

CONTRACTING ISSUES AND FORCE MAJEURE

IN THE CONTEXT OF

COVID-19

WEBINAR: WED. MARCH 25, 2020

4:00 P.M. – 5:00 P.M. EDT



LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and available rights and remedies will depend on the unique facts of each situation.
- For specific advice, please counsel with your qualified legal counsel before making any decisions or taking any action.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Follow up to date and reliable sources for your information.
- Every province and territory has its own legal regime; our focus today is on Ontario and Quebec.

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CANADIAN CASE LAW

THOMAS J. TIMMINS

MARCH, 2020



NOVEL CORONAVIRUS – COVID-19

THINK EXPONENTIALLY

- **COVID-19 recently declared a Public Health Emergency of International Concern**
- **Significant global impact, particularly on production**
- **Supply chains decimated**
- **Think exponentially –Rule of 42**

FORCE MAJEURE

- **A force majeure clause is common in contracts**
- **Protects parties from impairment caused by extraordinary events (“Acts of God”)**
 - Hurricane, flood, war, political unrest, labour disruption ...epidemic
- **Relieves parties from some or all obligations/liability if events falling within the definition of force majeure occur**

A SIMPLE EXAMPLE (DO NOT RE-USE)

Neither party shall be liable for any costs or damages due to delay or non-performance under this Agreement arising out of any cause or event beyond such party's control, including, without limitation, cessation of services hereunder or any damages resulting therefrom to the other party as a result of work stoppage, power or other mechanical failure, computer virus, natural disaster, governmental action, or communication disruption.

FORCE MAJEURE

- **Courts look to several elements when considering the applicability of a force majeure clause:**
 - **Qualification:** whether the event qualifies as force majeure under the contract
 - **Impossible Performance Standard:** whether performance is/was truly impossible
 - **Foreseeability:** whether the risk of non-performance was foreseeable and able to be mitigated
 - **Remedy:** what happens if this is a qualifying force majeure event?

CANADIAN CASE LAW

- ***Atlantic Paper Stock Ltd. v St. Anne Nackawic Pulp & Paper Co.***
 - *impossible performance standard*
- ***World Land Ltd. v Daon Development Corp.***
 - *Use of basket clause (“...or any other causes...beyond the control of..”)*
- ***Atcor Ltd. v Continental Energy Marketing Ltd.***
 - *Atcor Exception*
- ***Domtar Inc. v Univar Canada Ltd.***
 - *Re-enforces impossible performance standard / “Economic” force majeure extremely difficult to justify*
- ***CRTC “SARS decision”***
 - *Linked SARS to a force majeure event*

ASK: DOES THIS QUALIFY AS A FORCE MAJEURE EVENT UNDER YOUR CONTRACT?

- Force majeure clauses *occasionally* include terms such as “plague” “epidemic” or “pandemic” –often unclear
- Post-SARS, *some* reference “public health emergencies” and “communicable disease outbreaks”
- In general, the terms have not been fully tested by the Courts in Canada
- If disease not covered, does your clause capture **government action/restrictions/regulations** such as ‘Shelter in Place’ orders, border closures?
- Expect new case law to develop as a result of COVID-19
- Expect new clause wording to evolve –i.e. “national health emergency”, “pandemic”, “declared as such by WHO, Toronto Board of ..., Alberta..., etc.”

ASK: DID THE FORCE MAJEURE EVENT CAUSE THE FAILURE?

- Force majeure clauses are difficult to rely upon
- If a qualifying force majeure has occurred, **ask did the force majeure event cause the non-performance or delay?**
 - Did the product or part originate in an affected region?
 - Are there alternative sources -even if they are more costly?
 - Was the disruption actually due to the virus (ill workers) or was the disruption really due to choices made?
 - Do the circumstances meet the **impossible performance standard?**

TIME IS NOT YOUR FRIEND

- Given the notoriety of COVID-19, it is becoming especially important to prepare for disruptions
- **The ‘Forseeability Window’ is Closing** –i.e. it may become increasingly difficult to argue that COVID-19 disruptions were not foreseeable
- Take steps to mitigate risk/damage in advance
 - Even if these steps do not ultimately mitigate a force majeure situation, we believe they will be relevant in the Court’s analysis

TIME IS NOT YOUR FRIEND

- **Be proactive**
 - Consider whether COVID-19 will affect your ability to meet contract obligations and plan accordingly
 - How will you respond if other parties cannot meet their obligations?
 - If notice of a force majeure is given to you by another party, **respond promptly to create, clarify or correct the written record**

WHAT FM RELIEF IS AVAILABLE?

