Your Event is Cancelled Because of COVID-19: Breach of Contract or Excused Performance?

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SXSW, Coachella, the NCAA Tournament, Rock 'n Roll Hall of Fame Inductions, St. Patrick's Day parades, The Masters, the NFL Draft, the Houston Rodeo, Record Store Day, and the closing of clubs and concert halls from New York to California - the list of cancellations and postponements from the COVID-19 pandemic seems to grow by the hour. In light of global trends, the sports and entertainment industries face an unsettling reality: events and mass gatherings of people must be drastically limited, postponed or cancelled until the virus is contained. At a moment when voluntary "social distancing" is necessary to quell the rapid spread of the virus, industry professionals have taken the initiative by suspending or cancelling events and activities months in advance in an effort to protect event attendees, participants, staffers, and vendors that would otherwise be subject to the risk of exposure. In view of such cancellations and postponements, compelling legal questions arise with respect to the contracts related to these events. First and foremost, is unilateral avoidance or delay of performance allowed or is that party subject to damages for breach of contract? The unsatisfying answer is: it depends on the terms of the contract and surrounding facts. Second, is insurance available due to suspension or cancellation, for business interruption damages, or for such breaches?

Force Majeure

Many contracts include a concept known as *force majeure* ("superior force") or "Act of God," which is invoked to justify a party's suspension or cancellation of performance under the contract. While no business could have anticipated the realities of COVID-19, the application of such a clause in any given situation is dependent on the specific contract language, local law, and whether there is a causal connection between facts at hand (the COVID-19 pandemic) and the party's inability to meet its contractual obligations. Black's Law Dictionary explains that a *force majeure* clause, "is meant to protect the parties in the event that a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." In practice, *force majeure* clauses allocate risk between the parties when an unanticipated event makes performance impossible or impracticable.

While state laws vary, every jurisdiction respects parties' right to contract, meaning that disputes over the application of *force majeure* clauses start with the specific language used in the contract. Some *force majeure* clauses contain a laundry list of specific events that constitute a *force majeure*, while others may employ vague catch-all language designed to capture all events that are outside of the parties' mutual control. Generally speaking, the more specific the clause, the more limited application the clause likely will have – if the actual occurrence is not on a long list of specific events, it is not likely a *force majeure*.

Importantly, most clauses specify that they are only invoked when performance becomes impossible, while some have more liberal language requiring only the hindrance or delay of performance. Historically, courts tend to interpret *force majeure* clauses very narrowly against the party seeking to excuse performance. For instance, under Georgia law, the party seeking to avoid performance is required to demonstrate both the existence of a *force majeure* event and that it reasonably attempted to fulfill its contractual obligation but was prevented by the occurrence of the event.

As it pertains to COVID-19, most *force majeure* clauses are likely to excuse performance arising since March 11, when the World Health Organization declared COVID-19 a pandemic (and with more and more restrictions being imposed by state and local governments). Indeed, many *force majeure* clauses specifically include the term, "epidemic" or "pandemic" in their laundry list of qualifying events, and even without that specific reference, COVID-19 should qualify under most *force majeure* clauses due to government imposed travel bans, business closings, and quarantine orders. Therefore, if your contract contains a *force majeure* clause and unless the clause is very narrowly defined, the clause should permit the excuse from performance and serve as a shield from any liability in connection with such failure to perform.

No Contract Clause

In the event that a contract does not contain a *force majeure* clause (or if the clause is ambiguous), parties seeking to cancel or suspend a contracted engagement may have to invoke other (and potentially more difficult) contractual defenses. For instance, a party seeking to avoid performance may invoke the doctrines of impossibility, frustration, or impracticability. Generally, under common law, these doctrines may be employed to terminate a contract when a supervening event occurs, which is (1) unexpected; (2) beyond the control of the parties; and (3) makes performance impossible, materially changes the inherent nature of a parties obligations, or the purpose of the contract is destroyed or obviated.

