



NEWS Release

September 20, 2011

Weathering the Storm: The *Force Majeure* Clause

What happens when an event, outside of the control of a contracting party, prevents or hinders performance of contractual obligations? Sometimes landlords and tenants cavalierly believe they will be saved by the application of the doctrine of *force majeure*. However, if a lease does not contain a *force majeure* clause, including a definition of what constitutes *force majeure*, no relief for a *force majeure* event will actually be provided by law.

Applying *Force Majeure* to the Commercial Lease

Generally, a *force majeure* clause relieves one or both parties from their obligations under the lease when a supervening event, which is beyond the reasonable control of the party, renders performance of that party's obligations impossible. The provision operates as a double edged sword, as it is generally defined with mutuality, yet one can never know which party will be aided or damaged by it. Typically, the overpowering forces contemplated by a standard *force majeure* definition include events such as wars, natural disasters (e.g. earthquakes, hurricanes, floods and other "Acts of God"), as well as the failure of third parties to perform as expected (e.g. labour action by employees, failure of suppliers to deliver materials). With careful drafting, parties to a commercial lease can shape a *force majeure* clause to control risks that both parties consider undesirable or troublesome and worthy of the *force majeure* designation.

Drafting an Effective *Force Majeure* Clause

Four important elements of any *force majeure* clause must be kept in mind when drafting the clause:

- a description of the events that will trigger the *force majeure* clause;
- the likely impact of a *force majeure* condition on lease terms;

- the obligation of the relying party to notify the other party of a *force majeure* event and its anticipated duration; and
- a description of the consequence that the *force majeure* event will have on the terms of the lease (e.g. a period of delay in the requirement to perform a contractual obligation, or an extension of a timeline such as a condition expiry date or a fixturing period).

The most important element of this list is the description of the events that will trigger the *force majeure* clause. The parties to the lease must be careful to strike a balance between including a description of triggering events that is not too broad but also not too limited. An overly broad *force majeure* clause might give a Court leeway to interpret it in ways the parties did not intend. On the other hand, if the *force majeure* clause incorporates only a narrow and specific list of triggering events, without an appropriately drafted general provision, unforeseen circumstances that do not fit precisely within the list will be overlooked, to the unfair detriment of one party. (There's that double edged sword again!) The ideal *force majeure* definition incorporates a specific list of triggering events (e.g. strikes, terrorist attacks, fires, floods, equipment failure etc.) that are relevant to lease obligations, as well as general language that captures unforeseen circumstances (e.g. "any other similar reason, that is beyond the control of the party delayed and furthermore is not the fault of that party").

A *force majeure* clause could require that the *force majeure* event have a significant effect on the party relying on it. In the absence of such a restriction, one party to the lease may be able to circumvent its obligations even if the *force majeure* event does not materially impact that party. The clause might also incorporate a duty to mitigate: the relying party should not be able to delay performance of its obligations under the lease if it could reasonably reduce

or avoid the detrimental impact of the *force majeure*.

It may also be useful to impose an obligation on the party invoking the *force majeure* clause to inform the other party of the event, its reliance on it, and the length of the anticipated delay, as well as notice of the end of the event. While it might not be entirely practical to expect contracting parties to communicate with their contractual counterparts in the case of catastrophic events, the requirement to impart this information in commercially realistic circumstances will clarify expectations.

The final element outlined above concerns the effect of the *force majeure* event on the terms of the lease. Usually, a *force majeure* clause will provide that any performance under the lease, which is affected by a triggering *force majeure* event, will be postponed for a period of time equivalent to the length of the delay. However, it is important to explicitly state that operation of the *force majeure* section will not have the effect of suspending any obligation by either party to pay amounts due under the lease (whether rent or a tenant allowance).

Effective Placement of Force Majeure Rights

A few years ago, some municipal workers in the GTA went on strike, with the result that site plan applications and building permits ground to a halt. At that time, many lease agreements contained conditions precedent related to securing governmental approvals and permits by certain specified dates. The strike made the satisfaction of these conditions impossible. A well-crafted *force majeure* definition, as well as reference in the condition precedents themselves to *force majeure* events, could have saved these deals by extending the

condition dates by a period of delay equal to the length of the strike.

In a related vein, it is worth questioning whether *force majeure* events should be carved out of retail co-tenancy conditions.

Economic Force Majeure

In the wake of global economic upheaval, some litigants have sought to invoke *force majeure* clauses based on the state of the economy. Recent Canadian case law has opened the door for argument that where the language of the *force majeure* clause contemplates economic consequences or losses (for example, material changes in market conditions), the *force majeure* clause might be called into play. In the right circumstances, parties might attempt to rely on the concept of “economic *force majeure*” where they are, for example, unable to secure financing due to the general unwillingness of banks to lend. It is therefore prudent to ensure that the *force majeure* clause specifically excludes inability to obtain funds as a triggering event, if that is the intention of the parties.

Bottom Line

Landlords and tenants should not regard the *force majeure* clause as an automatic boilerplate provision. Each party must analyze their respective obligations, including such things as turnover dates, the duration of fixturing periods, as well as commencement dates, and consider the possible impact of a *force majeure* event on these provisions. The well written *force majeure* clause must be adapted to the particular circumstances of the parties; it can serve as a powerful tool for allocating risk and achieving flexibility in the event of unforeseen occurrences.



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