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## Force Majeure

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### What is Force Majeure?

*Force majeure* is a legal term from the archaic 'Law French' language, referring to a very old concept that a "superior force" can overwhelm the performance of contractual obligations.

### Force Majeure Clauses

The purpose of a *force majeure* clause in a contract is to relieve or modify obligations as a result of an extreme event or circumstance, sometimes called a "*force majeure* event." Typically, natural disasters or "Acts of God," such as a fire, flood, tornado, or hurricane, will qualify as *force majeure* events. In many cases, human-caused events such as enemy action or insurrection, terrorism, civil insurrection, or strikes may also trigger a *force majeure* clause.

If triggered, a *force majeure* clause may have a range of impacts. In some cases, the *force majeure* event may simply delay the timing of obligations under a contract. For example, in construction contracts, the obligation to achieve certain milestones may be delayed by a *force majeure* event with the obligation left in place. In other cases, a *force majeure* event may relieve a party from obligations, or in extreme cases, may release a party from all obligations in the contract or void it entirely.

### Force Majeure and COVID-19

Given the catastrophic impact that the novel Coronavirus, COVID-19, has had on communities and businesses around the world, its onset may well qualify as a *force majeure* event – depending, of course, on the drafting of the clause. Some clauses may limit or constrain what qualifies as *force majeure*, or specifically exclude certain types of disasters; whereas, in other cases, the contract will be more broad or may even contemplate this precise situation. Certain boilerplate templates and even contract textbooks recommend the phrase "epidemic, famine or plague" in enumerating specific events that should engage the doctrine.

Generally speaking, *force majeure* clauses are interpreted narrowly, meaning the court is inclined to rule against the party seeking its protection unless it is clear that the *force majeure* event prevented performance

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of the contract or obligation.

The extraordinary events of the past few days, however, including the introduction of tight border controls, restrictions on public gatherings and mandated social isolation of those exposed to the virus, will undoubtedly impact the labour market, disrupt logistics and impair the normal course of business in much the same way as enemy action or a natural disaster would. The impact will be felt by everyone from consumers whose travel plans or NBA tickets are cancelled to businesses that cannot continue production due to interruptions in the supply chain.

## What To Do Now

Due to the variety of events that may trigger a *force majeure* clause, and the range of potential outcomes when such a clause is engaged, it is important to consult legal counsel early in order to understand whether a *force majeure* event has in fact occurred (or is on the verge of occurring) under the meaning of a particular agreement; and if so, what the legal and practical impact may be in the context of ongoing performance. As *force majeure* clauses may be interpreted differently in different jurisdictions, seeking professional advice is especially critical for cross-border businesses.

Though there are many things to do during this time of crisis, it is important to be proactive and, if possible, to provide notice where you anticipate your own contractual performance will be overwhelmed; or to require that notice early if you are concerned another party will rely on a *force majeure* clause to excuse their non-performance of your agreement. In both cases, early communications with counterparties may strengthen reliance on, or defences to, the invocation of *force majeure* due to COVID-19.

## How Else Can Cassels Help?

FourLines is a division of Cassels that focuses on continually improving the quality and timeliness of our legal advice and related services, including through the assessment, pilot, and implementation of specialized staffing models, streamlined workflows, and technology.

Our FourLines team has the capability to assist clients in reviewing their inventory of commercial agreements to identify, in a cost-effective manner, the sections of those agreements that may be impacted by the COVID-19 pandemic (for example, exemptions for non-performance or non-compliance).

If you need an efficient solution for this potentially labour-intensive undertaking, FourLines can help.

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*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*