In early February we prepared an article for Gowling WLG’s Energy Newsletter entitled “What to do When You Receive a Force Majeure Claim Based on the Novel Coronavirus” which in turn sparked a rather active discussion around questions of contractually allocated risk, reasonable foreseeability, duties of care in disaster preparation, standards of performance under changed circumstances, the occasional pronouncements of both governmental agencies and elected officials and, perhaps surprisingly, several key differences between Canadian, American and English law.

Since then, we also hosted a webinar on the topic of force majeure -which attracted an astonishing 650 live viewers.

Now, as we continue through the second month of the COVID-19 lockdown in Canada and energy sector businesses everywhere continue to adapt and pivot to the new realities of commerce in a quarantine-constrained world, we are seeing new questions arise regarding force majeure, such as: How do we account for COVID-19 type public health occurrences in new contract negotiations? How should we adapt standard force majeure wording to take epidemics, pandemics and out-of-the-blue events in to account? How do we adapt the provisions of current contracts to ensure that the realities of COVID-19 are taken in to account by our suppliers?

Who owns the risk? Allocating the risk of possible future epidemics, pandemics and public health occurrences
A well-drafted force majeure provision is best thought of as nothing other than a risk allocation tool. It is an endeavour by contracting parties to peer into the fog of the future, anticipate possible events and circumstances and then allocate the risks associated with those potential future events and circumstances, and the costs of preparing for such events, between the contracting parties. Long shot events—shark attacks, asteroid strikes, etc.—may or may not merit consideration. More likely events and occurrences—strange weather events, geopolitical events, labour unrest, etc.—do. What events to include or not include in drafting an appropriately scaled force majeure clause must be informed by the commercial realities of the contract under negotiation, the term of the contract, the value at stake, the overarching risks associated with performance failure and many other matters. Not all possible eventualities can or should be covered but, somewhat counterintuitively, in many instances, using broad non-specific language can actually add a measure of contractual certainty.

As the world's recent experience with COVID-19 may have shown, out-of-the-blue events which affect contractual performance do occur. In drafting the force majeure clause, the challenge lies in maintaining brevity while at the same time capturing a wide enough array of possible eventualities so as to provide the contracting parties with some degree of certainty. Drafters could do worse than to use the recently developed International Chamber of Commerce (ICC) long-form force majeure clause as a starting point.

For discussion and review purposes, here is a definition of force majeure utilized in the recently revised version of the ICC standard (modified by us for use in Canada with some optional concepts added in square brackets for reader consideration):

1. "Force Majeure" means the occurrence of an event or circumstance (a "Force Majeure Event") that prevents a party from performing one or more of its contractual obligations under the contract, if and [only] to the extent that the party affected by the impediment (the "Affected Party") proves:
   a) that such impediment is beyond its reasonable control;
   b) that such impediment could not reasonably have been foreseen at the time of the conclusion of the contract; and
   c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party [acting in a commercially reasonable manner].

...
3. In the absence of proof to the contrary, the following events affecting a contracting party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause, and the Affected Party only needs to prove that condition (c) of paragraph 1 is satisfied:

   a) war (whether declared or not), hostilities, invasion, acts of foreign enemies, extensive military mobilization;

   b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, acts of terrorism, sabotage or piracy;

   c) currency and trade restriction, blockade, embargo, sanction;

   d) act of [government] authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization;

   e) plague, epidemic, pandemic, natural disaster, extreme natural event, extreme weather event, nuclear, chemical or biological contamination;

   f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;

   g) [general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises].

We particularly like this clause because it provides a broad, over-arching 'basket' approach to define the types of events which qualify as force majeure events, as well as an enumerated list which can be expanded. Under this wording, the event needs to be (a) beyond reasonable control, (b) not reasonably foreseen and (c) not reasonably avoided.

The 'reasonable avoidance' obligation, in particular, presents a departure from the standard Canadian court interpretation of force majeure. Under the classic 'impossible performance' standard, this obligation would call for exhaustive COVID-19 relief efforts—i.e. "You knew about it. You should have prepared for it. It could have been avoided."

Under the ICC wording which we have presented above, the threshold becomes a lower one of reasonability or, if opted for, commercial reasonability—i.e. "Would the reasonable person knowing what they knew (or should have known) in the circumstances have known, prepared for and avoided it?" Since virtually everyone now knows about COVID-19 and its effects on businesses, there is a strong argument that reasonable parties should have redundant/alternate supply chains in place in order to avoid any impeding effects of
COVID-19. Of course, as the situation evolves further, expectations for reasonable avoidance may change.

In summary, the threshold test proposed in the ICC template is one of reasonability rather than the impossible performance standard normally applied as a default at Canadian law. This is an important distinction and not to be taken lightly—particularly if you view yourself as the party whose performance is most likely to be impeded by the occurrence of a defined event. This threshold test of reasonability could, if agreed by the parties, easily be changed to a threshold test of 'commercial reasonability'. This is also an important distinction and requires some careful legal and commercial thought as to the commercial realities, risk allocation and, of course, odds.

