

Construction Liens and Construction Litigation

Desperate Measures: The “Force Majeure” Clause and Frustration of Contract

In the face of the COVID-19 pandemic, few construction projects are immune to shortages of manpower and materials, or the threat of governmental stop work orders. Importantly, there are two legal concepts designed precisely for this type of unforeseeable, destabilizing event: the “force majeure” clause, and the doctrine of frustration.

Force Majeure Clauses

A “force majeure” clause is a contractual term excusing somebody from their obligations to perform some, or all, of the contract. It can only be used when unexpected, unforeseeable events occur which violate the purpose of the contract. By way of example:

The parties are relieved of their obligations under this contract in the event of: (a) an Act of God; (b) war or any unlawful act against public order or authority; (c) strikes or other industrial disturbance; (d) storm, fire, flood, or explosion; (e) a governmental restraint; or (e) any other event which is not reasonably within the control of the parties.

Whether COVID-19 and the associated shortages, labour actions, or government stop work orders are *force majeure* events is determined by the specific wording of a contract. Some standard construction industry contracts (such as certain of the CCDC contracts) have fairly clear *force majeure* clauses that may apply in the circumstances, while other construction contracts may not deal with such events at all.

More importantly, you may not be able to rely on these clauses even where it looks like they are triggered by COVID-19. For example, courts have previously refused to allow the use of these clauses where the obligations could still be met despite the event, or the “unforeseeable event” was actually foreseeable at the time of the agreement or was a normal business risk.

Frustration of Contract

If your contract does not have a *force majeure* clause which addresses COVID-19 or other pandemics, the legal concept of “frustration of contract” may apply. This concept relieves a

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party of its obligations under a contract where a supervening event (not accounted for in the contract) makes the performance of a contract nearly impossible or *radically different* from what the parties had agreed to.

As this concept results in a very severe outcome (the contract ceases to exist and payments may need to be returned), courts only apply this concept in limited circumstances. While the question of whether a pandemic frustrates a contract was not a practical issue in the past, as COVID-19 continues to disrupt global economies, this question will likely be tested in courts sooner rather than later.

Conclusion

In these challenging times, we thought you should be aware of the implications relating to both *force majeure clauses* and frustration of contract. As either you or the other parties to your agreement may have altered obligations under these concepts, it is important you consult with a lawyer to determine how or if your rights and responsibilities have been impacted by the COVID-19 outbreak.

For more information, please visit our website at kmlaw.ca/constructionlaw or contact any of our Construction Law Group members listed below.

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