

Expect the Unexpected: Coronavirus Cancels Esports and Gaming Events, Almost

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Steve and Nick discuss contractual considerations facing many esports and video game companies canceling scheduled events due to the COVID-19 pandemic. They explain the importance of force majeure clauses in contracts, common-law defenses, and how some companies have shifted to offering digital events.

Transcript:

Steve Blickensderfer: Hello and welcome to another episode of the LAN Party Lawyers podcast. My name is Steve Blickensderfer and I am joined by my colleague and cohost Nick Brown. If you are one of our regular listeners, welcome back. For our new listeners on this podcast, we tackle issues at the intersection of video games, law, and business through debate, discussion, and interviews. We try to focus on legal issues in particular and offer our takeaways and our thoughts, but remember nothing we say is legal advice.

Today we are going to be focusing on an event that is affecting everyone's lives all across the world and that is the coronavirus and its effect on events, digital events, live events, and events in the gaming space in particular. So Nick, I know we are not actually in the same room this time. We are at least 6 feet away rest assured but we are hunkered down under quarantine both of us, trying to be safe and practice good social distancing. But there is a lot of crazy stuff happening and Nick why don't you just give us a little bit background as to what that is.

Nick Brown: Sure. So unless you have been living under a rock for the past few weeks or months you have probably noticed that there is some crazy stuff happening that is affecting everybody's lives. Various governments are issuing certain lockdown orders and a bunch of people and event coordinators are taking it upon themselves to try to prevent some public health problems and they are cancelling events, events that other people have assumed would go on no matter what. Events like E3 has been cancelled this year, GDC has been cancelled this year

Steve Blickensderfer: That's a game development conference.

Nick Brown: Right. And then, even outside the video game and esports sphere, we are seeing almost everything else get cancelled too. The NBA season has been cancelled, the NCAA has been cancelled, a bunch of sporting events, concerts.

Steve Blickensderfer: NHL.

Nick Brown: NHL, I don't know what else; by the time you listen to this, there will probably even be more things that have

been cancelled since the date of this recording. And so, it is safe to assume that everyone including you will experience significant effects of this global pandemic that we are experiencing. We may be dealing with it for weeks or months, or in some respects even years. And so, Steve and I thought it would make a lot of sense to discuss some basic contractual concerns that are implicated by these events because as you might expect, and certainly as we would hope, every one of these events probably involve at least one contract probably many, many more contracts, and so the question becomes what do the parties have to do? What are their rights and obligations if something like this comes along and yanks the rug out from under everybody's feet?

Steve Blickensderfer: Right, I agree with you Nick, hope there is a contract in place that governs the event, and usually what you have in these contracts is a term that often times even before the coronavirus people kind of often overlooked and that is an act of God or force majeure provision. Those are typically found in contracts and basically what that does is it says in the event of these acts of God or force majeure events the parties' obligations on the that contract will cease. You don't have to continue to act on the contract if one of these events takes place. And so, what does a force majeure mean and just looking at the dictionary it means a superior or irresistible force. Fancy French term for basically something that is beyond anyone's control. And you can imagine Nick, that force majeure, what is a force majeure could mean a lot of things, or it could mean a few things depending on how you look at it. So, often times in these contracts in these force majeure provisions to the extent that they exists you have specific examples of force majeure events; war, famine, maybe big union strikes or something. Labor shortages, extreme weather, hurricanes or something. And you will oftentimes also see epidemics. Maybe you would see a pandemic which is kind of what we are facing with the coronavirus. But, these provisions are also kind of stuck in the contracts often without much thought because how often do these events take place especially in more stable countries such as the United States.

Nick Brown: Right, these are the type of provisions that nonlawyers usually laugh at because they think lawyers are overly cautious for coming up with all these different contingencies. Although these are provisions that have been in contracts for many, many years and they are usually never raised, right now they are becoming pretty relevant.

