HIGASHIMACHI, LPC

Force Majeure v Frustration

Peter Cassidy

Introduction

From the recent Russian invasion of Ukraine to the "once in 500-year" weather events which seem to be occurring somewhere in the world almost every week, as well as the ongoing supply-chain disruptions caused by the Covid-19 pandemic, the possibility of the planned performance of a contract being interrupted by an event which is beyond the party's control seems to be increasing all the time.

But can such a party claim "force majeure" and be excused from their contractual obligations? As I will explain below, if the contract's governing law is a common law jurisdiction, it may not be so easy. I will also briefly introduce the common law concept of frustration, which also deals with the problem of being unable to perform a contractual obligation but is a very different issue.

Common Law Background

I think that most readers will be aware of the concept of force majeure (不可抗力) in Japanese law, which excuses a party from their failure to perform a contractual obligation if such failure is due to reasons not attributable to them. This was traditionally defined in court precedent and has more recently been added to the Civil Code.

On the other hand, unlike Japan's traditional judicial precedents, the English courts were not so kind to parties. Once a party made a contractual promise to do something, they were absolutely bound to perform the promise and were liable to compensate the other party if they failed to perform, regardless of the reason for the failure. Perhaps the best illustration of this rule was a 1646 case called *Paradine v Jane*, which ruled that the tenant was obliged to pay rent even though a foreign army had seized possession of the land. It was not until 1863 that some relief was provided against this strict rule, which led to the development of the doctrine of frustration. The doctrine will be discussed in detail below, but for now, it is important to note that it is a difficult principle for a party to rely upon. Therefore, parties need to protect themselves via a force majeure clause in the contract.

Defining Force Majeure in a Contract

Similar to the meaning of the Japanese word, "force majeure" comes from French and means "irresistible force" or "superior force". However, because there is no precise definition in the common law, it is normal for the parties to define what circumstances will be considered as a force majeure event. Parties are free to negotiate what events are included (or excluded) in the definition of force majeure under a particular contract, but usually both natural events (e.g. fire or flood) and man-made events (e.g. war or labour strike) are included. Some precision is required, as a clause which said "the usual force majeure clauses to apply" has been held to be void due to uncertainty. But on the other hand, it is possible to refer to a definition that exists outside the contract, such as the clause published by the International Chamber of Commerce.

It is also necessary to identify what the effect of the force majeure clause is. In other words, is the affected party excused from performing the contract, or is the obligation to perform merely suspended while the event exists? In commercial contracts, there is often an initial period where performance is suspended, with an option to terminate the contract if performance is still prevented after a certain period of time. Other practical elements which are often seen in a force majeure clause are a notice requirement and a duty to mitigate the effect of the event.

Ultimately, the important part to remember is that the clause is defined by the parties, so care should be given to what the clause does or does not say.

Frustration – the opposite

So, if force majeure is a purely contractual concept in common law jurisdictions, how about the doctrine of frustration? The basic principle of frustration is that the contract may be discharged when something occurs after the formation of the contract which either (a) makes the contract impossible to perform, or (b) transforms a party's obligation into a radically different obligation from that agreed to when entering the contract. The four highlighted portions above should be noted as follows.

Discharge of the contract: Unlike a force majeure clause in a contract, which may allow performance to be suspended, frustration will have the effect of discharging both parties from the entirety of the contract.

After the formation of the contract: A party cannot rely upon a pre-existing event or cause in order to claim a contract has been frustrated.

Impossibility: The contract may be physically impossible to perform, or commercially impossible to perform.

Radically different obligation: This is a more recent version of the test of frustration, which requires the type of obligation to be different, not just the cost or difficulty of it.

An example of how the doctrine applies is the 1863 case referred to above. In that case, the defendant agreed to let the plaintiff use a music hall for a concert, but the hall was destroyed by a fire after the contract was made. In this particular case, the court held that there was an implied condition in the contract that the hall should continue to exist on the day of the concert. Under the "impossibility" test which was developed in subsequent cases, it was impossible to perform the contract because the hall ceased to exist. Or, to use the more recent "radically different obligation" test, it would have been unfair to require the defendant to build a new hall before the day of the concert, as that was very different to the original obligation of letting the plaintiff use a hall that already existed.

It is important to note that the doctrine of frustration is applied very strictly and narrowly, in order to maintain the basic principle that a party should not be able to escape contractual obligations just because it turns out to be unprofitable or difficult to perform. It should also be noted that if a contract contains a force majeure clause that lists a specific type of event, then

the terms of that clause will apply and the affected party will unlikely be able to rely on frustration.

Finally, from a practical perspective, a party to a contract should not rush to claim frustration unless they are confident that the doctrine will definitely apply. Otherwise, they may be accused of repudiating the contract and liable to compensate the other party. Therefore, legal advice should be sought about a particular situation before making a claim based on frustration.