COVID-19 IMPACT ON CONTRACTUAL RELATIONSHIPS UNDER NEVADA LAW

by Michael N. Feder and Brooks T. Westergard

Businesses around the world are currently experiencing issues in dealing with our collective effort to "flatten the curve" with respect to the spread of the novel coronavirus (COVID-19). In conjunction with the global effort to mitigate the spread of COVID-19, a growing majority of states, including Nevada, have issued directives instructing businesses to either suspend operations, or to institute measures to facilitate social distancing.

On March 20, 2020, Governor Sisolak ordered a mandatory shutdown of most non-essential businesses, schools, and gaming facilities until April 16, 2020. On April 1, 2020, Governor Sisolak issued a "stay at home" directive, which extended the mandatory shutdown through April 30, 2020. In addition to extending the duration of the mandatory shutdown, Governor Sisolak issued a statewide travel advisory, urging Nevadans to self-quarantine for at least 14 days after returning from out of town. Based on the Governor's Declaration of Emergency, as extended on April 1, 2020, the Nevada Gaming Control Board required all gaming devices, machines, tables, games, and any other equipment related to gaming activity, to be shut down through April 30, 2020.

Amid the mandatory shutdown and corresponding social distancing and travel restrictions, many businesses will be reviewing their contractual relationships to determine whether their obligations can be temporarily, or even permanently, excused. The following addresses some of the legal theories Nevada businesses may need to consider in the coming days, weeks and possibly months, when reviewing these contractual relationships.

THE *FORCE MAJEURE* PROVISION

A *"force majeure"* clause is a contract provision that typically relieves the parties to the contract from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.

While the Nevada Supreme Court has not specifically weighed in on what types of events constitute *force majeure*, other courts considering the applicability of *force majeure* look to whether: (1) the triggering event is expressly identified in the contract; (2) nonperformance was foreseeable; and (3) performance is truly inadvisable, commercially impracticable, illegal, or impossible.[1]

The World Health Organization's classification of COVID-19 as a "pandemic" would trigger a *force majeure* clause that expressly accounts for pandemics. It is unclear, however, how the courts will apply a *force majeure* clause that excludes, or is silent as to, pandemics, but covers mandatory governmental shutdowns and forced closures, or similar types of events akin to those ordered and issued by Governor Sisolak. The outcome may hinge on whether a court determines the governmental order itself a triggering event, or whether it was issued, and thus caused by, the pandemic.

While there may be some questions concerning applicability of a *force majeure* clause to the present COVID-19 circumstances, if a Nevada business believes the circumstances are, or may be, covered by a contractual *force majeure* clause allowing for a temporary or permanent excuse of performance under a contract, the business should immediately provide written notice to the other party as required under the contract.

OTHER OPTIONS IF A CONTRACT LACKS A *FORCE MAJEURE* CLAUSE

In the absence of, or in addition to, a *force majeure* clause, the common law doctrines of "impossibility" and "frustration of purpose" may provide a basis to excuse performance under a contract.

In Nevada, the doctrine of impossibility applies when an unforeseen event has made it impossible for one party to perform its obligations under the agreement.[2] The key questions are: (1) whether the unforeseen event rendered performance objectively impossible; and (2) whether the nonoccurrence of the unforeseen event was an underlying assumption of the agreement. If both questions can be answered in the affirmative, the impossibility doctrine may apply.

Similar to the impossibility doctrine, under Nevada law, the doctrine of frustration of purpose applies when an unforeseen event has changed the circumstances surrounding the contract. Under the doctrine of frustration of purpose, the main purpose of the contract is essentially destroyed, even though the parties could still technically perform.[3] The overarching question is whether there was an unforeseeable event that has significantly altered the agreement such that performance would no longer fulfill any aspect of its original purpose.

Akin to the *force majeure* clause, if a Nevada business believes the common law doctrines of impossibility or frustration of purpose apply, it should immediately provide written notice to the other party.

MOVING FORWARD

If a Nevada business believes that the COVID-19 pandemic or Governor Sisolak's governmental orders have resulted in its or its counterpart's inability to perform under a contract, it should assess the viability of either a written *force majeure* clause or common law principles of nonperformance excusal. Under either a *force majeure* or common law analysis, the determination of whether a party will be excused from performance is a fact-intensive inquiry that will necessarily hinge on the language of the agreement between the parties and the circumstances surrounding nonperformance.

Dickinson Wright attorneys have and will continue to support the Nevada business community. As the global pandemic continues to evolve, our team is ready and available to answer any legal questions or concerns that may arise. Please don't hesitate to reach out to us today.

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[1] See Richard A. Lord, 30 Williston on Contracts § 77:31 (4th Ed.).

[2] Cashman Equip. Co. v. W. Edna Assocs., Ltd., 132 Nev. 689, 702, 380 P.3d 844, 853 (2016); see also Restatement (Second) of Contracts § 261 (1981).

[3] Restatement (Second) of Contracts § 265 (1981); see also Max Bear Productions, Ltd. v. Riverwood Partners, LLC, 2010 WL 3743928 (D. Nev. 2010); Graham v. Kim, 111 Nev. 1039, 899 P.2d 1122 (1995) (recognizing the doctrine of "commercial frustration").

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