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WHAT'S INSIDE

The Bahamas: COVID-19 & Contractual Force Majeure

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Arising from the emergence of COVID-19, it has become obvious that there shall be a massive impact upon virtually all subsets of commercial and consumer contracts. On 11th March, 2020, the World Health Organization (WHO) declared the virus a 'global pandemic' and to date, nearly every country has had confirmed cases. Further, most of the countries impacted have implemented some form of social distancing policy, curfew and/or quarantine. A necessary consequence of these measures has been restrictions to travel both domestically and internationally.

The Bahamas has, in some aspects more proactively than other jurisdictions, imposed its own social health protection measures leading to the closure of all businesses and institutions save for those which provide essential services. This has led to significant disruptions in business; and will continue to hinder individuals and businesses from being able to perform their contractual obligations. The categories of contracts most likely to be affected would include, but not be limited to: goods and services (in particular the tourism sector) financial contracts, supply, landlord and tenant, employment, insurance and construction contracts.

In order to lessen the impact which will arise from the measures implemented in response to the pandemic, many businesses will seek to rely upon what are known as force majeure clauses in their contracts; if they are fortunate enough to contain the same. This bulletin shall explore the issue of force majeure contractual clauses and the manner in which they are applied within The Bahamas.

The Concept of Force Majeure – What is it?

Force majeure is a doctrine with its roots in French law and is prevalent in many civil law jurisdictions. In its original civil law context, where force majeure is applicable, it may relieve a party of its performance under a contract where there are certain events which have arisen beyond that party's control. The events also must not have been reasonably foreseen at the time that the contract was concluded. Further, to be applicable, the effects of the said event could not have been avoided by appropriate acts.

In contrast to the civil law position, there is no fundamental doctrine of force majeure at common law and parties have traditionally had to rely upon the doctrine of frustration in circumstances where performance under a contract has become impossible. However, it is quite rare at common law for a contract to be held to be frustrated. The courts generally, save for instances that require certain public policy considerations, find that parties should draft the terms of their contract with the knowledge that circumstances may change and plan accordingly. The trend has developed, therefore, in common law jurisdictions for parties to include express force majeure clauses in contracts thereby setting out the circumstances which would relieve them of obligations.

As a common law based jurisdiction, the laws of The Bahamas fall in line with the principles related to applicability of force majeure and the need for an express contractual provision. As such, parties who wish to rely upon the doctrine of force majeure can only do so if it is expressly stated in their contract; otherwise, such a party would have to satisfy the high burden of proving that the contract has become frustrated. Where parties include a force majeure clause in their contract, whether it has become effective will be established based upon the particular construction and interpretation of that clause and the nature of the contract.

There have been relatively few reported cases in The Bahamas which have considered the doctrine of force majeure. However, one notable case from within this jurisdiction is Millennium Telecommunications Limited (MILETEL) v Bahamas Telecommunications Company Ltd [2017] 1 BHS J. No. 88. In that case, the Supreme Court accepted a definition of force majeure clauses as, essentially, clauses which suspend or extend performance of a contract upon the happening of a specified event beyond the control of the party. In that case the Plaintiff sought to rely upon a force majeure clause upon the basis that the liberalization of the telecommunications sector in The Bahamas had, essentially, rendered its performance impossible. In rejecting the claim, the Court held that the liberalization was not an event within the scope of events specified under the clause.

Force majeure clauses have become quite common in modern contracts although they may take various forms. What is important is that the clauses are drafted rather precisely and in the context of the particular relationship or transaction. Ultimately, the enforceability and applicability of such a clause is language dependent. For example, in Millennium the relevant clause provided:

"Force Majeure means in relation to either party any circumstances beyond the reasonable control of that party (including without limitation acts of God or of the public enemy earthquakes hurricanes acts of government in its sovereign capacity fire floods epidemic strikes and lock-outs)".

Unfortunately, for the plaintiff, this clause was too general in the context of the situation which eventually arose.

When does Force Majeure arise?

Generally, in order for a party to rely on an event as constituting a force majeure, that party must prove that:

The occurrence of the event was beyond his control; and

There were no reasonable steps which he could have taken to avoid or mitigate the consequences of that event.

Both of these factors must be established such that even if an uncontrollable event arises, a party may not be able to demonstrate force majeure where reasonable care was not exercised.

In considering the applicability of a force majeure clause, courts will look at the actual wording of the clause and will analyse several factors such as causation, the parties' intention,

evidence, the event, and the event's impact.

Therefore, a boiler plate force majeure clause cannot be relied upon as a panacea and courts will examine and analyse clauses on a contract-by-contract basis. The Courts have also been persuaded that a party cannot rely on a force majeure clause in order to escape responsibilities merely where events, including increased market price, make a contract 'dramatically more expensive' or more arduous to execute unless this relief was provided for in the contract.

