



# Force majeure clauses in commercial contracts – COVID-19

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# 1) The force majeure clause

- At common law, parties are required to perform obligations agreed to under a contract with very few exceptions (impossibility and frustration discussed below)
- A force majeure clause "generally [operates] to discharge a contracting party when a supervening, sometimes supernatural event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill"– *Atlantic Paper Stock Ltd. v. St. Anne Nackawic Pulp and Paper Company Limited* [1976] 1 SCR 580, at para 4)

## 2) Specific contractual language

- Force majeure is not available at large. Assessment must be grounded in the language of the specific force majeure clause.
- Force majeure clauses tend to be interpreted narrowly. There is a spectrum of force majeure clauses, ranging from broad and open-ended to specific and finite.
- The party claiming force majeure must show that COVID-19 falls within the meaning of the provision, show that COVID-19 has made performance of the contract impossible (even if temporarily), and that the reason they cannot perform their obligations is because of COVID-19.

## 2) Specific contractual language cont.

- Example of broad language:
- [No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("Impacted Party") [reasonable] control, including, without limitation, the following force majeure events ("Force Majeure Events"): (a) acts of God; (b) flood, fire, earthquake, tsunami or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; (g) national or regional emergency; [(h) strikes, labour stoppages or slowdowns or other industrial disturbances;] and [(i) shortage of adequate power or transportation facilities].
- Practical Law Canada, "General Contract Clauses: Force Majeure (Short Form)," (Thomson Reuters, 2020).

## 2) Specific contractual language cont.

- Also consider material adverse change/material adverse effect clauses of contract.
- Specifically enumerated events that could apply to the COVID-19 pandemic:
  - Performance hindered or delayed by the outbreak;
  - Public health emergency;
  - Quarantines;
  - Failure of upstream suppliers due to travel restrictions;

## 2) Specific contractual language cont.

- Specifically enumerated events that could apply to the COVID-19 pandemic:
  - Other events beyond the reasonable control of a party (e.g. infection on site);
  - Government order or law;
  - Actions, embargoes or blockades in effect on or after the date of this Agreement;
  - Labour stoppages or slowdowns.

## 3) Notice

- If the force majeure clause is found to cover the COVID-19 pandemic, the party seeking to rely on it will still be bound by notice requirements.
- Typically, these provisions require the party seeking to invoke the force majeure clause to state their intention to do so in writing, within a specific number of days of the event's occurrence.
- Failure to comply with the notice provision can void the party's rights under the force majeure clause.



## 4) Causation

- The party seeking to rely on the force majeure clause must show a direct causal link between COVID-19 and the party's ability to perform their contractual obligations.
- For example, pricing fluctuations or other indirect issues “caused” by COVID-19 are likely insufficient to make the performance of the contract impossible.

## 5) Mitigation

- Many force majeure clauses contain language expressing a duty to mitigate the effects of the force majeure event.
- This is separate from common law duty to mitigate damages.
- The Alberta Court of Appeal determined that the impacted party is required to mitigate the force majeure event itself and the effect of the force majeure on the counterparty. This duty to mitigate is limited to a standard of commercial reasonableness. – *Atcor Ltd. v. Continental Energy Marketing Ltd.*, 1996 CarswellAlta 642 (Alta. C.A.)

## 6) Frustration/Impossibility

- If a commercial contract does not contain a force majeure clause, the common law doctrine of frustration may apply.
- A situation where, through no fault of the parties, an unforeseen event renders performance of the contract radically different from what the parties had bargained for.
- There must be a cessation, or non-existence of a state of affairs that formed the foundation or root of the agreement.
- It is possible that government restrictions to travel and trade would trigger the doctrine of frustration in certain commercial agreements. Legislation protecting parties relying on COVID-19 may also be passed.

## 7) Jurisdiction/governing law

- The location of the parties, as well as the governing law of the contract will of course be important considerations during this time.
- Need to consider dispute resolution clauses and impact of foreign government conduct (e.g. China Council for International Trade “force majeure certificates”)
- Considerations include;
  - What is the subject matter of the contract? Is it an “essential service”?
  - Varies from jurisdiction to jurisdiction and is ever-changing.

## 8) Insurance considerations

- Most business interruption policies require direct physical damage to insured property, such as fire or flood.
- Insured parties will have to check their policies to determine whether coverage extends to non-physical events, such as the outbreak of a pandemic, infection on site, business closure mandated by government or if these non-physical events are specifically excluded.
- If a worksite is physically inaccessible due to government restrictions, a party will have to determine whether there ingress/egress coverage in place, and if so, how such coverage is worded in the policy.
- Class Action started last week against 14 insurers. Representative Plaintiff argues that COVID-19 was foreseeable.

## 9) Fluidity of the situation:

- The COVID-19 pandemic is a dynamic situation that is constantly changing and evolving. As such, any analysis of risk associated with commercial contracts must not be static.
- Local and national governments are continuing to implement and modify orders and guidelines that will have effects upon commercial life.
- In particular, keeping up to date on the changing definitions of “essential services”, as well as how shelter in place and quarantine measures are tightened or relaxed, will be essential to staying top of your client’s contractual rights and obligations.

# Helpful references:

- [https://ca.practicallaw.thomsonreuters.com/w-024-2932?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)](https://ca.practicallaw.thomsonreuters.com/w-024-2932?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))
- [https://ca.practicallaw.thomsonreuters.com/w-024-2932?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)](https://ca.practicallaw.thomsonreuters.com/w-024-2932?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))
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