

Frustration and Pandemic – A Long Term Perspective on COVID-19 and Frustration of Contracts

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In these times of global health uncertainty and economic troubles it is tempting to jump to the “frustration of contract” conclusion. While we acknowledge that it is tempting to see the current economic trouble as frustrating the performance of contract there are a number of factors that must be considered when undertaking an analysis to determine if a performance of a contract has been frustrated as a result of the COVID-19 global pandemic. In some case, such as sit-down restaurants, it is difficult to imagine frustration not applying when there is little flexibility in running the business. However, the analysis is much complex given the potential and unknown possibilities for remote work in other industries.

Force Majeure and Frustration

Force majeure and frustration are often confused with one another. While there is some overlap between the two, they are distinct.

In order for force majeure to apply, a specific provision must be contained in the contract. Force majeure clauses provide that parties to a contract may be excused from performance, in whole or in part, or entitled to extend or suspend the time of performance, as a result of some specific event or condition, an “Act of God”. Force majeure clauses can be tailored to specific events that the parties agree should change the parties’ performance obligations of the contract.

In contrast to force majeure, the common law doctrine of frustration may relieve parties of their contractual obligations, but only where a force majeure clause is not present. Frustration may apply when an unforeseen event renders performance of the contract radically different than what was bargained for. When invoked, frustration automatically results in both parties being discharged from the contract.

Elements of Frustration

The doctrine of frustration is applicable where, “a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes a ‘thing radically different from that which was undertaken by the contract.’”^[1] The contract must at its essence become impossible to fulfil due to an unforeseen event outside the control of the parties. Performance must not be simply more onerous or more expensive; it must be radically different than initially anticipated. Price volatility is generally viewed as an inherent risk in any market, and most claims of frustration based on fluctuations in price, even extreme swings, will fail.^[2]

High Bar for Success

Frustration is a limited excuse and has a high bar to meet, because of its severe impact on the contractual relationship. There is a strong policy argument against the success of frustration claims. Contract is a fundamental principle of our economy, and allowing these claims detracts from the inherent predictability of the contractual relationship.^[3]

There is an apparent difference between short- and long-term contracts. A long-term contract is made with the knowledge that the world and economy will change, but the contractual terms will endure. A contract that spans a number of years with definite terms specifically avoids the uncertainties of the future.^[4] A claim of frustration due to unforeseen circumstance is necessarily difficult in this case. However, where the contract was for the short-term (i.e. a short-term lease), there is a stronger argument that the parties believed, due to the nature of the contract, that there would not be major change, and intervening events

would actually be unforeseeable.

Conclusion

It is as yet unclear whether COVID-19 is an unforeseen event that will frustrate a contract. While it is certainly conceivable that this pandemic with its global and potentially long-term effects could be shown to render contracts radically different than what was undertaken, that must be balanced with the principles of contractual predictability. The term of contracts in dispute may play a large part in deciding the outcome of these debates.

[1] *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 SCR 943 at para 53.

[2] *Paterson Veterinary Professional Corporation v. Stilton*, 2019 ONCA 746.

[3] *Supra* note 1.

[4] *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, 2018 SCC 46. For predicting risk and the COVID-19 Pandemic please see: *Coronavirus Emergency Response: Risk Assessment and Risk Management*, Kenneth Jull, Toronto Law Journal, March 2020.

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