and transportation, as well as to companies with manufacturing bases located in or labour from China or other severely affected countries, causing production and supply chain delay issues. Businesses are now reviewing their legal positions with respect to liability for non-performance and the question for businesses is whether the COVID-19 situation entitles businesses to claim a force majeure event or an event of frustration to either postpone or avoid performance. We now examine these separate doctrines.

A force majeure clause refers to a specific type of clause which excuses a party from performance of its contractual obligations in the event of specified categories of events typically beyond the control of the parties and which could not have been reasonably foreseen at the time of contracting and whose effects cannot be avoided by appropriate measures. It usually provides for a temporary impairment that suspends the parties obligations or for postponement of the performance of the obligations. In the landmark case of *RDC Concrete Pte Ltd v Sato Kogyo [2007] 4 SLR(R) 413*, the Court of Appeal found that whether a force majeure event has arisen depends primarily on the construction of the force majeure clause and in doing so, the court will presume that force majeure will be restricted to supervening events arising from neither party's fault or responsibility. The party seeking to rely on force majeure will have the burden of showing that the event falls within the scope of the clause, and that it has taken all reasonable steps to avoid its occurrence or mitigate its effects. It is also critical to consider the consequences allowed or prescribed by the clause, such as temporary suspension for the duration of the force majeure event, or excusing performance only partially.

In contrast, the doctrine of doctrine of frustration operates automatically and governs the obligations of the contracting parties in relation to unforeseeable events that the parties did not foresee or contemplate. Broadly speaking, under this doctrine, a contract will automatically be discharged upon the occurrence of an event which renders the contractual obligations of parties impossible to perform or "radically or fundamentally different" from what had been agreed. The threshold to invoke frustration is high and hence, mere inconvenience or delay, hardship or extra expenditure to perform is insufficient. In other words, frustration can only be invoked in exceptional circumstances – the party seeking to rely on frustration must demonstrate that it is impossible to perform or where performance in those circumstances would be radically different.

Broadly, force majeure and frustration are similar in principle as they are intended to address the parties' contractual obligations in the event of matters occurring beyond the contemplation or control of the parties and which impact the performance of contractual obligations. Force majeure clauses are quite commonly found in contracts and fairly standard in terms of what events are specified and what consequences follow. Any dispute will invariably arise in relation to whether an event is sufficiently serious enough and unexpected as to amount to a force majeure event, and the operation, extent or duration of the consequences e.g. the amount of additional time or payment for performance, the period of temporary postponement etc and

when final termination shall occur. The doctrine of frustration on the other hand, operates automatically as a common law doctrine and can be invoked regardless of whether it is expressly provided or not in the contract.

Can COVID-19 be regarded as a force majeure event or frustration?

Unfortunately, there is no clear answer whether the COVID-19 epidemic would be considered by a court to be a force majeure event or that its effects can be said to frustrate a contract. At the end of the day, the answer will depend on the wording of the force majeure clause (if any) and the nature and severity of the impact if any on the performance of the contract in question. Some contracts may be impossible to continue, whilst some will only be more difficult or costly. Where there are government orders and restrictions that renders it impossible to fulfil a contract e.g. travel bans, quarantine measures, then it seems possible to argue that force majeure or frustration has arisen. In the case of a force majeure clause, a careful consideration of the clause is required, particularly how the force majeure event is defined, whether epidemics are specifically included and what consequences are specified. Different industries or contracts may have different considerations, and the scope of the force majeure clauses may consequently differ for each contract. A full review of existing contracts should be undertaken in order for companies to assess their potential exposure or to take mitigation measures. Companies looking to enter into new contracts should also consider whether the inclusion of a force majeure clause would better protect them against the risks of non-performance arising as a result of the COVID-19 epidemic.

For queries or more information, please contact:

Jason Chan
Director
jason.chan@amicalaw.com
(65) 6303 6215

Geraldine Tan
Director
geraldine.tan@amicalaw.com
(65) 6303 6231