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Commentary

Can Covid-19 constitute a force majeure? It depends

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With the pandemic continuing to affect business and one's ability to fulfill their contractual obligations, a common question being asked is "can Covid-19 constitute a force majeure?"

The answer to this question simply is, "it depends."

While Canadian case law surrounding force majeure litigation is currently sparse, it is expected to rise in light of the current vulnerabilities faced by contractual parties caused by the ongoing and evolving Covid-19 pandemic. However, given Covid-19's continued progression worldwide on a daily basis, it is likely that Canadian courts will accept that it is nevertheless a circumstance beyond the control of contractual parties.

What is a force majeure clause?

A force majeure clause also referred to as an "act of God" clause, is a provision in a contract which relieves contractual parties from performing their obligations when circumstances beyond their control arise, ultimately making the performance of the contract impossible, illegal or impractical.

Force majeure clauses come in a variety of shapes and sizes. For instance, some provide for an exhaustive list of circumstances that would be deemed "beyond the control of the parties," allowing for termination of the contract and a return of deposits paid. Most common examples of events found in a typical force majeure clause would include war, labour strikes, or "an act of God."

In contrast, other provisions may contain less detail and can be drafted narrowly, leaving it up to the parties to determine whether the event in issue constitutes a force majeure.

Contractual parties must also pay particular attention to the notice requirements governing the clause, if any, and ensure that such requirements are adhered to for the provision to be given full effect.

However, regardless of the provision itself or adherence to any notice requirements, differing legal interpretations of the clause as well as of the ability for the invoking party to fulfill their obligations is to be anticipated.

When determining whether to give effect to a force majeure clause within a given contract, courts will consider the following:

1. Whether the event qualifies as force majeure as per the provision;
2. Whether, as a result of the event, the party is prevented from performing their contractual obligations;
3. Whether performance would be truly illegal, impossible or impractical; and,
4. Whether the risk of non-performance could have been mitigated and if so, if the party seeking to rely on the clause took such steps.

Considering the novel coronavirus

Following the World Health Organization's pronouncement that the novel coronavirus was to be deemed a pandemic, clients including businesses, individuals and not-for-profit corporations looked to their contracts to see if the governing force majeure provision within it would provide them with relief.

The clause in question provided the following:

> "Should events beyond the control [of the parties to this contract occur], such as acts of God, war, curtailment or interruption of transportation facilities, strikes or the imminent threat thereof, threats or acts of terrorism or similar acts, disease, State Department or other governmental or international agency travel advisory, corporate travel restrictions, civil disturbance or any other cause beyond the parties' control, which would make it illegal, or impossible to perform its obligations under the Agreement, such party may cancel the Agreement without liability upon written notice to the other party."

Further, the clause stated:

> "Notice of cancellation may be sent at any time prior to the event provided the cancelling party has first used its best efforts to overcome the force majeure event and has sent written notice promptly thereafter."

The specific contract involved an agreement between our client and a hotel whereby accommodation services were to be provided for an upcoming convention. The convention, which typically yields hundreds to thousands of guests, was to be held during the latter part of 2021.

It was immediately recognized that Covid-19 was contemplated by the above-mentioned clause, specifically due to the force majeure event "disease" contained within it. Importantly, while the provision did not contain specific wording such as "pandemic" or "epidemic," "disease" properly captured the novel virus as both the Government of Canada and the Government of Ontario has continued to expressly label it as such.

Additionally, "governmental or international agency travel advisory" was of great importance when seeking to utilize the force majeure provision, given that the not-for-profit corporation, located outside of Canada, would be prevented from attending their own event due to the current restrictions implemented federally as well as around the globe concerning travel.

Throughout the course of negotiations, issues such as the following were brought to light:

- The illegality of continuing to perform under the contract based on the current restrictions implemented both federally and provincially with respect to gathering sizes, travel, and non-essential business closures;
- The impracticality of continuing to organize an event of the size and nature contemplated by the contract given the uncertainty created by COVID-19;
- The inability of our client to perform their contractual obligations due to circumstances beyond their control including delays in the planning process, the inability to arrange for keynote speakers and presenters, and the incapability to confirm or plan for the attendance of guests located outside of Canada;
- Our client's attempt to mitigate the risk of non-performance prior to utilizing the force majeure clause, such as attempts to negotiate a postponement of the event and a reduction in expenses; and,
- Adherence to the written notice requirement governing the force majeure provision.

Key takeaways

- Ultimately, one must always keep in mind that while Covid-19 may qualify as a force majeure event within the meaning of a given provision, the party wishing to invoke it must demonstrate that they are physically prevented from continuing to perform their obligations due to illegality, impossibility or impracticality.
- Inclusion of language such as "disease," "pandemic," or "epidemic" within the provision itself will yield positive results for a party wishing to terminate a contract and receive a return of deposits paid. Likewise, contract drafting going forward is expected to involve negotiation concerning the inclusion of similar language to protect a contracting party from an unforeseen circumstance of the like in the future.

Julian Doyle is a partner in the firm's business acquisitions and dispositions and securities and corporate governance groups. He has built his practice by advising clients on a broad range of corporate/commercial legal issues by thinking outside the box to solve specific client challenges. Clients select Julian for his responsiveness, cost-effective counsel and creativity.

For inquiries regarding contract drafting and negotiation, as well as contractual disputes, please contact our Corporate Law or Commercial Litigation groups.