Reliance on a Force Majeure Clause

Usually, giving proper notice of the force majeure event is a requirement expressly set out in the contract. Further, it is accepted that such notice must be made promptly to the other party. In Millennium, it was determined that the notice sent was neither prompt nor sufficiently specific.

As noted above, specificity is important in the context of force majeure clauses and to rely upon the same such clauses should:

Give precise detail as to the circumstances which constitute a force majeure event,

Specify notice procedures,

Set out a specific framework for the relief and remedies that the parties may pursue in the event that the clause is triggered. For example, extension, termination, reduced rates, and suspension;

Consider the domino effect that a force majeure event once pronounced would have on other contracts along with analyzing the risks involved with relying on force majeure such as the reputational, logistical and financial risks; and

Reliance on a force majeure clause also generally requires a party to take steps to mitigate and that party will need to show that, in the circumstances, reasonable steps were taken to avoid the event or lessen the impact. Therefore, mitigation obligations should be established.

Conclusion

The rights and obligations of parties to a contract which is governed by Bahamian law will be determined by the close reading and interpretation of the provisions within those contracts. Subject to the precise terms of a given contract, the outbreak of the current pandemic may qualify as a force majeure event giving rise to impacts on many aspects of commercial practice and serious risks to health and safety.

In these circumstances, individuals and business alike should examine their various commercial contracts to ascertain whether: (i) it contains a force majeure clause; and (ii) if so, whether it is applicable to the present circumstances. In the absence of legislation being passed, to force relief to be provided to parties to a contract in unfair circumstances; a force majeure clause is a good measure to attempt circumvention of uncontrollable risks. However, as stated, the effectiveness of a force majeure clause in a given contract is dependent upon, inter alia, its language. In the absence of a force majeure clause, or an effective force majeure clause, a party may be left to rely upon the general principle of frustration and the traditionally strenuous burden which arises in that context.

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Practical Considerations for Directors Duties in the face of COVID-19

Tara Cooper Burnside and Rhyan Elliott

The COVID-19 pandemic is an unprecedented world health crisis which has undoubtedly caused significant disruption to the growth, function and stability of the global economy. As a result, many corporations have experienced and will continue to experience a significant reduction in their commercial activity in the near term.

This reduction in commercial activity is, in many instances, owing in large part to the promulgation of emergency 'stay in place' orders across many jurisdictions, the effect of which is to restrict the free movement of people and the opening of non-essential businesses to the general public in an effort to minimize the spread of COVID-19.

On 17 March 2020, the Governor-General of The Bahamas issued a Proclamation of Emergency and subsequently, Parliament enacted the Emergency Powers (COVID 19) Regulations, 2020. The Prime Minister has since issued numerous emergency executive Orders to, inter alia, impose a 24 hour curfew, restrict the movement of people into and within The Bahamas and the operation of non-essential businesses, and to enforce strict social distancing protocols.

In turn, many businesses have experienced sharply decreased sales and, ultimately, a significant decrease in their cash-flow and operating revenue. This 'perfect storm' has, by and large, paralysed many sectors of the Bahamian economy and has no doubt come as an unexpected challenge to many companies and their directors. Moreover, the effects of the COVID-19 pandemic threaten global economic stability and, increasingly, many companies find themselves in financial difficulty and, unsurprisingly, at risk of insolvency.

Under Bahamian corporate law, company directors owe statutory and fiduciary duties to act honestly and in good faith with a view to the best interests of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. As a matter of general principle, these duties are owed to the company and the company alone. However, exceptionally, where the solvency of the company is questionable, these duties are extended and directors must have primary regard to the interests of the company's creditors, as a whole, and must act honestly and in good faith, with a view to minimising any loss to those creditors.

In practical terms, directors should not permit or cause the company to enter into transactions with a view to preferring one creditor (or class of creditors) of the company over other creditors (or class of creditors) or with a view to avoiding an obligation that may be owed to a creditor. Further, where the directors know or ought to know that there is no

reasonable prospect that the company will avoid insolvency, the directors must take every reasonable step to minimise the creditors' loss. A director's breach of these duties may result in personal liability for misfeasance, effecting a fraudulent disposition and/or in the latter case, wrongful trading.

In several jurisdictions, including the United Kingdom, Singapore and Australia, government and regulatory policies have been revised and, in some cases, legislative measures have been implemented to provide temporary 'safe harbour' relief to company directors, who otherwise may be exposed to liability for wrongful trading in light of the current COVID-19 crisis. For instance, in the UK the government has retrospectively suspended the offence of wrongful trading from 1 March 2020 and has announced proposals to suspend certain insolvency procedures to facilitate the rescue and recovery of insolvent companies.

