

Business as Usual? Contracts during the COVID-19 Pandemic.

INTRODUCTION

The emergence of the novel COVID-19 virus has led to devastating impacts around the globe, and if health experts and world leaders are correct, the full impact of COVID-19 has not yet been felt. Since the World Health Organization declared the outbreak of the COVID-19 virus a pandemic, many countries have imposed numerous restrictions and declared “Public Health Emergencies”. With news changing rapidly by the day, and even by the hour, the COVID-19 pandemic has created significant commercial uncertainty with few able to predict the length and effects of the pandemic. The global COVID-19 pandemic is leaving many business owners wondering what they should do if they are unable to perform their contractual obligations due to the chain of events set in motion by the COVID-19 pandemic.

FORCE MAJEURE PROVISIONS

At common law, parties to a contract must meet their obligations under a contract and in accordance with the terms of the contract, subject only to several common law doctrines. However, many contracts contain *Force Majeure* provisions which govern contractual performance in the occurrence of serious unexpected or unforeseen events., *Force Majeure* provisions have important implications for parties who find their contractual performance impacted by the COVID- 19 pandemic because, if they are successfully invoked, they limit a party’s liability for non-performance or delayed performance of the contract.¹

The legal concept of ‘*Force Majeure*’ is not recognized at common law ² and must be included as a contractual term for the remedy to be available to parties. The fact that *Force Majeure* provisions are created by contract means that *Force Majeure* provisions will vary from contract to contract and will be interpreted in accordance with the language of the specific contract in which they have been included³.

While the parties are free to contract into a *Force Majeure* provision which specifies any number of events, the common thread amongst *Force Majeure* provisions is that it applies to events which are unexpected, something beyond reasonable human foresight and skill, and outside of the control of the parties. ⁴ Parties concerned about the effect of the COVID-19 pandemic on their ability to perform their contracts should confirm whether the contract at issue contains a *Force Majeure* provision.

A party seeking to invoke a *Force Majeure* provision has the responsibility of establishing the COVID- 19 pandemic is a triggering event as defined by the provision.⁵ Whether or not the *Force*

¹ *Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Company Limited.* [1976] 1 SCR 580, 1975 CarswellNB 26/26[f] [“*Atlantic Paper*”]; *Atcor Ltd. v Continental Energy Marketing Ltd.*, [1996] 6 WWR 274 (ABCA), 1996 CarswellAlta 642 [“*Atcor*”]

² *Domtar Inc. v Univar Canada Inc.*, 2011 BCSC 1776 [“*Domtar*”] at para 78 citing *Tandrin Aviation Holdings Ltd. v. Aero Toy Store LLC*, 2010 EWHC 40 (Eng Comm Ct.)

³ *Atcor ;Tenneco Canada Inc. v British Columbia Hydro & Power Authority*, 1999 BCCA 415 [“*Tenneco*”]

⁴ *Atlantic Paper*

⁵ *Domtar at para 72 citing Channel Island Ferries Ltd. v. Sealink U.K. Ltd.*, [1988] 1 Lloyd’s Rep. 323 (Eng. CA) at 327.

Majeure provision will be triggered, and the effect the provision will have on the parties' contractual performance, depends on a proper interpretation of the *Force Majeure* provision itself and may require an interpretation of the contract as a whole and the parties' intentions.⁶

As it is not uncommon for *Force Majeure* provision to be referred to in numerous sections in the contract, it is important that legal advice is sought to ensure a complete interpretation of the *Force Majeure* provision. If a *Force Majeure* provision is relied upon when the legal requirements for such reliance are not met, the consequences can be severe and the party who failed to complete contractual performance may be liable for non-performance of their obligations under the contract.⁷

Two central questions must be answered in order to determine if a particular *Force Majeure* provision will limit a party's contractual obligations due to disruptions caused by the COVID-19 pandemic:

- 1) Does the COVID-19 pandemic fit within the events specified in the contract?
- 2) To what extent does the COVID-19 pandemic interfere with contractual performance?

Does the COVID-19 pandemic fit within the events specified in the contract?

The first step in the analysis is to determine whether the COVID-19 pandemic is a specified triggering event contained in the *Force Majeure* provision. If the *Force Majeure* provision includes "pandemic", "epidemic", "public health emergency", or "communicable disease outbreak" as a triggering event, then it is likely the COVID-19 pandemic would be caught by the *Force Majeure* provision. Courts have tended to interpret the specified triggering events strictly in order to ensure parties to a contract are bound to their contractual obligations.⁸ If the triggering events do not clearly capture the COVID-19 pandemic, it will be difficult to establish that the *Force Majeure* provision is triggered.