Steve Blickensderfer: Yeah, so we would just kind of wanted to go over what force majeure means and if you didn't have one of those in your contracts does that mean you are out of luck, or kind of what are the thought process, what's the thought process that these companies are going through as they are having to cancel events or reschedule events. And so just an important first point when discussing force majeure is that this term is not a common law or it is not something that exists outside of the contract automatically. You actually have to have included it in your contract in order for you to be able to take advantage or you will seek it as a defense of you know there is an epidemic going on, or pandemic going on and so we are not going to be able to move forward with the event and I don't have to pay you or send people and open myself up to lawsuit because of this pandemic. And so, you have to actually have it, it has to be specifically addressed in the contract. Otherwise there is no force majeure that you can rely on so you have to check the contract and you also have to check the definitions in the contract because again as I said before it can mean a lot of things. And so, one of the things tying it back to the coronavirus that we were often called to do was check to see, (a) is there a contract, does the contract contain a force majeure provision and (b) what does that force majeure provision say? What does it include in the examples or definitions of force majeure?

Nick Brown: Right.

Steve Blickensderfer: Some of them are better than others but as you said Nick, its often wasn't thought about as something that was important before a couple weeks ago, and it is very, very important and some companies are being even thoughtful of revisiting and revising their contracts to more expressly state what a force majeure event is. But, all hope is not lost if there is no force majeure provision in a contract. And Nick I think you are going to talk about some of those common law defenses that are otherwise available in the event there is no force majeure provision in the contract.

Nick Brown: Sure. So one thing to keep in mind is that these rules change depending on what jurisdiction you are in. So, Steve and I are going to go over some general rules, but none of this may apply in your jurisdiction; you need to determine what your jurisdiction's particular rules are. That said, for educational purposes we will walk you through some of the majority rules and some of the general rules and how these things work in most places. So one of the defenses is the common law defense for nonperformance meaning that, whether it is in your contract or not, you may be able to raise it in court as a reason why you didn't do what you said you would do under the contract. One of them--and these kind of go together--is the notion of impossibility and impracticability. So what does that mean, basically that means where, after you make the contract, a parties' ability to do what they said they would do under the contract becomes impossible. It becomes impracticable and it was a basic assumption on which the contract was originally made that that person would be able to do the thing.

So what does that mean? Keeping with the current example coronavirus, well if you had a contract to let's say put on a concert this week and you are unable to put on that concert either because the government has said that you cannot put on concerts because there are too many people or because let's say your road crew has become incapacitated by this virus that might be something that could render your performance you are putting on the concert impossible or impracticable. These generally include three types of impossibility and impracticability. One of them is called an act of God, we have all heard this term; what does it mean? It is some sort of overwhelming, unpreventable event caused exclusively by the forces of nature. We usually see this with an earthquake, or hurricane in Florida, tornados in other parts of the country; those are your typical, prototypical examples of acts of God. But there are other types of impossibility and impracticability too. Another one of them

is whether the act that you have contracted to do becomes illegal. One great example of that is if you scheduled, to keep with the same example, to put on a concert many, many months ago and this is the week of the concert and now the government has said no gatherings of people over 50. Well then even though you could have put on this concert, it would be illegal to do so now because of the intervening government action. And so that may qualify as impossibility and impracticability that would excuse you from performance of the contract. And then the third common type of impossibility or impracticability is when something just becomes absolutely impossible to perform. Where there is no amount of money or elbow grease that can come together to allow you to do what you said. An extreme example would be you know I agreed to host something at this hotel and then the hotel actually fell over because of something that is no fault of my own. It's impossible for me at that point to host an event at the hotel. So those are the types of things that somebody might be able to raise to prevent being held liable for being unable to perform under that contract.

Steve Blickensderfer: I was going to chime in here Nick and just to say, I mean before I mentioned force majeure is not something that exists in the common law but you can see how this sounds a lot like what you would otherwise be thinking about when you think of a force majeure contract provision. It's just there are certain elements depending on your jurisdiction that you need to meet in order to basically take advantage of that defense into the common law that impossibility or impracticability defense. You know it is often times a lot easier to know what is expected of you if you have written it out in a contract and have a force majeure provision but that is just the difference. One is in a contract and the other one exists in the absence of a contract provision there is still this possible defense that exists.