In the context of COVID-19, parties may reasonably raise impossibility or frustration of purpose as an excuse to non-performance; however, the success of any such argument will ultimately hinge on the specific facts and whether contracted performance is actually impossible (because of government action or acute economic difficulty) or materially different from what was contemplated by the parties. In the case of festivals and events, statewide and municipal closures and quarantine orders clearly rise to the level of impossibility, and travel bans similarly may serve as a basis for frustration of purpose. Still, it is difficult to establish a hard and fast rule that may be applied across the board. In the absence of a *force majeure* clause, a party seeking to avoid performance must carefully consider the facts at hand and the application of the fact-specific common law doctrines available to them.

Financial Fall-Out for Termination of Contract

Putting aside damages that may arise from a breach of contract, event cancellations have a significant and detrimental financial impact on the individuals and companies that work in the industry, along with the surrounding tourism and hospitality industries, their respective supply chains, and the fans and attendees that dedicate time and resources to attend the events. In the absence of contractual language addressing a cancellation, the common law concept of restitution requires that the parties be returned to their original, pre-contracting positions. In reality, this means that the parties must return any prepaid monies or deposits, while forfeiting any out-of-pocket expenses paid in reliance of the contract. In the alternative, some contracts, including those with *force majeure* clauses, may prescribe the allocation of paid and unpaid monies in the event of cancellation or suspension. For instance, many concert performance contracts provide that artists will retain any deposits paid notwithstanding the cancellation of the event for *force majeure*.

Sophisticated parties frequently carry insurance to protect against the risk of cancellation and/or similar risks, such as business interruption insurance. Upon the cancellation of an event, the payment of insurance proceeds will be contingent upon the terms of the policy itself, coupled with the nature of the event causing the cancellation and the relative response of the insured party. Peter Tempkins, a live music insurance specialist and managing partner at HUB International in Nashville, recently stated on a music business podcast[1] , that most cancellation (or non-appearance) insurance policies will only trigger if both (i) the cancellation is for reasons beyond the control of the insured party, and (ii) that reason is contemplated by the policy. To be certain, while cancellations mandated by state and municipal decree will usually excuse contractual performance among parties, whether such a cancellation will result in a payout for the insured party will still depend on the policy terms. In today's music event market, many event organizers (such as SXSW), third-party vendors, and artists do not obtain add-on communicable disease riders to their cancellation and non-appearance policies, which means they may not be able to collect any insurance proceeds despite the mandated cancellation of the event. Furthermore, according to Tempkins, if a promoter or artist *voluntarily* terminates the engagement based on subjective health and welfare concerns

1 *Inside Out with Turner and Seth*, March 12, 2020.

in the absence of a legal order (or other reason beyond their control) to do so, such cancellation is not a covered loss.

If a party conceivably has insurance that provides for some form of business interruption or other loss protection, the invocation of *force majeure* to excuse contractual performance could also impact the availability of such insurance. Accordingly, the presence of insurance needs to be factored as part of the overall problem presented by COVID-19.

While *force majeure* and excuse will generally return the contracting parties to their respective pre-contracting positions, the parties are unlikely to realize the financial benefit of the original bargain and, in most cases, will not be made whole through insurance either. With the exception of payments that are addressed specifically by contract (e.g., forfeiture of deposits or reimbursement of expenses), the parties to a cancelled engagement will be relieved of all additional performance and payment obligations. In the context of long-planned events, all parties are returned to the proverbial start - a result that is likely to be unsatisfying for all involved, if not financially ruinous.

Conclusion

The unilateral invocation of a *force majeure* clause or common law excuse to avoid performance of a contractual obligation creates a risk to the party breaking the contract. Nonetheless, when parties are focused on the safety and well-being of their employees, vendors, patrons, and the community at-large, the less tangible risks associated with breaching a contract may pale in comparison to palpable human concerns. As such, there are likely to be instances where parties preemptively choose to terminate a contract, regardless of whether a concrete basis for such termination exits. To be sure, COVID-19 presents a unique circumstance that will allow for parties to avoid contractual obligations; however, some such actions, although well-intended, will undoubtedly fall short of valid legal sanction, while others are certain to result in substantial financial losses. The unpleasant reality is that after the dust settles and the dangers of the COVID-19 pandemic (hopefully) have subsided, courts will be dealing with the legal fallout from the related event cancellations for years to come.

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