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## ARE CONTRACTS ENFORCEABLE DESPITE COVID-19? PART 3: INTERPRETING FORCE MAJEURE CLAUSES

As set out in the [first article in this series](#), the COVID-19 pandemic has left many businesses unable to fulfil their contractual obligations. This article focuses on the interpretation of *force majeure* clauses. These clauses are present in many commercial contracts and may relieve a party from its obligations in unforeseeable and uncontrollable circumstances.

As the Supreme Court of Canada has explained, a *force majeure* clause:

[...] operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.<sup>1</sup>

### Interpretation of *Force Majeure* Clauses in General

*Force majeure* clauses often operate to broaden the doctrine of frustration (described in the [second article in this series](#)), by setting out a test or specific events that may be more forgiving than the common law test for frustration.

As the Alberta Court of Appeal has explained, *force majeure* clauses come into effect when “circumstances occur which were unforeseen or beyond a party’s control”, but do not apply to “normal business risks or to reallocate bargained for contractual risks”<sup>2</sup>. These clauses are interpreted narrowly, to “exclude circumstances that do not clearly fall within the clause in question, and to exclude events which are not truly beyond the parties’ control.”<sup>3</sup> This means that a party is “generally not able to rely upon a force majeure clause to excuse its own acts or to make the contract one which it can terminate unilaterally”<sup>4</sup>.

Also, many force majeure clauses provide relief *if and only to the extent that* performance was prevented by the event in question.

<sup>1</sup> *Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Co.*, [1976] 1 SCR 580, pp 583 [*Atlantic Paper*]

<sup>2</sup> *Wal-Mart Canada Corp. v Gerard Developments Ltd.*, 2010 ABCA 149, para 15 [*Wal-Mart*]

<sup>3</sup> Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd Ed (LexisNexis: Toronto, 2016), pp 341-342 [Hall text]

<sup>4</sup> Hall text, pp 343, citing *Atcor Ltd. v Continental Energy Marketing Ltd.*, [1996] AJ No. 131 (CA), paras 11 and 14 [*Atcor*]

## Interpretation of Specific Elements of *Force Majeure* Clauses

Many *force majeure* clauses contain a list of events triggering the clause. Some of those lists are open-ended, while others are closed. Still others provide relief for events “beyond the parties’ control” or “reasonable control”, without enumerating any examples at all.

Where a *force majeure* clause uses a word like “including” before a list of events, that generally means that the definition is not exclusive, and that the clause may apply to circumstances not explicitly listed.<sup>5</sup> The standard rules of contractual interpretation apply to interpreting these lists, including the *ejusdem generis* rule. This rule may be engaged where a contractual clause contains a general word or definition followed by a list of specific items, to limit the general word to only those of “the same class or kind of occurrence” as those listed specifically.<sup>6</sup> However, the rule may be inapplicable where the words “including but not limited to” are used before the list of events, or where the list contains a broad catch-all at the end. For instance, in *World Land*, the Court held that the *ejusdem generis* rule did not apply to a *force majeure* clause because it contained a catch-all for “any other causes [...] beyond the control of the vendors or the purchasers” at the end of the list, and because the specific events listed were not of the same kind or character.<sup>7</sup>

Therefore, depending on the wording of the clause and contract as a whole, it may be possible to rely on a *force majeure* clause to forgive failure to perform contractual obligations as a result of COVID-19, even if a pandemic (or similar event) is not specifically listed in the clause.

However, where a *force majeure* clause contains a closed list of qualifying events, given the Courts’ narrow approach to interpreting *force majeure* clauses, it is unlikely that other events would be interpreted as triggering the clause, even if beyond the parties’ control. In fact, the Alberta Court of Appeal has cautioned that “a broad list of *force majeure* events offers the risk of turning the bargain on its head if it can be used as an escape clause,”<sup>8</sup> and therefore broad lists are to be read narrowly.

With this in mind, parties will need to review their *force majeure* clauses to determine whether COVID-19 is a triggering event. For instance, that should be the case if the clause includes the word “pandemic”. However, that is not common. More common is “epidemic” or “plague”. The World Health Organization (WHO) defines an “epidemic” as the “occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy”,<sup>9</sup> whereas a “pandemic” is a “worldwide spread of a new disease”.<sup>10</sup> The WHO declared COVID-19 an epidemic, and then upgraded it to a pandemic; so it appears that COVID-19 likely qualifies as either term. “Plague” applies less clearly to COVID-19 but may refer to “an epidemic disease causing a high rate of mortality”.<sup>11</sup>

<sup>5</sup> *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029, pp 1041

<sup>6</sup> *World Land Ltd. v Daon Development Corporation*, [1982] 20 Alta LR (2d) 33 (QB), para 43 [*World Land*]. This principle was applied by the Supreme Court of Canada in *Atlantic Paper*, pp 583

<sup>7</sup> *World Land*, para 45

<sup>8</sup> *Atcor*, para 14

<sup>9</sup> World Health Organization, *Definitions: Emergencies*, Online: <<https://www.who.int/hac/about/definitions/en/>>

<sup>10</sup> World Health Organization, *What is a pandemic?*, 24 February 2010, Online:

<[https://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/pandemic/en/](https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/)>

<sup>11</sup> Merriam-Webster Dictionary, “Plague”, Online: <<https://www.merriam-webster.com/dictionary/plague>>

In addition, *force majeure* clauses also often include reference to acts or orders of civil or public authorities, or for “emergencies”, and therefore could be triggered by the COVID-19-related declarations of states of public health emergencies and the issuance of related orders and restrictions. For example, the Province of Alberta has declared a state of public health emergency pursuant to the *Public Health Act*<sup>12</sup> in response to COVID-19, through which it has placed restrictions on gatherings and close-contact businesses.

Finally, where the clause simply provides relief for events “beyond the parties’ reasonable control”, it could be read broadly as applying to any circumstance not within the parties’ reasonable control. On the other hand, where the clause provides relief for events “beyond the parties’ control”, without including a “reasonableness” qualifier, it could be read more narrowly. Especially given the prevalence of the use of the word “reasonable” in *force majeure* clauses, the omission of that word may well be found to restrict the application of a clause to apply only to those circumstances that could not have been avoided even with an unreasonably high level of diligence.

### **Contractual Interpretation is a Contextual Exercise**

Every *force majeure* clause – and every contract – must be interpreted in context, in light of the agreement as a whole, and the surrounding circumstances and commercial purpose behind the contract.

Given this, as well as the rapidly changing societal and economic impacts of the COVID-19 pandemic, this article is not intended to replace the need for legal advice specific to the circumstances of each contractual relationship or force majeure clause. JSS Barristers has extensive experience relating to contract disputes respecting performance under purchase and sale agreements, long-term supply agreements, real estate and other commercial agreements. We are available to advise you of your options in light of COVID-19 and the unique circumstances of your agreement. Our experience is that, regardless of whether a party seeks to enforce or be relieved of the obligation to perform, early strategic input can substantially affect the ultimate outcome.

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<sup>12</sup> *Public Health Act*, RSA 2000, c P-37