WHAT CAN CONTRACTUAL PARTIES DO WHEN UNFORESEEN EVENTS PREVENT PERFORMANCE OF CONTRACTUAL OBLIGATIONS?

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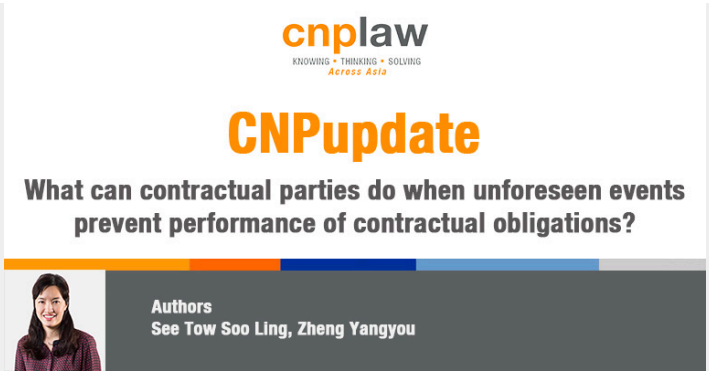

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Authors and Contributors: See Tow Soo Ling, Zheng Yangyou

Force Majeure clause in the contract

Force majeure is commonly understood as a specific kind of contractual clause which excuses the parties from their contractual obligations when an unexpected, external event has occurred that prevents or inhibits performance. There is no general rule as to what amounts to a force majeure event; whether a force majeure event arises depends on what is contractually provided for in the contract. It is possible to contractually provide that the acts of third parties could be such an event if such acts prevent performance by the contracting parties.

Generally, a force majeure event is supervening event which happens outside of the parties' control. In the context of the Covid-19 pandemic, events such as "epidemic" or "pandemic" are commonly provided for in most force majeure clauses. It may also be practical to rely on terms such as "government acts", or "compliance with any law or government order", if such terms are provided for in the force majeure clause, as it is more likely than not the laws or executive actions taken in response to the pandemic which actually prevent or hinder contractual performance rather than the pandemic itself. Other common force majeure events which you may find in the contractual clause are war, armed conflict, acts of terrorism, act of God, and natural disasters.
It is for the party who is seeking to rely on the force majeure clause to show that the situation falls within the force majeure clause as defined under the contract and that the force majeure event has prevented or hindered (depending on the wording of the force majeure clause) performance of their contractual obligations. Unless the force majeure clause so provides, it is insufficient for a party merely to show that performance has become more expensive; that party usually must show some sort of impossibility or hindrance of performance on its part that goes beyond simply having to pay more to perform the contract.

More fundamentally, it is not sufficient to merely show that a force majeure event has arisen; the mere fact that the event (for example, the Covid-19 pandemic, civil war, change of laws) has happened alone is not enough, it must have been the cause of the inability or difficulty to perform the contract. Lastly, the party that is seeking to rely on the clause must have taken all reasonable steps to avoid the operation of the force majeure clause, and to mitigate the circumstances by taking any steps that are reasonably available to that party.

It is also important to check whether there are any notice obligations before a party can rely on the force majeure clause. A notice is often provided to allow contracting parties the opportunity to discuss and agree on alternative performance of a contract. Failure to comply with this requirement may result in the force majeure relief being denied.

The consequences following a force majeure event would have to be specified in the clause. The parties may agree to suspend their obligations for a specified period of time, or they may agree to terminate the contract altogether, depending on the nature of the event.

Common Law Doctrine of Frustration

A party will have to rely on the common law doctrine of frustration in the absence of a force majeure clause. A contract becomes frustrated when there is an unexpected and extraordinary event beyond the parties' control that completely undermines the principal purpose of entering into the contract , or the obligation has become radically different from what was agreed in the contract. Mere hardship or extra costs in performing the contract is insufficient to make an event a frustrating event.

The classic case about frustration of the purpose of a contract arose from events surrounding the Coronation of King Edward VII and Queen Alexandra in 1902. A man hired a room with a view of the street to observe the Coronation procession, but the procession did not take place on the day originally set. The guest refused to pay the balance for the room and litigation ensued. It was held at trial, and upheld in the English Court of Appeal, that the purpose of the contract had been frustrated; this wasn't just hiring a room, it had a particular purpose which had been thwarted.
In the recent English High Court authority Canary Wharf (BP4) T1 Ltd v European Medicines Agency EWHC 335 (Ch). the European Medicines Agency (EMA) tried to argue that their 25-year lease on a London skyscraper was frustrated by Brexit. The judge was not persuaded by this. He ruled that, as a result of a clause permitting the EMA to sublet the property, the contract contemplated, and expressly provided for, a scenario where the EMA would leave Canary Wharf before the lease term expired. The lease therefore provided for a scenario where the EMA might have lost its reasons to remain in Canary Wharf.

Unlike force majeure which has contractually stipulated consequences, frustration operates to discharge the contract in its entirely. Both parties are no longer bound to perform the remaining obligations under the contract, including not being able to seek compensation for any loss or expenses which might have been incurred prior to the frustrating event. The harshness of the doctrine of frustration is mitigated by the Frustrated Contracts Act (Cap. 115). This Act allows affected parties to seek the assistance of the Singapore Courts to claim expenses incurred prior to the event of frustration, recovery of payments made or assess the value of the benefit received by the other party. The Court will exercise its discretion to fairly and equitably determine the outcome of the contracting parties' rights and obligations to mitigate any resulting unfairness from the operation of the doctrine of frustration. Where a contract can properly be severed from the remainder of the contract, being a part wholly performed before the event of frustration, the Court may treat the part performed separately and only consider the claims for reliefs in respect of the remainder of the contract affected by the event of frustration.

Conclusion

A contractual party may rely on the force majeure clause or the doctrine of frustration as a result of an external event beyond its control. This is a complex area of law and it is important to have the benefit of legal advice early on to avoid putting yourself in breach of contract.

If you find this CNPUpdate useful and would like to read more on Force Majeure, our Partner Ms See Tow Soo Ling has jointly collaborated with other dispute resolution experts from IR Global to publish two

articles. Please refer to the following links:

- Defining 'Force Majeure' in a post-Covid landscape: https://members.irglobal.com/file/a4ed659550183366adff89ea657dcf37.pdf
- Force Majeure: Protecting yourself against divine intervention: https://www.irglobal.com/publications/force-majeure-protecting-yourself-against-divine-intervention/