

Goodmans^{LLP} Update

COVID-19 and Contractual Implications: Force Majeure Clauses

This is part of a series of Goodmans Updates on COVID-19 and its potential ramifications on contract law issues, specifically focusing on what are known as “force majeure clauses”. Further to our March 16, 2020 Update, *COVID-19 and Force Majeure on Construction Projects*, this update explores Force Majeure in relation to contractual obligations faced by other industries. Subsequent Updates will provide a summary of other important considerations, such as frustration, impossibility and repudiation.

The outbreak of COVID-19 (commonly known as the Coronavirus) has impacted various industries at a global level. With the World Health Organization’s official declaration of the illness as a pandemic, it seems likely COVID-19 will continue to have widespread and profound economic impact on numerous businesses around the world.

Notably, this crisis has presented challenges in performing existing contractual obligations for companies in a variety of sectors. Understandably, for example, companies may lack the employees necessary to manufacture goods to be supplied under agreement to third parties. Others may lack the ability to benefit from obligations covenanted for. These are but a few of a myriad of possibilities.

What is a Force Majeure Clause?

A force majeure clause is a provision in a contract that justifies a party’s non-performance of its contractual obligations as a result of an event beyond the parties’ control. Some of the common events identified in a force majeure clause include acts of God, war, terrorism, riot, natural disaster, and disease. In general, force majeure clauses permit the affected party to suspend, defer, or terminate the contract without liability.

To avoid ambiguity, contracting parties may specify the events or circumstances that will excuse performance of obligations. This approach enables the parties to allocate risks inherent in force majeure events and typically leaves little room for a court’s inquiry into the event’s foreseeability. In other cases, the clause may provide for an open list of circumstances that do not limit the definition of force majeure events. Such clauses will commonly use the phrases “including”, “including, without limitation,” or “other similar events.”

A force majeure clause is typically enforceable only to the extent it is included in the relevant contract. In Canada, most contracts include one. A typical example is:

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, if such failure or delay results from acts beyond the affected party's reasonable control, including without limitation, acts of God, flood, fire, war, invasion, terrorist threats or acts, riot or other civil unrest; government order or law, action by any governmental authority, strikes, labour stoppages or other industrial disturbances.

This common example of a force majeure provision does not specifically delineate or provide for virological events such as COVID-19. It is unlikely most contracts do.

Authors

This Update has been prepared by Goodmans Litigation Group.

Does COVID-19 Constitute a Force Majeure Event?

The question of whether the outbreak and spread of COVID-19 constitutes a force majeure event, is a matter of interpretation that depends on the contract language and the facts of the case. If a clause clearly stipulates events such as epidemics or pandemics, it may be easier for the party seeking relief to establish that COVID-19 falls within the ambit of the force majeure clause.

Although there are a few cases from the United Kingdom that consider a flu pandemic in connection with force majeure clauses,¹ there is no Canadian judicial decision that interprets these clauses in the context of outbreaks, illness, or pandemics.

If an epidemic or other similar event is not specifically covered in the wording of the clause, a party may still claim force majeure under another type of event. For example:

- work stoppages or shortages;
- actions taken by a government or public authority;
- compliance with law or governmental order, regulation, or direction; or
- other circumstances outside the [reasonable] control of the contracting parties.

In all cases, it is important to establish causation between the event and a party's obligations under the contract. The circumstances must be beyond a party's control and cannot have been foreseeable so as to have been avoidable with reasonable steps. Courts will be reluctant to recognize COVID-19 as a force majeure event where a contract is simply more difficult or expensive to perform.

In some countries, government agencies may issue certificates to businesses to reduce disputes and liability for non-performance of contracts. In China, companies can apply for "force majeure certificates" from the China Council for The Promotion of International Trade (CCPIT) that may be useful in demonstrating a force majeure event in court.

Other Considerations

Force majeure clauses commonly include a requirement for the affected party to notify the other party and demonstrate efforts taken to mitigate the impact of the event. For instance, while the phrase "act of God" is a common insertion in force majeure clauses, it excludes circumstances that may be avoided by a party taking reasonable and prudent steps.

Conclusion

The determination of whether a contracting party should invoke the force majeure clause will depend on the facts and circumstances of the case. Often, it will require careful consideration of the specific contract and a detailed review by a lawyer. The party seeking relief should also consider the business consequences of such a claim since the termination of a contract may inadvertently trigger rights and obligations contained in other agreements.

The team at Goodmans LLP is available to review any operative contracts or arrangements that your organization may be operating under and can assist in any issue that has arisen or that you anticipate will arise. Please contact any member of our [Litigation Group](#).

This Update has been prepared by [Jerry Topolski](#) and [Clara Ryu](#) on behalf of the [Goodmans Litigation Group](#).

¹ See, for example, *Gardner v Clydesdale Bank Ltd*, [2013] EWHC 4356 (Ch) and *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC*, [2010] EWHC 40 (Comm).