AUSTRALIAN BUSINESS
Lawyers & Advisors

Coronavirus and the impact on contractual arrangements

Dear Kimberly,

Many businesses have contacted us with valid concerns about potential consequences for contractual arrangements resulting from the impact of the
COVID-19 (Coronavirus) outbreak worldwide.

Clearly, there are practical issues in relation to supply chains. However, in legal terms, how do you deal with contractual obligations in an environment where a party to the contract is prevented from performing the contract due to a "force majeure" event (like the Coronavirus pandemic) or in a situation where a contract may be "frustrated"?

Here is a quick guide.

Force Majeure
Force Majeure is generally known as an "act of God". Firstly, you must check the contract in question to see that it contains force majeure provisions and whether, or not, an outbreak of this nature falls within the protections offered by the clause.

Generally, a party affected by a force majeure event, or whose performance of a contract is hindered or prevented by a force majeure event, is relieved from its obligations and liabilities to the extent it is unable to perform its contractual obligations due to the occurrence of that force majeure event. This can be a complete or partial excusing of obligations or liabilities often by specific events which are outlined in the contract sometimes by way of a definition. Often a right to terminate the Contract might be triggered following the continued occurrence of a force majeure event.

What does this mean in practice?
Read your contract carefully. For example, it is not necessary for the Coronavirus or general health emergency to be specified as the cause of a force majeure event. It may be that products vital to services or component products are unavailable as a result of blocked shipping lines and this may be the trigger of a force majeure event.

If you are currently engaged in contract negotiations, you should consider the consequences of a lack of supply of goods which may be necessary to the performance of the contract. Be sure to include force majeure provisions in the contract which will provide protections in the event it is unable to be performed.

Contracts often require the affected party to use reasonable endeavours to overcome the effects of the event so be sure you do all you can to deliver on your obligations. If, for example, alternative arrangements can be made in order to fulfil your contractual obligations, you should investigate these to determine whether, or not, it is reasonable for you to do so.

If you believe you are unable to perform your obligations under the contract, it is important to check the contract for any notification obligations which may fall upon the party effected by the force majeure event. This is a technical, but often, important provision to adhere to.

If your contract is silent on the issue of force majeure then the parties to the contract may still be at liberty to rely on contract frustration principles.

Frustration
The principle of frustration acts to relieve parties of liability where, due to the occurrence of an unforeseeable, supervening event beyond the control of the parties, there is a radical change in the circumstances in which a contract is to be performed. The simple alteration of circumstances in which a contract is to be performed in not enough. The event must have a substantial impact.

Importantly, the frustrating event must have been unforeseeable at the time the contract was entered into. The event must not have been caused by the fault of either party to the contract. As with force majeure, if alternative arrangements can be made in order to perform the contract then the doctrine of frustration cannot be invoked. It will be difficult for a party to rely on the frustration principle merely because it has been let down by one of its suppliers, there are delays or if performance of the contract has simply become more expensive.

Certain legislation is in place which addresses some of these issues. For example, the *Frustrated Contracts Act 1978* (NSW) (Act) addresses what happens in the case of frustration and the mechanisms controlling it. If, for example, a party performed a service before the frustrating event, the other party must pay them based on the performance. Similarly, if a contract is frustrated and a party pays money before the performance of the obligation, then the money is to be returned.

What does this mean in practice?

A frustrated contract is wholly discharged even in the event the contract contains severable obligations, in other words, the entirety of the contract will be discharged (other than obligations which survive termination or expiry). There is no right for a party to the contract to claim damages. In other words, losses lie where they fall. No party can claim damages for non-performance because no party is at fault.

If the parties are happy with current arrangements and a contract can remain on foot, consider whether the termination of a long-term contract is in your business' best interests. It would seem counter-productive to terminate a good commercial arrangement in the face of comparatively short- term issues.

If you are currently engaged in contract negotiations, you should consider a series of clauses which will outline what should happen in the event of potential contract frustration. Such provisions will allow the contract to continue through the operation of these clauses.

What next?

If you have concerns or wish to clarify your contractual position, we are happy to assist you with review of your contract, drafting of a contract or legal and practical guidance as to your best next steps. Call Australian Business Lawyers & Advisors on**1300 565 846** or email **info@ablawyers.com.au**.

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