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Force majeure clauses: Contractual risk allocation and the COVID-19 pandemic

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Owing to the COVID-19 pandemic, the *force majeure* clause has entered what will hopefully be its only heyday. *Force majeure* clauses typically operate as risk-allocation provisions that excuse performance where a party becomes unable to perform its contractual obligations due to the occurrence of an event beyond its control.

Virtually ubiquitous boilerplate in the modern commercial agreement, *force majeure* clauses have been often paid little, if any, attention by contracting parties (notwithstanding that a poorly drafted *force majeure* clause can have severe consequences in the event that a party finds itself unable to perform due to an event beyond its control). However, the COVID-19 pandemic is raising issues related to *force majeure* like no event before it. In this article, we provide an overview of certain legal principles related to *force majeure* and consider some issues engaged when interpreting a *force majeure* clause, including in the context of the COVID-19 pandemic.

Introduction to *force majeure*

In the common law jurisdictions of Canada, *force majeure* arises from the terms of a *force majeure* clause in a contract; it is not a free-standing legal doctrine (unlike frustration of contract). If a contract makes no provision for *force majeure*, then the doctrine cannot apply to the contractual relationship. In contrast, the common law doctrine of frustration can apply in the absence of a *force majeure* clause. A *force majeure* clause need not expressly include the words "*force majeure*" to provide the protections of a *force majeure* clause.

A *force majeure* clause typically operates to fully or partially excuse the non-performance of a party's contractual obligations, or to delay the obligation to perform, in circumstances defined (narrowly or broadly) by the contract. Those circumstances must generally be beyond a party's control. In the Supreme Court of Canada's seminal decision on the subject, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*, the court explained that a *force majeure* clause generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible."

By their nature, the circumstances triggering *force majeure* clauses rarely arise and these clauses are typically drafted to reflect the unusual nature of the underlying conditions. Also, because *force majeure* is a purely contractual issue, disputes regarding the interpretation and application of a *force majeure* clause may be considered in the context of confidential

arbitration proceedings rather than in the courts (the authors have represented clients in two major international commercial arbitrations relating to *force majeure* since 2013). As a result, there has been limited judicial consideration of *force majeure* clauses in Canada. However, a number of interpretive principles are nevertheless clear from the case law.

Interpreting a *force majeure* clause

In assessing the applicability of a *force majeure* clause in a given situation, a court will undertake a detailed examination of the precise contractual language used by the parties. A typical *force majeure* clause will include a list of events (which may be framed exhaustively, or non-exhaustively) and describe how an event must interfere with contractual performance for the clause to be triggered.

As indicated in *Atlantic Paper*, to qualify as an event of *force majeure,* the event in question must usually render performance "impossible"; an event that renders performance merely inconvenient, unprofitable or commercially unviable typically will not suffice. Obligations relating to the payment of money are typically excluded from a *force majeure* clause, so that impecuniosity cannot be relied upon to excuse those obligations. See, for example, an earlier Osler Update entitled "COVID-19's impact on mining" on osler.com relating to the inapplicability of *force majeure* provisions to most project agreements.

Parties seeking to interpret a *force majeure* clause typically start by considering whether the impugned event was specifically enumerated in the contract. However, while the event must unquestionably be a qualifying event under the clause, the central and more difficult inquiry in most instances will be whether performance of one or more of a party's contractual obligations has been rendered *impossible*. In other words, what is a party obligated to do under the contract that it now cannot do?

The issue of whether an event is a "qualifying event" under the *force majeure* clause is generally less contentious, particularly given that many such lists in commercial agreements are non-exhaustive (e.g., "including, but not limited to, earthquakes, fires, floods," etc.). If the clause contains a non-exhaustive list of events and the event at issue is not listed, determining whether that event (which must be beyond a party's control) qualifies as a *force majeure* event typically depends on whether a causal connection can be established between the event at issue and a contractual obligation that cannot be performed.

Of note, in the event of a non-exhaustive list of potentially qualifying events, the principle of *ejusdem generis* – which provides that where general words follow specific words, the general words are confined to the same kind or class of things as the specific words – may still apply to effectively limit the types of events that might qualify.