Nick Brown: Beware because something doesn't become impossible or impracticable in a context that we are talking about here just because it is bad for you. Keep in mind it has to be unexpected and not reasonably foreseeable. So if you get a flat tire on your way to the event that probably doesn't count. That probably counts as something that you could have predicted and brought a spare with you. It needs to be something more than that most of the time and you know a global pandemic may suffice. The other one we wanted to mention is frustration of purpose which is a little more abstract but it gets to the same point which is where after the contract is made your whole purpose for entering into the contract has been frustrated without fault by you by the occurrence of this event that nobody could have predicted but which everyone assumed would never happen. So this has a couple of extra elements but it gets to the same point which is an event occurred which made it basically made it unreasonable. Your whole purpose for entering into the contract, right. So it has to be a total frustration to the point where the contract has no value and both sides must have had this same purpose. So it is not going to be enough when you go to sell someone your widgets and all of a sudden the widgets are defective. Because your purposes are different. One party there wanted to sell the widgets one party wanted to buy the widgets. And so only one party's purpose has been frustrated under that circumstance and so the party delivering the defective widgets probably can't claim frustration of purpose.

Steve Blickensderfer: Probably.

Nick Brown: Probably!

Steve Blickensderfer: Yeah, it's harder to argue that one versus again go to the contract that says this is a qualifying event and so because that happened we already agreed that that is going to excuse everyone's performance. That is the difference between having a contract with a force majeure provision or relying on these common law defenses like frustration of purpose and impossibility. Sorry, I just had to jump in there again.

Nick Brown: No, it is a great point because there is a lot less certainty when you are relying on common law provisions. If you could have included something in your contract that deals with this specific event, almost always both parties are going to be better off because you will have added certainty over just relying on the gap-filling function of certain common law provisions.

Steve Blickensderfer: Right.

Nick Brown: So what are we seeing in response to this? Companies are understandably scrambling. Companies, event coordinators, and contract creators are all scrambling to try to figure out how to deal with this. Steve you want to tell us a little bit about that?

Steve Blickensderfer: Sure, as you mentioned Nick a lot of events are being cancelled. And so, 2019 was the year of: is esports a sport? That was what is trending on Twitter and what everybody says you know is the debate or isn't really the question to be asked. This year who cares, because now it is the only sport and the only game in town.

Nick Brown: That's right.

Steve Blickensderfer: For all intents in purposes

Nick Brown: It's esports' time to shine.

Steve Blickensderfer: Right so you actually have sports athletes who are playing esports. NASCAR drivers who are driving on line games. NHL hockey players playing on line and basketball players...

Nick Brown: Yeah and so NBA players are finishing their season in 2K which is amazing.

Steve Blickensderfer: ...yeah, it's awesome. And it just goes to show you the potential that esports has to fill just a void that we all have right now. And so what we initially saw at the beginning when all the events were being cancelled is that

actually esports was very much cancelled too. The live events in particular, because the live events is very much a core component of the top esports leagues in particular or even if you go to the fighting games going live it's a lot of fun to see everybody gather together but that could not happen now so they had to kind of cancel those events that were already planned and just go completely digital. And so, that is what we are seeing with these esports events and also the events and the game space kind of go to these virtual events and these digital offerings. And so it is exciting. It helps to satisfy our obligations right now as we are all under these quarantines to not be in a certain range with one another and we can still enjoy the content. We can still hear the commentators even though they are probably in their own houses, right, but we are still delivering these awesome events and so that is what we are seeing. It might not be as amazing as we want it to be but it is still nice to see esports being able to fill a void that we all have as a result of what is going on.

Nick Brown: Yeah, and it showcases one of the real strengths of esports which is, there is always benefit to being there in person for sure--I am not going to discount that--but one great thing about esports is that you can get a lot of the experience from just by watching it online. So that's one thing that make esports a little bit different than traditional sports where the gulf between watching on line and going in person is probably a little bit bigger. Esports having been designed to be watched on a screen and enjoyed that way from the ground up; this is really esports' time to shine so it may be a little bit inconvenient on the front end that these events are getting cancelled and we can't go do the fun things we were looking forward to doing. Ultimately this is going to result in esports making leaps and bounds in terms of advancements in the popular zeitgeist and have the added benefit of maybe saving people's lives. Which certainly we can't complain about.

