

CONTRACTS IN A POST-COVID WORLD

By Ashley Winberg



COVID-19 has changed how we communicate with one another and how we do business. It has also made us realize that similar pandemics and events, which were once only conceivable in the movies, can arise and can significantly impact every aspect of our daily lives.

As a lawyer, COVID-19 taught me the importance of well-drafted comprehensive force majeure clauses and has opened my eyes to other standard contractual clauses, which should now be scrutinized more than ever and redrafted to provide greater certainty in the event of a second wave of COVID-19 arising or another, once incontrovertible event, becoming a reality.

Price and Payment Terms: Pandemics such as COVID-19 negatively impact supply chains and the availability of labour, which in turn increases operating costs. Thus, as operating costs rise contractors and suppliers will want to pass these additional costs onto their customers. Accordingly, clauses on price and payment terms should be carefully reviewed going forward. Furthermore, given these uncertain times, fixed-price contracts, which are preferable for condominium corporations, may be less common and if a fixed-price contract is proposed, the same should be carefully reviewed by a solicitor before a condominium corporation enters into the same. In a fixed-price contract, the clauses about the contract's price, scope of work, supplies, exclusions, and payment terms must be carefully scrutinized. A condominium corporation that is a party to a proposed fixed-price contract must have a clear understanding of what work and what supplies are included in the fixed-price and if there are exclusions, that the circumstances giving rise to the exclusions are clearly stated in the contract and are reasonable.

Alternative Dispute Resolution: During the height of COVID-19, the court system largely shut down. Accordingly, dispute resolution clauses in a post-COVID-19 world should be redrafted to ensure that the same contain alternative dispute resolution mechanisms such as referring the dispute to a predetermined neutral third-party expert for determination as well as mediation and/or arbitration.

COVID-19 Clause: Force majeure clauses in any contract entered into going forward will not apply to any future consequences of COVID-19 or any future waves since those consequences and waves are now foreseeable. Thus, it is advised that any contracts entered into include a COVID-19 clause, which addresses the current and future consequences of COVID-19 on the performance of the parties' respective obligations and advises how COVID-19 and the measures implemented in response to the same, may impact the parties' respective rights and obligations.

Force Majeure Clauses: COVID-19 has shown us that events, which were once incontrovertible, can become a reality and significantly impact contractual performance. Thus, force majeure clauses must be carefully reviewed going forward. Condominiums should have their solicitors carefully review the force majeure clause in any proposed contract to ensure that the same applies to any future: health emergencies; pandemics; geopolitical events; nuclear, chemical or biological contaminations; contagions and measures required to comply with any laws or government orders. Solicitors should also ensure that force majeure clauses going forward specify the consequences of a force majeure event in detail and delineate the termination rights in the event of an extended force majeure event as well as the resulting consequences of the same.

The foregoing is just a snapshot of some of the contractual clauses that should be scrutinized going forward. Additional contractual clauses that should be carefully examined in a post-COVID-19 world include those that pertain to insurance coverage, disease prevention, workplace safety, performance standards and termination. The power to instruct a solicitor to review these critical contractual terms rests in the hands of condominium corporations some of whom may not see the value of incurring legal fees now on reviewing and redrafting these key contractual clauses. However, those that do, will significantly reduce the likelihood of a dispute arising in the future, thereby reducing their legal fees in the long run.

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