- **Third, what is the extent of the FM relief available?**
 - Does the force majeure clause specify the form or timing of relief?
 - Is this relief limited to a period of time?
 - Does the clause specify liquidated damages?
 - Are there other provisions relating to contract cancellation or damages more generally?

DOUBLE CHECK THE GOVERNING LAW

- **Remember: jurisdiction matters quite a lot**
 - The governing law of the contract in question may have significant bearing on whether force majeure is available
 - There are significant differences between Canadian, English, American, European and Chinese case law on this topic
 - We have only considered Canadian law in this presentation



FRUSTRATION AND OTHER AVENUES OF REDRESS IN COMMON LAW JURISDICTIONS

SAHIL SHOOR

MARCH 2020

NO FORCE MAJEURE CLAUSE?

OTHER RELEVANT CLAUSES FROM YOUR CONTRACT TO CONSIDER:

- Excusable Conditions/Delay Clause;
- Rights in the events of unforeseen conditions;
- Relief in circumstances outside of the parties control; and
- Does your contract provides relief if any local, regional or federal government exercises statutory powers which directly affects the execution of works.

If the contract does not have a force majeure clause, parties can still attempt to rely on other contract law defences

- In particular, Courts may still consider defences based on the foreseeability of the impairing event

NO FORCE MAJEURE CLAUSE?

DOCTRINE OF FRUSTRATION

- Where an express force majeure provision does not exist in your contract/agreement, the Canadian courts are unlikely to find an implied force majeure provision notwithstanding the occurrence of a likely force majeure event.
- Courts default treatment has been to apply the more general doctrine of frustration.
- The Doctrine of Frustration applies where, “a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract.’”
 - This statement can be broken down into three considerations.

NO FORCE MAJEURE CLAUSE?

- **DOCTRINE OF FRUSTRATION**

1. **The Situation:** Similar to how force majeure clauses trigger upon force majeure events, the doctrine of frustration is activated by a supervening event that occurs through no fault of either party.
2. **The Absence of Contractual Provision:** The lack of a contractual provision, generally referring to an express force majeure clause, is a prerequisite for the general doctrine of frustration to apply.
3. **The Radically Different Performance of Contract:** this can be interpreted as a situation which “renders the performance of the contract substantively different than the parties had bargained for”.

RESULT OF A SUCCESSFUL FRUSTRATION CLAIM

- The contract is deemed frustrated and all obligations are extinguished as of the date of the supervening event
- Many provinces have enacted provincial legislation to administer the outcomes of contracts found to be frustrated. For example:
 - Ontario's *Frustrated Contracts Act* applies to any contract that is governed by the law of Ontario and that has become frustrated and consequently discharged.
 - It prescribes the amounts paid or benefits conferred prior to discharge are recoverable. Additionally, it allows the severance of frustrated obligations of a contract if the remainder was substantially performed prior to discharge.



AVENUES OF REDRESS IN QUEBEC

GUY POITRAS
MARCH 2020

THE ORIGIN OF FORCE MAJEURE UNDER QUÉBEC LAW

- **There are two sources of force majeure in Quebec: the Civil Code and contract.**
- **Unlike Common Law provinces, force majeure is implicitly incorporated into all contracts concluded under Quebec law as per the Civil Code.**
- **A contracting party in Québec may invoke this form of impossibility of performing the obligation even in the absence of a clause providing for it in a contract.**
- **The main differences between “legal” force majeure and “contractual” force majeure are:**
 - the elements to be proven in order to be exempted from liability;
 - situations that may constitute a force majeure.

NO CLAUSE: WHAT DO I HAVE TO PROVE?

- **In the absence of a force majeure clause, the Civil Code requires proof of the following:**
 - The event has to be irresistible, exterior and unpredictable;
 - The event has to make the performance of the obligation by the debtor absolutely impossible.

CONTRACTUAL FORCE MAJEURE

- **In the presence of a clause to this effect in the contract, the party invoking it must demonstrate:**
 - The clause was not imposed unilaterally to the other contracting party or the clause was negotiated between the parties;
 - The event must correspond to the definition of force majeure as provided for in the contract.
- **The advantages of including a force majeure clause in a contract are:**
 - the burden of proof is less rigorous;
 - its effect on liability can be predetermined in the contract;
 - the scope of force majeure can be broaden.

QUESTIONS?



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