Steve Blickensderfer: Could infringe a benefit right there. So some take a ways if you find yourself either you are concerned about an event that is coming up that you are either hosting or participating in whether as a vendor or someone just supplying labor or even just merchandise. What can you do, start with your contract. Hopefully you have one. If you don't then you probably should call a lawyer first. But hopefully you have a contract, review it, review it with the assistance of counsel and see if you have the necessary protections in place or provisions in the event of a force majeure. And remember the biggest take away of all is the force majeure is not Nick's cologne; it is a well-defined area of law.

Nick Brown: Speak for yourself [*laugh*]

Steve Blickensderfer: You can define in the contract to mean these events like this pandemic that has been happening with the coronavirus. Other things you can do in the event that (a) you got a contract, (b) it does or doesn't have this provision in it you can always talk to the other side or to the business partner that you are dealing with who is handling an event.

Nick Brown: Yes, reach out and give them some notice. Let them know what you are thinking, let them know what your thought process is and see if you can come to some sort of agreement about how to deal with this that will avoid the need for costly litigation.

Steve Blickensderfer: Right, and then also think about force majeure going forward, right. Revisit your contracts for your events with the thought in mind well, this totally just happened this year, next year I want to make sure I am prepared and I am not going to make force majeure an afterthought or give it the little thought that it has been given for so many years for so many folks because it has never been triggered before. Or very few times has it ever been triggered. So giving it some thought. Kicking the tires on the definition making sure you are satisfied with it. And also thinking about going digital. Maybe that should be written in the contract have you considered if a force majeure is triggered maybe if it is in a certain period of time and there is some money and time invested into the event maybe there is a requirement that the parties actually contractually must consider a digital event first before they just straight up walk away from the contract and don't do the event. I have seen that with some events going forward especially in this space because it lends itself to digital events and if you are in the events space consider writing it and crafting it into your contract. I think it is a good idea.

Nick Brown: One of the things, I am going to look into my crystal ball here as Steve likes to encourage us to do, and I am going to go out on a limb and say I think something we are going to see a lot of focus on in the next few years as people deal with the fallout from the cancellation of events due to this pandemic I think a lot of it is going to focus on the issue of foreseeability because every contract incorporates the notion of foreseeability into it. Like we were talking about force majeure if something so unforeseeable occurs that comes and blows your contract away the law may recognize some remedy or some relaxing of your obligations thereunder. But if it was foreseeable--or if the other side can convince the judge or the court that it was foreseeable--well you are going to have an entirely different problem to deal with and keep in mind what is foreseeable changes over time. Was this pandemic foreseeable when it started making news back in October and November of last year, 2019? Or was it foreseeable back in January when it started to make its way over to the United States. Or are these cancellations only foreseeable now that the spread of the disease has exploded and other people are cancelling events. What if you scheduled an event today to take place a couple months from now, would it be foreseeable if the coronavirus situation ends up cancelling that too? All of these issues, what is foreseeable depends on the available evidence at the time and what somebody can convince was available evidence looking in hindsight, so keep in mind the concept of foreseeability. I think we all are going to see that come up a lot and as you look at your own contracts and rewriting them or perhaps entering into new agreements keep in mind what somebody might determine to be foreseeable as of the day that you enter into them because that may have an enormous impact on your ability to deal with these things as they arise.

Steve Blickensderfer: Well said. Well that wraps it up for this episode of the LAN Party Lawyers podcast. Be sure to check out our other episodes from Season II and Season I. You can connect with us on Instagram; just look up LAN Party

Lawyers, Twitter, or our website LANpartylawyers.com We would love to hear your comments and opinion about topics we cover so if you have any please reach out. And so Nick unless you have got anything further.

Nick Brown: I do have one further thing: please folks be safe, practice good hygiene, wash your hands and engage in social distancing so we can try to beat this as quickly and effectively as possible and get back to our lives.

Steve Blickensderfer: There you go, thank you so much and game on!

Nick Brown: Game on!

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