



Real Estate Roundtable 2020

Finding Force Majeure and Frustration

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FACT PATTERN

After Cowboy Jim removes subjects on the acquisition of the Property, the Vendor passes along a licensing inquiry from a company called Santa's Square Ltd. that wishes to organize a Christmas market on a portion of the parking lot in November and December. They begin negotiating the terms of a licence agreement. Santa's Square has offered a \$50,000 deposit but wants to include a clause that requires a return of the deposit in the event of force majeure.

After closing, shortly before the Christmas market is due to open, the local newspaper reveals a significant outbreak at a high school one block away from the Property that has spread to teachers and parents. In a news briefing, Dr. Bonnie Henry cautions the public about holiday shopping and gatherings of family and friends in advance of the season, and that the province is reviewing appropriate policies. Local reporters speculate on the likelihood of shutting down Christmas activities like parades, markets, and light displays. The next day, Santa's Square claims an event of force majeure has occurred and tells Jim that they want to cancel the market and get a refund of their deposit. Santa's Square also tells Cowboy Jim that, even if the latest developments are not force majeure, the contract is frustrated and is no longer binding. Cowboy Jim has spent significant resources supervising the organization of the market, dealing with COVID-19 protocols and liaising with tenants. He was also counting on the Christmas market for income and to drive traffic to the Property.

Did an event of force majeure occur? Is the contract frustrated?

What is *force majeure*?

Commercial parties may choose to include terms in their contract that provide relief for a party that is unable to perform its obligations due to events outside its control. It is up to the parties to the contract to define what constitutes a *force majeure* event and what the consequences will be.

What is *force majeure*?

Commonly includes:

- ‘acts of God’ (e.g. landslides, floods, earthquakes, storms, lightning)
- non-natural disasters (fires, explosions, power failures)
- wars, revolutions, terrorism, civil disturbances, riots
- governmental action or legislation
- blockages, embargoes
- organized labour activities such as strikes and lock-outs
- shortages of materials, suppliers or labour
- epidemics, pandemics and quarantines
- a catch-all phrase such as “other similar events beyond the party’s reasonable control” and may or may not be paired with a phrase such as “not avoidable by the exercise of reasonable effort or foresight”

Commonly excludes:

- Party’s financial difficulty or inability

Force Majeure - example #1

“Force Majeure” means any circumstance which is beyond the reasonable control of the Licensee which delays, hinders or prevents the Licensee from performing any covenant under this Agreement, including, without limiting the generality of the foregoing, strikes, acts, orders, legislation, regulations or directives of any governmental or other public authorities, war, riots, earthquakes, fire, storms, and acts of God, provided that an event caused by or contributed to by a party's financial difficulty shall not be included as a force majeure event.

Force Majeure – example #2

“**Force Majeure**” means strikes, acts, orders, legislation, regulations or directives of any governmental or other public authorities, war, riots, epidemics, disease, pandemics, quarantines, earthquakes, fire, storms, and acts of God, provided that an event caused by or contributed to by a party's financial difficulty shall not be included as a force majeure event.

Force Majeure – example #3

“**Force Majeure**” means any circumstance which is beyond the reasonable control of the Licensee, including, without limiting the generality of the foregoing, strikes acts, orders, legislation, regulations or directives of any governmental or other public authorities, war, riots, pandemics, quarantines, earthquakes, fire, storms, and acts of God, provided that an event caused by or contributed to by a party's financial difficulty shall not be included as a force majeure event. **The present COVID-19 pandemic or an increase in the number of cases will not, in and of itself, constitute a force majeure event. A government order restricting the size of gatherings of people will not constitute a force majeure event unless such order expressly prohibits or requires the cancellation of the Market.**

A force majeure clause may...

- suspend a party's contractual obligations for the duration of the *force majeure* event, and bar a claim for damages due to breach
- give rise to a right of termination (immediately or after a period)

A *force majeure* clause may...

- provide that performance is excused if a party is “delayed” or “hindered” or “prevented”;
- require the event to last for a period before the condition of *force majeure* is met;
- require the affected party to provide notice of *force majeure* (possibly including information about what obligations are affected and the expected duration);
- include a duty of the affected party to mitigate the effects of the event; or
- exclude payment obligations from the relaxation of performance obligations.

What is frustration of contract?

Frustration of contract is a common law doctrine. A contract may be frustrated where, due to a supervening event, its performance becomes impossible or substantially different from the original obligations assumed by the parties.

A supervening event is an event that occurs:

- after the formation of the contract;
- for which the contract makes no provision; and
- which is not the fault of either party, not self-induced and not foreseeable,

that is not temporary or transient but permanent, and does not merely result in inconvenience or onerousness.

What is frustration of contract?

Where frustration is established, both parties are discharged from further performance.

The *Frustrated Contract Act* (British Columbia) does not define frustration but operates to mitigate the effect of the common law by providing a system of rules to define the position of the parties to a frustrated contract.



THANK YOU FOR LISTENING



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