To date, however, no such measures have been adopted in The Bahamas to temporarily suspend or relax the corporate duties owed by directors.

In the circumstances, it is important that directors of Bahamian companies are aware of the statutory duties which they owe to the company, as outlined above, in the event that the company experiences financial and other difficulties that may potentially lead to an insolvency.

A list of practical recommendations to assist directors in the exercise of their duties during these challenging and uncertain times is set forth below.

Understand the regulatory environment – directors should review and understand the various Government Proclamations and Emergency Orders and their impact on the company's business. Where the company provides essential services and is permitted to remain open, directors should seek advice regarding the obligations of the company to its employees from a health and safety perspective. Where the company is required to close its doors, directors should seek advice if temporary layoffs and / or redundancies are contemplated.

Review and understand the company's contractual and debt obligations – directors should review existing contracts to establish the company's rights and obligations and whether it may suspend or avoid contractual obligations if this is desired. Additionally, a review of the company's lending agreements should be reviewed to ascertain whether there is a risk that the company may breach its financial covenants. Where appropriate, forbearance or loan restructure arrangements should be pursued.

Communicate and/or meet more often – directors should communicate regularly with management to obtain up-to-date information on the operations of the company and closely monitor and manage the company's financial position. In the event the company is in financial difficulties, the full board should convene often to assess the company's financial health and consider appropriate measures that may be taken. When communicating by email on matters which may be sensitive, directors should bear in mind that such communications will be discoverable in the event of litigation.

Keep proper records – directors should be sure to meticulously record meetings of the board and all decisions taken by directors, and the reasons for those decisions, All decisions should take into account current data, including cash flow projections and trading forecasts and where appropriate, legal and financial advice.

Higgs & Johnson has a robust team of attorneys working with clients across the globe to consider and address issues arising as a result of COVID-19.

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COVID-19 & The Bahamas' Opportunity for its International Aviation Policy

Keith O. Major, Jr.

With the many negatives that covid-19 has and continues to leave in its wake, it is imperative for countries such as The Bahamas to derive as many positives from this period as possible. In the wake of covid-19, The Bahamas is presented with an opportunity to: use the current halt in global air travel as a time wherein it can re-think, clarify and/or re-direct its international aviation policy. It behooves The Bahamas, to wisely use this halt in global air travel (which perhaps is a once in our lifetime opportunity) in advance of when it resets full-on air travel to and throughout The Bahamas.

Background & Context

The rapid spread of the deadly covid-19 virus was no doubt aided to a great extent by the well-developed and highly patronized vast global air travel network pre-covid-19. According to Statista, in 2019 alone, the global airline industry recorded the boarding of over 4.5 billion scheduled passengers. As a result of a delay in ascertaining the highly communicable nature of covid-19, the virus was not immediately designated by ICAO States for the purposes of regulating effective measures for the sanitation of aircraft to limit or prevent its spread. As a result, global air travel performed as normal and unabated. In turn, in only approximately three (3) months, the vast majority of the world's nations were reporting cases of covid-19, at a speed only rivalled by and achieved from the likes of the very same jet-powered modes of modern global air travel.

In 1918, the last time that the world experienced a global pandemic of the proportions of the current covid-19 pandemic (Spanish Flu), international commercial aviation was still yet a fledgling. No more than five (5) years prior to the 1918 Spanish Flu, was the first commercial airline involved in just demoing its flight capability. After that, it would be several more decades, to the 1950s-60s, before air travel became common place and therefrom steadily make increases and become more common place year on year. As such, it is important to note the novelty of the covid-19 induced global aviation shutdown which was brought about by States imposing travel bans along with airspace and border closures for public health and safety reasons. This remarkable shutdown which brought global air travel to a grinding halt, was evidenced by airport closures, cancellation of flights, and huge airline furloughs to an extent never before witnessed in the airline industry. On the 10th March 2020 the International Civil Aviation Organization (ICAO) and the World Health Organization (WHO) published a joint statement regarding the covid -19 outbreak outlining updated advice regarding the virus and civil aviation.

Opportunities for Clarification

A country's international aviation policy is, by nature, shaped by the

international aviation agreements (whether bilateral or multilateral) in which it enters.

Upon becoming an independent nation in 1973, specifically in the first five (5) years of doing so, one is able to deduce a clear and identifiable policy of The Bahamas at that time to re-think, clarify and/or re-direct its international aviation policy. The Bahamas achieved this by succeeding to a number of multi-lateral air law instruments, namely: 1929 Warsaw Convention, 1944 Chicago Convention, 1961 Guadalajara Convention, 1963 Tokyo Convention, 1970 Hague Convention, 1947 Convention on the Privileges and Immunities of the Specialized Agencies, and 1944 International Air Services Transit Agreement.

