Severe weather, frustration and force majeure

Within the past month, severe flooding in Auckland has been followed by widespread damage caused by Cyclone Gabrielle. The tragic human cost of these events is still being assessed, and our thoughts are with everyone who has been impacted across the country.

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The ability of many businesses to perform their contractual obligations will have been affected by these devastating events. In the New Zealand context, lawyers advising on these questions should be asking themselves two questions:

1. Is my contract frustrated?
2. Does my force majeure clause apply?

Frustration

The common law doctrine of frustration governs the position of parties to a contract where, as a result of an unforeseen event and through no fault of either party, a contractual obligation is rendered incapable of being performed. In such circumstances, the contract is frustrated and is automatically and immediately terminated, regardless of the subjective intentions of the parties.

In light of the drastic consequences that arise when a contract is frustrated, our courts have confirmed that a high threshold applies. In *Planet Kids v Auckland Council* [2014] 1 NZLR 149, the New Zealand Supreme Court confirmed that the doctrine of frustration can only be invoked when the main purpose of the contract has become incapable of being performed. The doctrine cannot be relied on to

terminate a contract when the main object can still be accomplished.

Destruction of the subject matter of a contract by natural disaster is perhaps the quintessential case of frustration. In the classic English case of *Taylor v Caldwell* (1863) 3 B & s 826, the defendant had agreed to rent a music hall to the plaintiffs for a series of concerts. Before the concert series began, the hall was destroyed. The Court held that, as neither party was responsible for the fire or accepted the risk of a fire occurring, the doctrine of frustration was engaged and the contract was terminated.

Force majeure

Parties to a contract are also free to agree on the consequences that may flow from an event that might otherwise engage the doctrine of frustration. Such an agreement is often documented in *force majeure* clauses, which are particularly common in supply, transportation and construction contracts (along with extension of time clauses).

While the wording of *force majeure* clauses varies from contract to contract, they are designed to relieve a party from liability arising either from its delay in performing, or failure to perform, its obligations under the contract, upon the occurrence of certain defined events. These clauses will typically list the circumstances in which relief can be invoked, such as acts of God, natural disasters, epidemics, war, strikes, and acts taken by governments.

It is typically not possible for a party to rely on a *force majeure* clause in circumstances where performance of contractual obligations has merely become more expensive or is no longer profitable. Rather, standard *force majeure* clauses require the reliant party to show that:

1. a triggering event has occurred;
2. the triggering event was outside the control of the party;
3. the triggering event either delayed or prevented the party from performing their contractual obligations; and
4. there were no reasonable steps that could have been taken to avoid or mitigate the event and the consequences.

Whether severe weather will be sufficient to engage a *force majeure* clause will depend on the nature of the contract, the wording of any *force majeure* clause, and the impact the weather has had on the position of the parties. Depending on those circumstances, it is certainly possible that the *force majeure* clause might provide relief for an otherwise defaulting party where problems in performance of the contract have arisen because of severe weather.

What should you do?

For parties who are concerned about how the recent severe weather may affect their contractual arrangements, we recommend:

- reviewing any relevant contracts to determine whether they contain a *force majeure* clause;
- determining whether the applicable *force majeure* clause specifically addresses severe weather, flooding, etc that are beyond the parties› control;
- making note of any procedural provisions required to invoke the *force majeure* clause, such as notice or timing requirements. Strict compliance with such requirements is usually required, and a party could lose its rights under the *force majeure* to excuse or defer compliance if it does not meet them;
- in the construction context, checking whether an extension of time clause applies;
- identifying whether there are any alternative means to performing the obligations under the contract, such as identifying other suppliers; and
- considering what steps can be taken to mitigate the potential consequences of a breach of the contract.

Generally, parties should also consider whether they may have insurance protections available to them. Most businesses are likely to hold material damage and business interruption policies that will cover them for damage to their premises (and, in some cases, for business losses suffered due to damage to suppliers' premises). Other covers such as for bailee's liability may also be relevant. As always, insurers should be notified promptly and may wish to have input into how the damage and flow-on consequences are to be managed.

COVID-19 vs severe weather

Many lawyers will be more familiar with the operation of the doctrine of frustration and the *force majeure* clauses in their contracts following the COVID-19 pandemic. Indeed, we published a previous version of this article on 20 February 2020 (8 days later the first COVID-19 case was reported in New Zealand and a month later we were in our first lockdown).

However, it is worth observing that there are some potential differences in relation to the application of these concepts in the COVID-19 context and the severe weather context. In many instances, it was not the COVID-19 pandemic itself but the government restrictions imposed in response to COVID-19 (ie lockdowns, border closures etc) that had the effect of frustrating contracts or engaging *force majeure* clauses. Such restrictions were absolute, whereas the effect of the recent severe weather on contractual performance is much more likely to be a question of fact and degree. Similarly, whereas in many instances it is difficult to see what a contracting party could have done to avoid or mitigate the consequences of government restrictions imposed in response to COVID-19, arguments about avoidance or mitigation are likely to be more complex in the context of severe weather.

If you require contract-specific advice, please get in touch with one of our experts below.

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