While many *Force Majeure* provisions will not contemplate the events listed above, most contain a catch-all phrase which refers to "all other like events". If this is the case, the party seeking to invoke the *Force Majeure* provision must establish the COVID-19 pandemic is analogous in kind to the triggering events included in the *Force Majeure* provision.⁹

Depending on the disruptions experienced by a business due to the COVID-19 pandemic, more commonly included triggering events may be utilized such as "market disruptions" or "Government restrictions" to invoke the *Force Majeure* provision. However, in all cases, the triggering event must be clearly identifiable in the *Force Majeure* provision, and the Courts have generally interpreted *Force Majeure* provisions narrowly.¹⁰

To what extent does the COVID-19 pandemic interfere with contractual performance?

If the contract does include a *Force Majeure* provision which captures the COVID-19 pandemic, that does not necessarily mean contractual performance may be waived. The party seeking to

⁶ *Atcor, Tenneco, NewPage Port Hawkesbury Corp., Re*, 2013 NSSC 124 ["Newpage"]

⁷ *Wal-Mart Canada Corp./Cie Wal-Mart du Canada v Gerard Developments Ltd.*, 2010 ABCA 149 ["Walmart"]; *Domtar*

⁸ *Atlantic Paper*

⁹ *Atlantic Paper, World Land Ltd. v. Daon Development Corp.*, [1982] 4 WWR 577, 1981 CarswellAlta 131 (ABQB) ["World Land"]

¹⁰ *Atlantic Paper*

rely on the *Force Majeure* provision must also establish a causal link between the triggering event and non-performance¹¹.

The party seeking to invoke the *Force Majeure* provision should look to whether the provision specifies to what extent contractual performance must be interfered with for the *Force Majeure* provision to be invoked. A *Force Majeure* provision may detail the necessary impact the triggering event must have on performance of the contract before the *Force Majeure* provision may be relied upon¹². *For example*: A contract may specify that performance need only be “hindered” or “delayed”, or it may specify the higher standard of “impossibility” of performance.

In the absence of an express contractual provision which details the requisite impact of the triggering event, the courts have consistently held that the triggering event must make performance of the contract “impossible” before a party may rely on a *Force Majeure* provision¹³. Further, it is well established that commercial losses or inconvenience caused by the triggering event will not be sufficient for a party to rely on the *Force Majeure* provision¹⁴. However, in Alberta, there is some suggestion the lower standard of the triggering event causing “a real and substantial problem” which makes performance of the contract “commercially unfeasible” may be sufficient.¹⁵

A party is unlikely to successfully invoke a *Force Majeure* provision where they contributed to the triggering event relied upon.¹⁶ While this is unlikely to be an issue if the triggering event relied on is something akin to a “pandemic”, this may become an issue where a party seeks to rely on triggering events such as “labor shortages” if they laid off staff to allow the business to keep operating during the COVID-19 pandemic.

Additional considerations

a) Notice

A party seeking to invoke a *Force Majeure* provision must ensure that they comply with any notice requirements contained in the provision that specify triggering events as well as related timelines. Proper notice that complies with the notice requirements of the contract provision is a condition precedent that must be satisfied to effectively invoke the *Force Majeure* provision.¹⁷

b) Specified consequences on contractual performance

The effect of a validly invoked *Force Majeure* provision on a party’s contractual obligations will depend on the language contained in the clause. The contract may specify, among any number of other options, that performance may be delayed, suspended, or reduced.¹⁸.

FRUSTRATION

If the contract does not contain an applicable *Force Majeure* provision, but performance is nonetheless prevented by the COVID-19 pandemic, a party may be able to rely on the common

¹¹ *Atlantic Paper*

¹² *Atcor*

¹³ *Atlantic Paper*; *Walmart*; *Domtar*

¹⁴ *Domtar*

¹⁵ *Atcor*

¹⁶ *Atlantic Paper*

¹⁷ *World Land*

¹⁸ *Newpage* at para 28

law doctrine of frustration. Unlike *Force Majeure*, frustration is a common law principle which exists regardless of its inclusion in a contract's terms. A party who claims the contract has been frustrated has the onus of establishing the necessary elements of the common law doctrine of frustration are met.¹⁹

Frustration occurs when an intervening event arises after the parties have entered a contract, for which the parties made no provision for in the contract, and performance of the contract becomes "a thing radically different from that which was undertaken by the contract".²⁰

For frustration to be established, the changes to contractual performance caused by the intervening event must be fundamental changes that go to the very purpose for which the contract was created. An intervening situation that merely makes performance difficult or more costly will be insufficient in satisfying the test for frustration.²¹ Further, frustration will not be found where the intervening event was foreseeable to the parties at the time the contract was made.²²

The doctrine of frustration can be understood as a request to the court to intervene and relieve the parties of their contractual obligation because an intervening event occurred without fault to either party.²³ Where the elements of the doctrine of frustration are met, the most common result is that both parties are released from further obligations under the contract and the contract is brought to an end.²⁴

