Supply Chain Uncertainty: Navigating rail shutdowns and possible port strikes

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Context

For several weeks businesses and stakeholders from throughout the supply chain have braced for potential labour strikes and lockouts impacting Canada's major rail networks. These labour disruptions are expected to result in a major nationwide railway work stoppage, leading to widespread ramifications throughout the supply chain.

The potential disruption in Canada's supply chain arrives as part of a global trend. In the United States, possible strikes at East Coast and Gulf Coast ports loom large should a deal with roughly 45,000 dockworkers not be reached before the expiry of their current union contract on September 30, 2024. Strikes at U.S. ports could exacerbate the effects of any rail shutdown here in Canada.

These potential work stoppages raise 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.

Canadian courts have consistently held the term *force majeure* has no specialized meaning, and that the effect of a given *force majeure* clause depends on a proper interpretation of the clause in accordance with general principles of contractual interpretation.[1] In interpreting a *force majeure* clause, courts will attempt to give effect to the parties' intention, and will not "re-write" the contract.

In the case of labour disruptions, the extent to which any strike or lockout will trigger a *force majeure* clause will therefore 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.

For example, the most recent *force majeure* boilerplate provision published by the Baltic and International Maritime Council (BIMCO) 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 or lockout makes performance impossible.

In general, the party seeking to be discharged from the contract has the burden of showing that the labour strike or lockout prevented it from performing its contractual obligation. Courts have framed this as an obligation on the party seeking relief having the burden of bringing itself "squarely" within the *force majeure* clause to obtain its protection.[2]

Under BIMCO terms, a party seeking relief under the *force majeure* clause would therefore likely need to establish the following:

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

Minimizing the impact of a *Force Majeure* event

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, keeping in accordance with the other express terms of the contract. To this end, *force majeure* provisions require the affected party to exercise "reasonable endeavours" to minimize the effect of the *force majeure* event.

In *RTI Ltd v MUR Shipping BV*, the Supreme Court of the United Kingdom (UKSC) clarified the extent to which those reasonable endeavours must be exercised in order to rely on the *force majeure* clause.[3] In that case, U.S. sanction against Russia caused a delay in the payment of U.S. dollars from a charterer to an owner under a contract of

affreightment. The owner sought to rely on the *force majeure* clause to refuse to perform shipments for which they would not be paid in U.S. dollars, while the charterer argued that the owner was obliged to accept an offer of payment in euros based on the "reasonable endeavours" requirement in the *force majeure* clause. The UKSC unanimously ruled that the owner was not required to accept payment in euros contrary to the contract. Instead, the "reasonable endeavours" requirement applies only to forms of performance which fall within the express contractual terms.

While the interpretation of each *force majeure* clause will necessarily turn on the specific wording of a given contract, the UKSC's decision may have widespread effect on the interpretation of "reasonable endeavours" or similar language in future *force majeure* cases.

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. The legal doctrine of frustration, which can operate to set aside contracts when an unforeseen event occurs, offers one possibly remedy.

In the recent case of *Aldergrove Duty Free Shop Ltd. v. MacCallum*, 2024 BCCA 28, the British Columbia Court of Appeal confirmed the three elements to establish that a contract has been frustrated:

1. a qualifying supervening event that was not contemplated by the parties when they entered into the contract;
2. the supervening event is not the fault of either party; and
3. the supervening event rendered performance of the contract something "radically different" from that which was undertaken.[4]

Whether or not the doctrine of frustration applies to a contract will depend on the specific facts of a given case.

Contact us

If you have any questions about how a labour disruption 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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Footnotes

[1] See *e.g.*, *Domtar Inc. v. Univar Canada Ltd.*, 2011 BCSC 1776 (*Univar*); *Consolidated Fastfrate Inc. v. 2516295 Ontario Ltd.*, 2023 ONSC 1005

[2] See *Univar*, at para. 72; *Channel Island Ferries Ltd. v Sealink U.K. Ltd.*, [1988] 1 Lloyds Rep 323 at 327.

[3] *RTI Ltd v MUR Shipping BV,* [2024] UKSC 18

[4] *Aldergrove Duty Free Shop Ltd. v. MacCallum*, 2024 BCCA 28,

By

Jean-Marie Fontaine, Dionysios Rossi, Braeden Stang

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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