Force majeure and COVID-19

As a result of the truly unprecedented impact that the COVID-19 pandemic has had on businesses in Canada and around the world, the oft-overlooked *force majeure* clause has become a topic of significant interest among commercial parties and practitioners. Parties to contracts signed prior to the pandemic are now often assessing whether the COVID-19 pandemic qualifies as an event of *force majeure* under their agreements such that they should now be excused from performance. Meanwhile, parties entering into contracts since the beginning of the pandemic are grappling with how to best allocate the risks that a global pandemic – now no longer an unforeseen event – will render them unable to perform their contractual obligations.

Simply put, there is no one answer to the question whether the COVID-19 pandemic constitutes an event of *force majeure*. As with any potential *force majeure* event, the answer will turn on the wording of a party's specific contract, as well as the nature of the obligations prescribed by that contract.

A party seeking to rely on the COVID-19 pandemic, or its effects, as an event of *force majeure* will first have to demonstrate that the pandemic (or its consequences) falls within the applicable definition in the contract. Provided that contractual performance is impeded by the COVID-19 pandemic, clauses that specifically identify "disease," "epidemics" or "pandemics" as events of *force majeure* will likely capture COVID-19, which has been designated by the World Health Organization as a global pandemic. In the absence of such language, the pandemic may nevertheless qualify as an event of *force majeure* if the contractual definition is non-exhaustive and applies generally to any external circumstances outside the parties' control that preclude performance. Additionally, commercial agreements are often quite prescriptive in respect of specific notice and/or mitigation obligations imposed on a party seeking to rely on a *force majeure* clause. Parties invoking, or responding to a party seeking to invoke, a *force majeure* clause, should therefore be mindful of any such obligations.

Even if an affected party can demonstrate that the COVID-19 pandemic is potentially covered by the language of a *force majeure* clause, the central inquiry will then be whether (and, if so, how) the party's contractual performance has been affected. Based on the current state of the law and typical *force majeure* clause language, if COVID-19 has simply made a party's performance less convenient, less profitable or commercially impracticable – for example, by causing financial hardship or insolvency, or causing performance to be wholly unprofitable – that party may not be entitled to invoke *force majeure*. Moreover, an affected party may face difficulties if its contract provides that an event of *force majeure* must "directly" affect performance. In certain instances, the COVID-19 pandemic may only indirectly affect performance – for example, where the direct obstacles to performance are issues such as labour shortages, unavailability of supply, or potentially, laws passed in response to the pandemic. We note that, depending on the language of the contract, these indirect obstacles may, however, qualify as *force majeure* events in their own right.

As of the time of writing, very few decisions have been released by courts in the common law provinces addressing the intersection of COVID-19 and *force majeure*. In the authors' experience, this has been due both to the prevalence of parties reaching temporary (or permanent) commercial resolutions, together with the prevalence (mentioned above) of confidential arbitration provisions in such agreements. Nevertheless, there is no doubt that commercial parties are invoking the COVID-19 pandemic (and its consequences) as events of *force majeure* both confidentially and publicly.

For instance, in June 2020, Nabis Holdings Inc., a Canadian investment company, announced its intention to rely on a *force majeure* clause in an indenture agreement to defer interest payments owing to debenture holders, asserting that "COVID-19 has made raising capital virtually impossible during the global pandemic." Somewhat unusually, the indenture agreement at issue (available on SEDAR) did not carve out inability to pay from the *force majeure* provision. In response, the trustee under the indenture agreement has reportedly commenced legal proceedings, alleging that Nabis breached the terms of the indenture agreement by failing to make the prescribed interest payments.

One of the few published decisions touching on the concept of *force majeure* in the context of the COVID-19 pandemic is *Durham Sports Barn Inc. Bankruptcy Proposal*, which involved a tenant who argued that it should be relieved from paying rent during the period during which it was prevented from operating as a gym due to emergency orders issued by the Ontario government. The Ontario Superior Court disagreed, finding that while the *force majeure* clause in the tenant's lease relieved the landlord from providing quiet enjoyment

during the shutdown, it did not relieve the tenant from its obligation to pay rent. The Court declined to follow a recent decision of the Québec Superior Court, which found in favour of a tenant in similar circumstances, because the clause in the Québec case was worded differently and because that case was decided based on a civil law doctrine that does not exist in Ontario. The *Durham* case is consistent with the interpretive principle that courts will focus on the particular wording of the clause in question.

It is beyond doubt that the body of case law on the interplay between the COVID-19 pandemic and *force majeure* will continue to expand as pandemic-related cases trickle through the litigation process and we look forward to providing further commentary as it does.