

PUBLICATION

Business Contractual Obligations in the COVID-19 Pandemic

Rahim Merchant
Randolph (Randy) W. Mitchell

April 6, 2020

The COVID19 pandemic has resulted in unprecedented circumstances to Alberta's economy. Businesses have been forced to cease operations due to social distancing guidelines. Others are facing a severe drop in demand for their services and materials. This has resulted in many parties, despite their sincere intentions, being unable to meet their contractual obligations. The question has frequently then become whether parties are still required, or liable, to fulfill their contracts in these troubling times.

There are two general ways parties can escape their contractual obligations due to extraordinary events out of their control. First, the contract may contain a "force majeure" clause that suspends obligations under the contract due to extreme events. Second, some contracts may be considered "frustrated" at law, meaning circumstances have made either party incapable from performing the contract at no fault of their own.

To start, force majeure clauses are not typically written into all contracts. If your contract does not have such a clause, then these provisions will likely not apply but you may be entitled to rely on the legal doctrine of "frustration".

If your contract has a force majeure clause, then the following are general considerations that may affect whether a force majeure clause might apply during the pandemic:

- *Have circumstances surrounding the pandemic caused you to be prevented, hindered or delayed from doing something under the contract?*

This will depend on the particular wording of your entire contract (not just the force majeure clause) and the circumstances of your business. For example:

- Force majeure clauses often use different wording that may affect whether you are able to rely on the provision in this pandemic. While not determinative, some force majeure clauses might specifically refer to a "pandemic" or "epidemic" as a potential event suspending obligations under the contract. Other contracts might not specifically mention a pandemic, but refer more generally to "acts of God" or other events beyond the reasonable control of the party which have prevented the performance under the contract. Whether more general wording will be sufficient will require a careful review of

your contract and circumstances.

- Even identically worded force majeure clauses may be applied differently depending on the context of the contract. A commercial lease agreement where a tenant is unable to make payments due to a decline or disappearance in business may be treated differently in a force majeure clause compared to a service contract where the specific service contracted for has been prohibited or made impossible by government regulation.
- *Have you taken reasonable steps to attempt to “mitigate” (or minimize) the impact the pandemic had on your contract?*

Force majeure clauses often require the parties to take reasonable steps to minimize or avoid the issues preventing them from fulfilling the contract. If you could have taken reasonable steps to mitigate the impact the pandemic had on the contract, you may not be able to rely on a force majeure clause.

- *Have you given appropriate notice to the other contracting party of your reliance on the force majeure clause?*

One generally has to give notice to the other contracting party of their intention to rely on a force majeure clause. It will not be enough to simply stop performing the contract and not communicate with the other party.

Whether a party has grounds to use a force majeure clause requires careful consideration and analysis. You should seek legal advice and assistance before attempting to invoke a force majeure clause. Otherwise, if you improperly attempt to rely on a force majeure clause, you may ultimately be found in breach of contract and be liable to pay the other party.

Depending on your circumstances, our Commercial Litigation group assists clients in negotiating enforceable arrangements that preserve the contracts between parties while adjusting their obligations to weather the pandemic until a level of normalcy returns to Alberta’s economy. If such arrangements cannot be reached or are not appropriate, we also assist parties in analyzing and potentially evoking, or resisting, a force majeure clause. Contact one of our lawyers in McLeod Law’s [Commercial Litigation group](#)—we are here to assist you.