The insurgence of the novel COVID-19 pandemic and its ensuing effect on the domestic and global economies has required companies to consider potential remedies should they, or their counterparties, not be able to perform under contracts. One potential remedy is force majeure. Force majeure contractual clauses will receive considerable attention in the coming weeks and months as the COVID-19 pandemic continues to evolve, so it is important to understand how they are generally interpreted and applied by the courts.

Wording of the Clause

The typical force majeure clause seeks to provide relief to a party unable to meet its contractual obligations due to extraneous circumstances outside of the parties' control. The common thread amongst force majeure clauses is that of the unexpected. This is why a force majeure clause is also sometimes referred to as an Act of God clause.

The events typically specified in a force majeure clause can range from flood, fire, perils and dangers, to war, warlike operations, civil war, riot, civil commotion, or strikes. In most force majeure clauses, these performance-excusing circumstances are then followed by the words "or any other causes beyond our control," or similar language to that effect. This language is interpreted narrowly, so as to confine it to the same class or kind of occurrences as that specifically enumerated. Regardless of construction, however, it is generally accepted that force majeure clauses do not protect contracting parties from normal business risks, nor do they serve to reallocate contractual risks.

Risk Allocation or Frustration?
Force majeure clauses exist to account for circumstances beyond the contracting parties' control that interfere with their ability to perform under the contract. In that sense, force majeure is a risk allocation tool; it is aimed at circumstances where performance will be rendered nearly impossible, and provides mechanisms to relieve a party from performing and not being held in default.

Force majeure is to be distinguished from the doctrine of frustration. Frustration of contract occurs when a situation has arisen for which the parties made no provision in the contract. In such instances, performance of the contract becomes "a thing radically different from that which was undertaken by the contract."[5]

Frustration is generally a supervening event that the parties could not have anticipated in entering into the contract. In such cases, the court is asked to intervene to relieve the parties of their bargain because of a "radical change" in the parties' obligation makes the contract impossible to perform.[6] Thus, frustration brings the contract to an end.

With force majeure, the party that would otherwise find itself in default is usually not entitled to bring the contract to an end. Rather, it is entitled to suspend performance or claim an extension of time for performance.[7] Because COVID-19 is temporary in nature, the party unable to perform its obligations under the contract will likely be able to rely on a force majeure clause to suspend performance and not face a termination of the contract.

**Force Majeure, Human Agency and the Duty to Mitigate**

COVID-19 will probably constitute a supervening event for the purposes of most force majeure clauses. As a pandemic, it meets the indicia of being both out of the parties’ control and, depending on the construction of the clause in question, within their contemplation.

However, a word of caution; force majeure will not necessarily relieve parties from performance in all circumstances, and may not capture all of the economical fall out from COVID-19. The larger concern for businesses going forward will not be COVID-19 itself, but rather its direct and indirect consequences, many of which have yet to be borne out. For example, distressed businesses may be unable to pay employees, suppliers, and landlords in the weeks and months to come. Are those inabilitys causally related to COVID-19 such that the protections of a force majeure clause extend to those future breaches? At what point is COVID-19 no longer the direct cause of the breach in question such that force majeure cannot apply?
The case law suggests the answer to these questions will depend on the degree of control a party has over the consequences of COVID-19, and the opportunities a party has to mitigate its losses. As soon as a party can exert a degree of control over its circumstances, even if originally caused by COVID-19, the duty to mitigate its losses will likely be triggered. Consider the cases that follow.

In Atlantic Paper Stock Ltd v St Anne Nackawic Pulp & Paper Co, [1976] 1 SCR 580, the defendant paper mill sought to rely on a force majeure clause when the American market for its manufactured corrugating medium became unprofitable due to freight taxes and duties. It had a contract with the plaintiff to purchase no less than 10,000 tons of waste paper per year for ten years in order to manufacture the corrugating medium. Within 14 months, it realized that it had overestimated its ability to sell its product.

In holding the defendant could not rely on the force majeure clause, the Supreme Court of Canada found the inability to abide by its contractual obligations was "a condition which it brought upon itself". The company lacked an effective marketing plan for the local Canadian market, had inordinately high operating costs, and did not manufacture a complementary product that purchasers often bought in tandem.

Notwithstanding there were circumstances outside of its control (increased freight taxes and duties), which alone may have constituted a force majeure event under different circumstances, the Court placed the onus on the party seeking relief to take measures to mitigate its losses. Where a party does not mitigate, force majeure may not be available.

Similarly, in Wal-Mart Canada Corp/Cie Wal-Mart du Canada v Gerard Developments Ltd, 2010 ABCA 149, Gerard Developments Ltd. was also precluded from relying on a force majeure clause after it failed to construct a road by a contractually-imposed deadline. It argued delays in municipal permits, zoning approvals and the enactment of certain bylaws led to the road's delayed completion. The Court of Appeal disagreed, finding those tasks were not unexpected, but foreseeable, and thus, manageable.

Based on these and other cases, reliance upon a force majeure clause will be permitted where the contracting party cannot exert any degree of control over the circumstances it faces, or reasonably avail themselves of alternatives to enable performance.

**Conclusion**

A party concerned about being able to meet its contractual obligations due to COVID-19, should review the contract to determine whether there is a force majeure clause that can
be relied upon to relieve that party from performing under the contract. If there is such a clause, it would be beneficial to that party to be proactive about its next steps, and consider whether it has exhausted all options available to it to ensure performance. Force majeure clauses are not necessarily the shield parties think they are, and courts do not look kindly on parties who have attempted to assert force majeure while taking no responsibility for their own actions.

[3] World Land Ltd v Daon Development Corp, [1982] 4 WWR 577 (Alta QB) at para 39. In that case, the interpretive principle ejusdem generis, was held not to apply, however.

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