**Common Law Fuzziness**

As mentioned in our previous article, there is still a degree of uncertainty regarding the threshold for granting force majeure in Canadian common law. Despite the strong precedent of 'impossible performance' set by Atlantic Paper Stock Ltd. v St. Anne Nackawic Pulp & Paper Co. and followed in subsequent cases, some exceptions such as Atcor Ltd. v Continental Energy Marketing Ltd. have deviated from the standard. To summarize, the court in Atcor found that the threshold was that of a "real and substantial problem" affecting performance instead of impossibility. This finding is similar to the reasonability threshold that we have presented above in that they imply a lower threshold for obligations on affected parties to avoid or overcome impediments.

Furthermore, both the Atcor standard and our proposed standard suggest the possibility of granting force majeure in situations where contracts become substantially more expensive to perform due to extreme events. This presents a departure from the holding applied in Domtar Inc. v Univar Canada Ltd., where the court indicated, "the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure." If a standard of reasonability is applied, the fact that a contract has become dramatically more expensive would be a much more persuasive factor in determining the application of force majeure.

Notwithstanding the fuzziness of force majeure common law and the relative paucity of COVID-19-related case law, parties can seek to take matters into their own hands by explicitly adding reasonability or commercial reasonability as a consideration to their force majeure clauses. In doing so, these amended force majeure clauses may provide the basis for a shift in Canadian common law away from the standards set in Atlantic Paper and Domtar Inc. and towards the one set in Atcor.
Of course, what constitutes 'reasonable' or 'reasonability' at law is less than clear. We know that this is a source of frustration for many clients, but, herein lies some of the magic of the Common Law: the very uncertainty of a court proceeding outcome surrounding what was or was not reasonable in the circumstances can often be enough to keep parties within bounds.

**How should we adapt standard force majeure wording to take epidemics, pandemics and out-of-the-blue events in to account, add clarity and certainty and appropriate contract risk allocation?**

The proposed force majeure language above is meant to be a general purpose clause that attempts to capture "typical" extreme events that may affect parties in most industries. That being said, we would recommend putting a great deal of thought toward customizing it to meet the particular expectations of parties in different situations. For example, instead of declaring any acts of government authority as force majeure events, parties can choose to specify only the acts of certain named government agencies (or agents) as qualifying events. This may be a particularly useful approach for companies that have relatively local supply contracts and wish to expressly include or exclude actions of certain provincial governments from force majeure applicability.

Force majeure provision drafters may also seek to address the temporal element of large-scale events like COVID-19. The longer these events persist, the more we should be prepared for them. However in some extreme cases, an extended period of force majeure may cause even the most prepared parties to be locked in contractual limbo. In order to avoid this and to add more certainty, parties may consider defining when they can terminate the contract in the event of prolonged force majeure. The new ICC force majeure amendments suggest a default period of 120 days of substantial force majeure-related impediment before parties have a right to terminate the agreement. This detail not only adds more certainty to the agreement, but it also gives parties a relief period where they are protected from unilateral termination. Depending on the contract, this default period may be increased or decreased so that industry-specific commercial realities are properly reflected.

**How do we adapt the provisions of current**
contracts to ensure that the realities of COVID-19 are taken in to account by our suppliers?

Contracts created before COVID-19 may not take events such as the COVID-19 crisis into account other than via references to "epidemic" or "plague". To close the matter of COVID-19 impacts off in an existing contract, parties may consider adding wording to the effect that (a) both parties acknowledge the existence and growing worldwide commercial impact of the COVID-19 epidemic and (b) confirm that they have taken COVID-19 and its impact into account in making business plans and made multiple, redundant supply arrangements to ensure that COVID-19 will not impair performance. In the event of litigation, provided that there is proof of consideration, this express acknowledgement should provide the court with evidence of the parties' contractual intention to accept the risks that come with operating in the era of COVID-19.

A renegotiation clause is another way in which parties can ensure that their contracts remain relevant to the ever-changing business landscape. Upon a triggering event, parties can contract to renegotiate certain terms of an executed contract through renegotiation clauses. This means that parties can use COVID-19 related events such as new government orders to trigger optional or mandatory updating of contracts. Alternatively, the passing of a fixed period of time can be set as the trigger to renegotiate in the future. However, parties should be particularly careful in drafting renegotiation clauses as they may increase uncertainty if left too open-ended—an agreement to agree is not enforceable. If any material disagreements arise in the course of relying on such clauses, it may create additional friction in business relationships and allow for an unintended termination of the contract. In any case, expert legal advice is strongly recommended.

Conclusion

With the state of business operations constantly in flux in light of COVID-19, parties must be adaptable in their approach to drafting contracts now more than ever. Crafting carefully considered force majeure clauses is one way that businesses can mitigate uncertainty. The new ICC clause referred to above provides parties with a solid base to prepare for modern extreme events, however, before using the clause, parties must adjust the language based on the degree of risk that they are comfortable with and the current state of the law governing their contract. This can be done by defining the scope of force majeure through carve-outs and addressing prolonged events through conditional termination rights. Parties can also use mechanisms such as express acknowledgement or
renegotiation clauses to ensure that expectations are in check both during and after the COVID-19 lockdown. Ultimately the power is in the hands of the parties to protect themselves as much as possible from potential future failures of performance—more effort spent in drafting thorough contracts now will materially reduce time spent resolving disputes in the future.

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