The doctrine of frustration is commonly argued in contract disputes but is seldomly raised successfully. Frustration has been successfully raised in situations where the intervening event is a change of law, which makes the performance of the contract illegal or impossible.²⁵ Similarly, frustration is often argued in employment law contracts in cases of prolonged employee illness or injury²⁶, death of an employee²⁷, changes in law²⁸ or destruction of the workplace²⁹. Depending on the restrictions and measures imposed by the provincial and federal governments in Canada, and the consequential impacts of these restrictions, it is possible that

¹⁹ *Bang v. Sebastian*, 2018 ONSC 6226

²⁰ *Naylor Group Inc v. Ellis- Don Construction Ltd.*, 2001 SCC 58 *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361 (S.C.C.)

²¹ *Fishman v. Wilderness Ridge at Stewart Creek Inc.* 2010 ABCA 345

²² *Perkins v. Sheikhtavi*, 2019 ONCA 925 citing *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 9 O.R. (2d) 617 (Ont. C.A.) , at p. 626.

²³ *Naylor Group Inc v. Ellis- Don Construction Ltd.*, 2001 SCC 58

²⁴ *Klewchuck v Switzer*, 2003 ABCA 187 citing H.G. Beale, ed., *Chitty on Contracts*, 28th ed., vol. 1 (London: Sweet & Maxwell, 1999) at 24-069.

²⁵ See *Klewchuk v. Switzer*, 2003 ABCA 187 where "Plaintiff and defendant worked together to provide location and services charities needed to operate casinos — Defendant provided facility and plaintiff provided dealers and portable gaming equipment's — Parties entered into written agreement outlining relationship — Rules governing conduct of casinos changed in 1996 — Defendant purported to evict plaintiff from facility — Plaintiff commenced action for damages — Defendant counter-claimed — Trial judge awarded damages for conversion, punitive damages and dismissed counter-claim — Defendant appealed — Appeal allowed in part — Agreement was frustrated and trial judge's error in not so finding undermined analysis — Arrangement contemplated under agreement could not have continued once 1996 Gaming Rules came into effect": see also *Petrogas Processing Ltd. V. Westcoast Transmission CO*, 1988 CarswellAlta 74 where "Supervening illegality occurs when, after the making of a contract, a change in the law renders it illegal to perform the contract in accordance with its terms. The change in the law, to qualify as a frustrating event, must be one which was not foreseen by the parties and for which no express or implied provision is made in the contract. In addition, the illegality must not be temporary or trifling in nature when viewed in the context of the contract as a whole. If these conditions are met, the contract is automatically discharged by frustration the moment performance in accordance with its terms becomes illegal. Here, although the sale and purchase of gas under the contract was not rendered illegal by the price regulation, compliance with the price provisions in the contract was rendered illegal. Those provisions were a fundamental term, and the illegality was neither trifling nor temporary."

²⁶ *Yeager v. R.J. Hastings Agencies Ltd.* (1984), 1984 CarswellBC 768, [1985] 1 W.W.R. 218 (S.C.); *Gielen v. Ste. Anne (Town)*. 2009 MBQB 2,

²⁷ *Rickards Estate v. Diebold Election Systems Inc.* 2007 BCCA 246,

²⁸ *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357

²⁹ *Davidson v. Craig Manufacturing Ltd.*, 2009 NBCA 42.

contracts will become frustrated by restrictions imposed in response to the COVID-19 pandemic.

Overall, courts are reluctant to find frustration of a contract and the decisions often turn on the facts of the specific case and the nature of the contract.³⁰ However, it is unlikely that an unforeseen expense, or cashflow shortages, would meet the required threshold for a finding of frustration.³¹

Finally, it is prudent for a party to be cautious when terminating a contract on the basis of frustration. If a party terminates a contract because the COVID-19 pandemic caused frustration of the contract, and a court does not find the high bar for establishing the doctrine of frustration is met, the party may be liable for wrongful termination of the contract and damages flowing from non-performance of contractual obligations. Accordingly, it is important that parties receive legal advice before terminating a contract based on frustration.

The purpose of this article is to provide relevant legal information to those affected by the COVID-19 pandemic and is not intended as a substitute for legal advice. As each contract is worded differently, and as all circumstance are unique and fact specific, we caution that we would be required to review the specific agreement and the surrounding facts before we would be in any position whatsoever to provide any legal opinion or advice to you. If you require legal advice in relation to your contractual and factual circumstances, please contact Brian Wallace, Ted Feehan or Jeff Fixsen to discuss your specific situation.

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³⁰ Erin A. Viala. Frustration of contract as a Defense in Canadian Breach of contract Litigation: Recent Cases and Developments (2012) Annual Review of Civil Litigation.

³¹Wilkie v. Jeong, 2017 BCSC 2131