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Has COVID-19 nullified your business contracts?



PHOTO | FLICKR/J. STEPHEN CONN *Connecticut State Supreme Court Building in Hartford.*

By David A. Slossberg

In the midst of the Covid-19 pandemic, many businesses are struggling to understand their obligations under existing contracts.

Some have closed. Others have significantly limited operations. There is a ripple effect across industries, interrupting supply chains, the ability to proceed with property development, and the means of providing professional services.

While no one could have imagined the depth of this crisis, there are principles in contract law that may provide some relief.



PHOTO | CONTRIBUTED; *David A. Slossberg*

These include reliance on “force majeure” clauses and the doctrine of impracticability.

Force majeure literally means “superior force.” Contracts typically include such clauses to protect parties if some or all of the contract cannot be performed due to causes outside everyone’s control and unavoidable even by the exercise of due care.

While the language can vary from contract to contract, these clauses typically excuse performance based on such specific events as floods, fires, war, riots, famine, strikes, embargo – and quarantine.

Courts enforce force majeure provisions based on commonly understood legal principles. Typically, the party seeking to avoid performance bears the burden of demonstrating the existence of a force majeure event.

However, economic hardship alone often is not enough.

“Inability to perform” is not the same as “inability to perform profitably.”

If a business invokes a force majeure clause, it must do so within any time limits provided by the contract and must articulate reasons why a dispute is ripe for adjudication, should it look to the courts for a ruling.

In addition, a party seeking to avoid performance under a catchall provision or undefined term (e.g., “acts of god”) should understand that courts may require proof that the events were “unforeseeable” or “unavoidable” regardless of contractual language.

Even where the party seeking to avoid performance invokes an event that appears to be specifically listed in the force majeure clause, Connecticut courts will look to the terms of the contract as a whole to determine whether that party can be properly excused from performance.

Fortunately, with the onset of the Covid-19 pandemic, demonstrating that the current crisis was not “foreseeable” is unlikely to be a significant burden.

That said, even when an event is an extreme and unforeseeable occurrence sufficient to trigger a force majeure clause – such as a global pandemic – a litigant still must prove that the pandemic prevented or frustrated performance as stipulated in the contract.

For example, a provision requiring the triggering event to have made performance “inadvisable” may have a different outcome from one that requires proof that performance has become “impossible.”

Thus, the success of a business in invoking force majeure will vary from case to case, depending on the specific language and type of contract at issue.

Even where a contract does not contain a force majeure clause, businesses can look to the doctrine of impracticability to address the circumstances.

As the Connecticut Supreme Court recognized, the impracticability doctrine represents an exception to the accepted notion that agreements of the parties must be observed. The court recognized that certain conditions cannot be met because of unforeseen occurrences.

A party claiming that an event has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without fault of the party seeking to be excused; and, (4) the party has not assumed a greater obligation than the law imposes.

In connection with Covid-19, courts are likely to focus primarily on whether the nonoccurrence of an event caused by the pandemic was a basic assumption of the contract and whether the alleged hardship was caused in whole, or in part, by the party seeking to be excused from performance.

Again, the lack of foreseeability and the pervasive impacts of the pandemic would seem to be a given.

So, as businesses assess their contractual obligations during the duration of the Covid-19 pandemic, they should consider force majeure and impracticality in planning for recovery and in managing their relationships with business partners.

David A. Slossberg leads the business litigation practice at Hurwitz, Sagarin, Slossberg & Knuff.