Since this period in its history, The Bahamas' record with its international aviation policy has not been as robust. In particular, since then, it has acceded to only two (2) multi-lateral air law instruments, namely: 1971 Montreal Convention and 1991 Convention on Plastic Explosives in 1984 and 2008 respectively. Although, the Bahamas became a signatory to the 1999 Montreal Convention on the 28th May 1999 it has refrained for more than twenty (20) years from ratifying the same, which remains without force in The Bahamas.

The 1999 Montreal Convention is an international air law treaty concerned with passenger claims. As this treaty is not limited to affording rights and obligations to only state actors or entities with international legal personality, it is required to have domestic effect to be enforceable for such purposes. As The Bahamas is a dualist and not monist State, an international treaty does not acquire domestic effect upon its signature alone, but rather requires approval and incorporation through domestic legislation by its Parliament.

Additionally, for some time, various proponents have encouraged The Bahamas to implement an international aircraft registry so as to enable the Bahamas to reap the spin-off financial services benefits. To an extent The Bahamas has also expressed an interest in this course of action, however, this too is subject to action by The Bahamas on its international aviation policy front. This is because the implementation of an international aircraft registry is effected by The Bahamas first acceding to the 2001 Cape Town Convention which relates to international interest in mobile equipment such as aircraft.

The above highlights two (2) instances with multi-lateral treaties which call for The Bahamas to re-think, clarify and re-direct its international aviation policy. While this short piece addresses multi-lateral treaties, it is important to note that there are also bi-lateral arrangements which give The Bahamas an opportunity to update its international aviation policy.

In closing, upon the backdrop of a global picture, which at present, appears dim, this author finds it helpful to lift up the illuminating words of renown novelist Margaret Drabble, "when nothing is sure, everything is possible!". In that context, though these times are surely unprecedented and fraught with uncertainty; even still it is imperative for The Bahamas to draw a precedent of re-thinking, clarifying and re-directing its international aviation policy from its earlier self to a sure end of deriving a benefit from our present circumstances.

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Recognised In Who's Who Legal

Congratulations to litigation partner, ***Tara Archer-Glasgow*** on being ranked by Who's Who Legal in the area of Asset Recovery (2020).

WWL states, Tara is described by her peers as a 'strong asset recovery lawyer' with over 20 years' experience in high value commercial litigation.

Power Women's Breakfast

"As female leaders, we need to encourage and support the movement of female entrepreneurship and ownership in a significant way", noted Joan Albury, President of The Counsellors Ltd. Albury, who has led the full service marketing agency and production company since 1985, delivered the keynote address at the 2020 Power Women's Breakfast. The event, which was a celebration of International Women's Day (IWD 2020), is part of the firm's focus on diversity and leadership that brought together female executives from financial services, law and accounting firms, oil and gas, telecommunications and the public sector, to examine how to take action for equality so as to help forge a gender equal world.

"Thankfully, we now live in a world that expects balance, and, therefore, gender is firmly on the agenda," said the firm's first female Co-Managing Partner, Surinder Deal. "I sincerely believe that hosting this breakfast is one way to celebrate women's achievement. I am delighted that we had this opportunity to come together and, not only speak of our own challenges, but also focus on how we can be the game changers and way makers for other women. While in many respects we have moved forward as women in The Bahamas, there is still much more work to be done."

Deal said Albury, a 40-year veteran in research, advertising and public relations, was a natural choice to address the gathering because she is an innovator who has been at the heart of many 'firsts' in the Bahamian business communications industry.

"Leadership has always been the criteria for speakers at our annual Bahamas Business Outlook (BBO) and, as a result, our presenters are typically male," said Albury, the innovator of the BBO conference, which, for the past 29 years, has been bringing together the country's top business people and leaders from across the economic spectrum. "However, as we are planning for our 30th BBO we are examining these criteria in an effort to promote positive visibility of women."

Identifying possible solutions with regards to the #EachforEqual theme of the IWD 2020, Albury indicated that millennials have become a significant percentage of the BBO audience. "They are heavily interested in entrepreneurship and owning their own businesses. They have demonstrated that they are the risk takers. This movement suggests to marketers that we should look at ownership and not necessarily leadership as the criteria for the selection of our presenters, which may allow for an open space to give a platform for more female presenters."

Higgs & Johnson continues to make strides in advancing more women to leadership positions, boasting of female leaders for half of its practice groups as well as with the appointment of its first female Co-Managing Partner (2020).