

COVID-19: Time to Check your Construction Contract's Force Majeure Clause

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By

If you are considering submitting a claim in respect of delays caused by the COVID-19 outbreak, or if you have already received notice in respect of the same by contractors or suppliers, it may be worthwhile to consider the *force majeure* clause (or, the absence thereof) in your construction contracts.

A *force majeure* clause may function to relieve a party from the performance of its contractual obligations when an intervening event outside of the control of either party makes the performance of those contractual obligations impossible. In cases where *force majeure* clauses have been found to operate, the intervening events in question have typically been something unexpected and beyond the reasonable foresight of the parties.^[1] A *force majeure* clause is the part of a contract which says something similar to the same effect as the following:

1. Neither party is responsible for any failure to perform its obligations under this contract if it is prevented or delayed in performing those obligations by an event of *force majeure*; or
2. In the event either party is unable to perform its obligations due to acts of God, strikes, equipment malfunctions, or any other damage beyond its control constituting a *force majeure* event, such party is not liable for damages resulting from such failure.

Force majeure clauses do not excuse parties from the consequences of their own actions and do not entitle parties to refuse to perform their obligations upon the occurrence of some reasonably foreseeable event.^[2]

Reviewing a *Force Majeure* Clause

There are, of course, many other examples of *force majeure* clauses. Determining whether the current COVID-19 pandemic engages a particular *force majeure* clause is a contextual exercise that depends on the wording of that clause. Courts have not interpreted *force majeure* clauses based on pandemics or outbreaks as of yet. The main purpose of a *force majeure* clause is to protect parties from liability for breaches of contract caused by events which are outside of their control and which are outside normal business risk.^[3]

To date, courts have interpreted *force majeure* clauses narrowly, requiring the party seeking to claim a *force majeure* event to bring itself within the scope of the clause as defined by the parties.^[4] Depending on the wording of the specific *force majeure* clause, this may require the party relying on the clause to prove a causal connection between the alleged *force majeure* event and the party's inability to perform its contractual obligations. This may require evidence to support whether the *force majeure* event in question has made performance of the contract unfeasible.^[5] Importantly, where a *force majeure* clause contains a list of triggering events without indicating that the list is non-exhaustive, courts may interpret the list as a closed one and therefore treat any event that is not on the list as something that cannot constitute *force majeure*.

Finally, many *force majeure* clauses require that the party seeking to exercise its rights under the clause provide notice thereof to the

other party to the contract.^[6] Some *force majeure* provisions may even provide timelines within which a party is required to provide this notice. In fact, failing to comply with the timelines attached to a notice provision in a construction contract can be fatal to the exercise of the rights requiring such notice.

The Standard CCDC 2 *Force Majeure* Clause

The standard CCDC 2 contract format, for example, contains the following *force majeure* provision:

6.5.3 If the *Contractor* is delayed in the performance of the *Work* by:

1. labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound),
2. fire, unusual delay by common carriers or unavoidable casualties,
3. abnormally adverse weather conditions, or
4. any cause beyond the *Contractor's* control other than one resulting from a default or breach of *Contract* by the *Contractor*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly.

The words "pandemic", "epidemic", and "disease" are absent from this list. There is a catch-all included in 6.5.3.4, "any cause beyond the *Contractor's* control...". However, the courts have not specifically interpreted whether all causes beyond a party's control result in a *force majeure* in this context and have in fact, tended to place limits on the scope of such broadly worded catch-all clauses.^[7]

Conclusion

Individuals reviewing their contracts, whether they are of the standard CCDC suite of contracts or otherwise, will need to be on the lookout for the inclusion of specific terms relating to the current COVID-19 outbreak (i.e., "pandemic", "epidemic", "disease", "emergency", "national or regional emergency", etc.). Regardless of whether any such terms are included, individuals will also need to assess the specific context in which a party claims that the COVID-19 outbreak constitutes a *force majeure* event. Depending on the contract, it may not be sufficient to point to the outbreak as a *force majeure* event excusing the performance of obligations under a contract unless the outbreak has in fact rendered the performance of contractual obligations unfeasible.

When reviewing *force majeure* clauses and determining whether a situation engages one, it is important to ask the following four questions:

1. Is the definition of *force majeure* in *this contract* satisfied by the COVID-19 outbreak?
2. Has the effect of the COVID-19 outbreak rendered the performance of contractual obligations impossible?
3. Have the associated notice timelines (if any) been complied with?
4. What consequences can result and what rights are given up through the exercise of a particular *force majeure* clause?

The world is ever changing and with possible shut downs, travel bans and other required closures, there should be constant review of the specific *force majeure* clause involved and its application and an assessment of the specific conditions and concerns. As stated above, there is no law on *force majeure* clauses in respect of pandemics, so make sure to provide appropriate notice to protect your rights.

[1] *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co* [1976] 1 SCR 580 at para 4 [*"Atlantic Paper"*].

[2] *Halsbury's* at HOC-136, "*Force Majeure* clauses".

[3] *Atcor, Ltd v Continental Energy Marketing Ltd*, 1996 CarswellAlta 642 , at para 12 (CA) (WL Can) [*"Atcor"*].

[4] *Androscoggen Energy LLC v Producers Marketing Ltd.*, 2003 Carswell Alta 1899 at para 13.

[5] *Atcor*, *supra* note 3 at para 11.

[6] As is the case with many other clauses entitling one party to an increase in time or costs of performance.

[7] See for example, *Domtar Inc. v Univar Canada Ltd*, 2011 BCSC 1776 for a case where the catch-all follows the list.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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