SQUIRE PATTON BOGGS

Force Majeure – With or Without Frustration

One of five situations might exist under a contract with difficulties in performance:

1. The contract may have a *force majeure* clause and a definition of that term
2. The contract may simply refer to *force majeure* without defining the term
3. The contract may have no reference to *force majeure*, nor provide for difficulties in performance
4. The definition of *force majeure* may be so broad as to impliedly exclude the doctrine of frustration
5. The definition of *force majeure*, or the absence of a definition, may allow the doctrine of frustration to apply

Force Majeure Clause With Definition

This is the simplest situation, with the questions being whether:

(a) The event falls within the definition

(b) Relief is dependent on the impossibility of performance or merely delay, material adverse consequences or similar

(c) Relief is limited to specific events listed or whether they are illustrative only and do not establish a genus

(d) Relief is conditional on notice being given or notice is merely required

(e) Relief is limited to the period of the event or extends to the period of the event's consequences

(f) Notice must be given on the happening of the event, or when it is known or suspected that performance will be affected, or when performance is affected

(f) Performance is totally excused during the period or is simply deferred to the end of the period

(g) Performance would have been affected, in any case, by some other non-*force majeure* event

(h) The event or its consequences have ceased and the contract can be performed

(i) The event or its consequences have lasted so long that the contract is frustrated

Force Majeure Reference With No Definition

If a contract refers to *force majeure* without a definition or any indication of its meaning, the court or tribunal has to do its best to give the words meaning. In 1920, an English judge said the following was the meaning of the phrase often used in English contracts:

> This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such *force majeure* is sufficient to justify the non-execution of a contract. Thus, war, inundations, and epidemics, are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of *force majeure*.

He said it went beyond acts of God – that any direct legislative administrative interference, such as an embargo, would, "of course", come within the term, as had a breakdown in machinery and abnormally bad weather.

In 1949, a Divisional Court including Lord Goddard CJ said, "… the expression '*force majeure*' must also be construed with regard to the words which precede or succeed it and must, we think, be limited at any rate to something preventing in time the fulfilment of the contract," citing the case referred to above.

In 1952, another English judge said the phrase "subject to *force majeure*" was not too uncertain to be enforceable, and he only found uncertainty in that case because the phrase was "subject to *force majeure* conditions", that "conditions" in the context meant clauses or stipulations, and there were none.

No Reference to Force Majeure or Performance Difficulties

The only recourse in this case is to the common law doctrine of frustration, which applies where without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Frustration terminates the contract, unlike *force majeure*, which suspends, defers or excuses non-performance of the obligations during the affected period.

To satisfy the test:

(a) A high threshold must be met

(b) There must be a radical change in the circumstances in which a contract is to be performed

(c) Mere alteration of the circumstances is not enough

(d) It is not enough if performance is merely more expensive

(e) The obligation usually must be other than the payment of money

(f) The event must usually have been unforeseeable, or at least not provided for in the contract

(g) The change must be the fault of neither party

(h) The frustrating event must have caused the change in performance

(i) There must not be a reasonable alternative method of performance

Broad Force Majeure Clause Excludes Frustration

A broadly worded *force majeure* clause, regulating all circumstances where a party cannot perform its obligations due to events beyond its control, might be so broad that it impliedly excludes the doctrine of frustration. For example, "If a party is prevented or delayed in the performance of any obligation by a cause beyond its control and which it could not reasonably anticipate or prevent … ." This is on the principle that such an express, detailed provision was intended to exclude the common law, just as detailed contractual obligations can exclude the common law of negligence.

No, or Narrow, Force Majeure Clause

Frustration will be available if there is no *force majeure* clause or it is not so broad to impliedly exclude frustration. A narrow clause might begin "If a party is prevented or delayed in the delivery or acceptance of the goods by one or more of the following causes beyond its control which it could not anticipate or prevent – act of God, war, embargo, strike." Obviously, this restricts the relief to specific obligations arising from limited, specific causes, unlike the broader obligations and causes giving rise to frustration.

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