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Force majeure

An overview of common law and civil law approaches, a brief look at recent domestic and US case law and where we are headed

The COVID-19 pandemic has resulted in the temporary (and sometimes permanent) closure of many Canadian businesses and the inability of those businesses to carry out their contractual obligations. As a result, there has been a great deal of discussion on contractual force majeure clauses. These clauses, which had been commonplace, but seldom invoked, have been increasingly relied upon by businesses as grounds to excuse their non-performance under contracts. While many parties have been content to "agree to disagree" during the pandemic and push forward with more immediate issues, these matters will inevitably become the subject of litigation as business operations begin to normalize and parties seek to recover what they have lost during the shutdown.

This article provides an overview of force majeure clauses and their operation in both common law provinces and under Québec civil law, and reviews a recent US decision in order to give some insight into how force majeure arguments may be dealt with by Canadian courts.

What is Force Majeure?

"Force majeure" is a contractual concept that relieves parties to a contract from performing certain contractual obligations if specified events or conditions – i.e., "force majeure events" – occur. There is no common law right of force majeure; as such, a contract must contain a force majeure clause in order for a party to invoke force majeure in most Canadian jurisdictions.

The exception is Québec, where, unlike the other Canadian jurisdictions, parties to a contract may invoke force majeure as of right. Article 1470 of the *Civil Code of Québec* (the CCQ) defines the civil law concept of force majeure as an "unforeseeable and irresistible event, including external causes with the same characteristics". Importantly, the concept of force majeure in the CCQ is not of public order, which means that parties may agree on a different definition of force majeure, whether broader or narrower, or exclude it in its entirety. In other words, in Québec, article 1470 of the CCQ applies, unless expressly excluded.

Although each force majeure clause will vary in terms of its scope and effect, force majeure normally applies where circumstances are unforeseen or beyond a party's control. It will not apply to normal business risks or risks that have been provided for elsewhere in the contract. A force majeure clause will typically define the events or conditions that will trigger the clause, which can be specific (e.g. natural disasters, war, trade embargos, civil unrest, or government action such

as expropriation or shutdowns) or general (e.g. "acts of God" or catch-all categories of events that were unforeseeable and beyond the control of one or both parties). A force majeure clause may also require the invoking party to take certain steps to mitigate the force majeure event and/or its impact on that party's ability to perform under the contract. A force majeure clause can carve out certain contractual obligations that will not be impacted by force majeure – for example, some leases expressly provide that the payment of rent will not be excused by a force majeure event. Finally, parties should verify whether their force majeure clause is accompanied by any notice provisions, requiring the party seeking to be excused from the performance of its obligations to send a notice to the other party by the deadline specified in the contract, failing which it may lose the right to rely on a force majeure event.

How does a party invoke force majeure?

In order to successfully invoke a force majeure clause, a party must establish that: (a) a force majeure event has occurred; (b) the force majeure event has rendered that party unable to perform its obligations under the contract; and (c) the party invoking the clause has made reasonable efforts to mitigate both the event and its effect. Each of these factors is discussed briefly below.

- **Force majeure event:** some clauses include events such as "epidemics" and "pandemics" in their list of force majeure events. In the absence of such clear language, parties seeking to declare force majeure in the context of COVID-19 may attempt to rely on other triggering events such as government-declared states of emergency. Parties may also consider relying on any catch-all provisions included in their clauses – although doing so may be difficult given that force majeure language tends to be construed narrowly by the courts.
- **Impact of force majeure event:** the existence of a triggering event is not on its own sufficient to invoke a force majeure clause. The party seeking to establish force majeure must also show that the event in question has directly impacted their ability to perform under the contract. Generally, the event must have prevented performance, rather than simply render it more onerous or economically difficult. Some clauses will specify the level of impact that a party must show in order for the clause to be operative.
- **Mitigation:** as noted above, some force majeure clauses will specifically address the steps that a party must take to mitigate the force majeure event or its impact on that party's ability to perform under the contract. If the clause is silent, then the invoking party must generally show that it made all "reasonable" efforts to mitigate, which will be a fact-specific inquiry.

In Québec, a party seeking to establish force majeure under the CCQ must demonstrate that the event was unforeseeable, irresistible, and beyond its control (*external*). The unforeseeability criterion means that a reasonable person, in like circumstances, could not have foreseen the event when entering into the contract. The irresistibility criterion is twofold as it entails that a prudent and diligent person placed in a similar situation: i) could not have taken reasonable measures to avoid the event; and ii) that the event made performance of the obligation absolutely impossible. An obligation that becomes more difficult, perilous, or onerous will not meet the irresistibility criterion. With respect to mitigating the impact of the force majeure event, the CCQ provides that, as a general principle of law, an injured party must reasonably try to avoid the aggravation of its damages.

What to expect going forward

Force majeure litigation in Canada has been historically rare, and the question of whether a force majeure clause is operative will depend on the facts of each case and the specific language of the clause.

However, a recent US decision may provide some insight into how Canadian courts could address claims of force majeure arising out of the COVID-19 pandemic.

In *re Hitz Restaurant Group (Hitz)*, the United States Bankruptcy Court (Northern District of Illinois, Eastern Division) considered a restaurant tenant's claim that a statewide government order prohibiting restaurants and bars from providing on-premises food and beverage service constituted a force majeure event that excused the tenant from the obligation to pay rent. While the court agreed with the tenant that the force majeure clause in the lease was triggered by the government order, it did not fully excuse the tenant from its obligation to pay rent because the government order did not prohibit restaurants from offering curbside pickup and delivery services – which the tenant had

not done. The court ordered that the tenant be obliged to pay 25% of its rental payments on the basis that the kitchen portion of the premises, which could have been used to provide such services, made up approximately 25% of the square footage of the premises.

Although the decision in *Hitz* makes clear the fact-specific nature of force majeure analyses, the court's reasoning appears grounded in a pragmatic and common-sense-based approach that takes a hard look at parties claiming force majeure and holds them to account for any failure to make reasonable efforts to mitigate. As government restrictions begin to relax and businesses reopen, parties who have relied upon force majeure clauses during the shutdown should make concerted efforts to resume operations and perform under their contracts as best they can.

There is also very little Québec case law on force majeure. However, very recently, in *9333-8309 Québec inc. v Procureure générale du Québec (Ministère des Transports)*, the Superior Court of Québec mentioned that COVID-19 could constitute a force majeure event, in the same manner as a flood. However, that comment was made in *obiter*.

The Québec courts have also ruled on a limited number of force majeure cases linked to epidemics or pandemics under article 1470 of the CCQ. In the decisions *Lebrun v Voyages à rabais (9129-2367 Québec inc.)* and *Béland v Voyage Charterama Trois-Rivières ltée*, both from 2010, the Superior Court of Québec ruled that the H1N1 flu constituted a force majeure event that prevented travel agents from providing the plaintiffs with travel services. In both cases, the court held that the H1N1 crisis could not have been avoided by the travel agents and could not have been foreseen by them when the plaintiffs purchased the services.

As an aside, it is interesting to note that in the *Lebrun* case, the court invalidated the force majeure clause because the travel agent had full discretion in determining whether an event constituted a force majeure event, which contravened Québec's *Consumer Protection Act*.

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