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## ARE CONTRACTS ENFORCEABLE DESPITE COVID-19? PART 4: FORCE MAJEURE NOTICE REQUIREMENT

As described in [last week's article](#) in this series, many businesses unable to fulfil their contractual obligations as a result of the ongoing pandemic may be looking to the *force majeure* clauses in their contracts for relief.

However, in order for a party to rely upon a *force majeure* clause, it may have to comply with strict notice obligations contained within the contract.

Notice provisions will vary from contract to contract and the language of each agreement will identify the notice requirements for a party seeking to rely upon the agreement's *force majeure* clause.

Notice provisions often lay out timelines indicating the period within which notice must be provided to the receiving party. These provisions may require the notifying party to provide notice of any delay in its obligations within a certain number of days or hours following a *force majeure* event, or where a specified time is not listed, in a "timely," "prompt" or "reasonable" manner.

Alternatively, the clause may require a minimum period of notice ahead of an event contemplated by the contract. For example, a new COVID-19-related government regulation impacting the maximum size of permitted gatherings may be a *force majeure* event under the particular language of an agreement and may start the clock on the notice period even though the event (which would involve more people than allowed by the government regulations) may be in the future.

A notice provision in an agreement may also dictate the format that such notice must be provided (in writing, for example) and/or lay out additional documentation or information that the notice-provider must include with the notice. For example, some notices may require the party to provide sufficient specificity to explain the nature of the event relied upon and why the triggering event applies to a given provision in a contract. It may be necessary to provide supporting documentation as well.

Properly providing notice may be treated as a condition precedent in order to rely upon a *force majeure* clause. In the event the party seeking to rely on the *force majeure* clause fails to provide the proper notice within the specified timeline, it may be barred from relying upon that clause for relief.

However, there is a chance that a Court may reject an unreasonably strict reliance on notice requirements. In *H & R Drilling v Aquilo Energy Inc.*,<sup>2</sup> the Court ruled against a party seeking a strict interpretation of certain *force majeure* provisions (albeit provisions unrelated to notice). In that case, a fire led to delays in the construction of a drilling rig. The party who was thus prevented from its access to the rig argued that the other party was obliged to complete construction without any delay. The Court rejected this argument. It held that the *force majeure* clause, which required resumption as soon as reasonably possible, did not require the party claiming relief thereunder to proceed imprudently. The Court determined that it was reasonable to seek evaluations of the equipment and ensure that insurance coverage remained intact before proceeding, disagreeing with the Defendant's argument. While the Court did not specifically touch on the application of notice provisions, this case could be used as an authority that a strict interpretation of timing requirements is not always required, especially when such an interpretation would be unreasonable.

In fact, in *Wisconsin Elec. Power Co. v Union Pacific R.Co.*,<sup>3</sup> the Court rejected the claim that a two-month delay in providing notice should disentitle the defendant from *force majeure* relief. On the facts of the case, it was clear that the plaintiff had suffered no damages from the delay (in fact, it had benefitted) and that there was no doubt surrounding the event of *force majeure* (thus no investigation was impeded by the delay).

Therefore, an insistence on notice as a strict formality could likewise be rejected if such an imposition is unreasonable and there is no prejudice to the other party.

Nonetheless, it is worth noting that conditions where a Court will relax notice requirements are unlikely to be common. Overall, Courts typically will uphold obligatory language requiring notice and hold parties to their contractual obligations.

JSS Barristers has acted for counsel on many *force majeure* disputes. We are available to advise you on your options related to *force majeure* clauses and notice requirements in light of COVID-19 and taking into account the unique elements of your agreement.

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<sup>1</sup> *World Land Ltd v Daon Development Corporation*(1981), 20 Alta LR (2d) 33, [1982] 4 WWR 577 (ABQB) at para 47.

<sup>2</sup> (2000), 265 AR 141 (ABQB).

<sup>3</sup> 557 F 3d 504 (NY Cir Ct App 2009).