Labour strike on Canada's West Coast: The impact on marine industry stakeholders

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On July 1, 2023, the International Longshore and Warehouse Union Canada (ILWU), the union that represents port workers in British Columbia, commenced strike action at more than 30 ports across the province, including the largest port in the country – the Port of Vancouver. The labour strike may have important legal implications for various marine industry stakeholders.

Context

The labour disruption comes amidst ongoing supply chain challenges. Recently, the Port of Vancouver placed near the bottom in a global port efficiency ranking for the second year in a row.

Notably, both a National Supply Chain Task Force and a targeted review of Canada's supply chain identified labour shortages and the need for long-term collective-bargaining agreements as key issues to be addressed to improve supply chain performance.

In the wake of the strike, service providers have had to adapt their typical practices to account for the disruption. CP Rail has temporarily stopped rail traffic into the Port of Vancouver. The Port of Vancouver issued a notice advising stakeholders of port congestion, requesting that parties adopt near-time arrival for vessels calling the port, in order to ease congestion. The Port of Vancouver has also implemented temporary changes to its anchorage assignment protocols, in order to prioritize terminals that are still operational.

The ongoing strike raises questions about the operation of *force majeure* clauses for a variety of marine industry stakeholders.

What is *force majeure*?

Force majeure clauses are contractual provisions that operate to discharge a party from its obligations under an agreement when an event beyond the reasonable control of either party makes performance of the contract impossible.

The extent to which the current strike and associated labour shortages will trigger a *force majeure* clause will depend on the wording of the specific provision. Generally, a *force majeure* clause will include provisions dealing with strikes, lockouts, work stoppages, labour disputes and similar industrial actions by workers, such that one or both parties would be relieved from performance of their obligations for the duration of the *force majeure* event.

Recent changes to industry standards reaffirm that contracting parties may be able to rely on *force majeure* clauses in response to non-performance brought about by labour strikes. For example, in 2022, the Baltic and International Maritime Council (BIMCO) introduced a new boilerplate *force majeure* provision that categorizes general labour disturbances such as boycotts, strikes and lockouts as *force majeure* events. As such, contracting parties may be discharged from their contractual obligations if they are able to establish that the labour strike makes performance impossible.

In general, the party seeking to be discharged from the contract has the burden of showing that the labour strike prevented it from performing its contractual obligation. Under BIMCO terms, this would likely involve proving:

1. the existence of a labour strike;
2. that the labour strike is beyond the reasonable control of the party invoking *force majeure*;
3. that the affected party could not reasonably have foreseen the strike at the time it entered into the contract; and
4. that the effect of the labour strike could not reasonably have been avoided or overcome by the affected party.

Historically, invoking *force majeure* clauses required that the *force majeure* event not be caused by, or within the control of, the party seeking to be discharged. Typically, *force majeure* clauses have a high threshold for a triggering event, and require that the performance of the contract be impossible, rather than simply difficult. If, however, there is a valid *force majeure* event, its effect will depend on the wording of the specific provision.

Some agreements allow parties to prioritize different obligations, or release parties from certain obligations under the agreement. Some *force majeure* provisions even contemplate termination of the agreement as a whole if the *force majeure* event meets specific requirements or persists for a specific duration of time. Regardless of the effect of invoking the *force majeure* clause, the party invoking it will have a duty to take commercially reasonable and feasible steps to minimize the impact on the other party.

Contracts without a *force majeure* clause

Even if a contract does not contain a *force majeure* clause, it may be possible for parties to seek relief either under the common law or applicable statutes. One legal doctrine that may be applicable is the common law doctrine of frustration, which applies where an event was unforeseeable, and which rendered the contract “radically different” from the agreement the parties originally reached. Whether or not this doctrine applies depends on the specific facts.

Commercial impact on marine stakeholders

The ongoing labour strike in British Columbia has the potential to cause significant further disruptions to the country's already-strained supply chain, as well as attendant reputational risks.

Whether the federal or provincial governments intervene and table back to work legislation remains to be seen. Such measures would not be unprecedented: in 2021, the federal government enacted such legislation to end a walkout by Port of Montréal dock workers.

Contact us

We will continue to monitor and report on developments concerning the strike. If you have any questions about how the labour strike will affect your business or the operation of *force majeure* clauses in your contracts, please contact any of the authors or members of BLG's national Shipping Group.

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