



Novel Coronavirus (COVID-19)

Business Law

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COVID-19 and *Force Majeure* Clauses

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With COVID-19 being top of mind for everyone, it is important to understand how this affects contractual rights and obligations under an agreement. This may affect your business in situations in which you are a party, where you or the other party claims that it cannot perform its obligations under the agreement as the result of an event such as the current pandemic.

Normally, Ontario courts will not imply or otherwise permit a party to claim that it should not be responsible for damages where their non-performance is a result of an event not contemplated by the agreement. For this reason we often include *force majeure* clauses in agreements, so a party would not be unduly punished or responsible for the other party's damages for events beyond their control. In general terms, a *force majeure* clause states that non-performance as a result of an event outside the party's control (i.e. a labour strike, terrorist attack, or a significant pandemic) will not result in the non-performing party being held responsible for the damages to the other party. Below are some points to keep in mind when trying to rely or reject the argument that a party is entitled to act on a *force majeure* clause:

1. Make sure that the agreement has a *force majeure* clause. Specifically, the common law does not imply or otherwise enshrine a *force majeure* clause into an agreement. If an agreement is silent on what happens upon a *force majeure* event then a party will not likely be able to use the *force majeure* event as a reason for not fulfilling its obligations under an agreement.
2. *Force majeure* clauses are often narrowly interpreted by the courts. If the clause does not specifically contemplate the related event, then the courts may not allow a party to rely on the *force majeure* clause. Now that COVID-19 has been determined to be a "pandemic" by the World Health Organization, the use of "pandemic" or a synonym thereof within the *force majeure* clause may be helpful for a party that wishes to rely on a *force majeure* clause under the current circumstances.
3. The non-performance by a party must be a result of the *force majeure* clause. Also what is the effect of relying on a *force majeure* clause? Will it result in the termination of the agreement or is the application

of the force majeure event subject to time limitations?

4. Reliance on a *force majeure* clause may require complying with certain other obligations within an agreement, such as notice obligations and taking steps to mitigate the foreseeable or actual impacts of the *force majeure* event.
5. The Courts will look to see how proactive an organization was in anticipation of a *force majeure* event. In other words, if the non-performance could have reasonably been avoided, then it is possible that a party may not be able to rely on the *force majeure* clause. Similarly, a non-breaching party should be ensuring that the other party has taken steps to avoid the *force majeure* event as this may affect the amount of damages that it will be able to claim in the event of a breach.

If you or the other party to a contract are relying on a *force majeure* clause, then you should contact your legal advisor to ensure that you have taken such steps as are necessary to protect your interests with respect to the agreement and your business.

For legal advice on issues arising from COVID-19, please contact your Torkin Manes lawyer. For more information about dealing with COVID-19, please visit our COVID-19 Resource Center.

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