MINDEN GROSS LLP BARRISTERS AND SOLICITORS
145 King Street West, Suite 2200, Toronto, ON M5H 4G2
P. 416.362.3711 ▪ F. 416.864.9223 ▪ @MindenGross ▪ www.mindengross.com

Force Majeure Clauses and COVID-19

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By: Samantha Schreiber - Litigation

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic. Since then, the disruption of the global markets, interruptions in supply chains, and the implementation of self-quarantine and social distancing measures have had and will continue to have a significant impact on Canadian businesses in a variety of sectors.

In light of the sweeping changes caused by the COVID-19 outbreak, businesses may be unable to meet their contractual obligations. This article concerns the protection afforded to Canadian businesses by force majeure clauses, which are commonly found in contracts, in the context of the COVID-19 pandemic.

What is a Force Majeure Clause?

Force majeure literally means “superior force”.

A *force majeure* clause is a contractual term by which a party is excused or discharged from performing the contract, in whole or in part, when an event beyond the control of either party makes such performance impossible. In *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co.*, [1976] 1 S.C.R. 580, the Supreme Court of Canada interpreted a *force majeure* as “the unexpected, something beyond reasonable human foresight and skill” and as a “supervening, sometimes supernatural, event beyond the control of either party.”

A determination of whether COVID-19 or its effects on businesses and the global economy constitute a *force majeure* and the consequences of the reliance on a *force majeure* clause depends entirely on the wording or interpretation of that clause, as drafted.

A well-drafted *force majeure* clause typically addresses the following three issues, a review of which is imperative to determine the degree of protection afforded to contracting parties if they are at risk of being unable to fulfill their contractual obligations:

1. The breadth or scope of the triggering events described in the clause, as defined;
2. The impact of the triggering events on the contractual obligations of the party who invokes the *force majeure* clause; and
3. The effect that the invocation of the clause will have on those contractual obligations.

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The Scope of the Definition of "Triggering Events"

The first step in determining whether a party can effectively rely on a *force majeure* clause is determining whether the triggering event falls within the contract's definition of *force majeure*.

It is common for *force majeure* clauses to include a list of specific triggering events, such as acts of God, non-natural disasters, wars, governmental orders, changes in statutes or laws, and organized labour activities. For example, the CCDC 2 – 2008 Stipulated Price Contract specifically lists labour disputes, fires, unusual delays by common carries or unavoidable casualties, and abnormally adverse weather conditions as triggering events in its *force majeure* clause.

Certain *force majeure* clauses may include epidemics or pandemics in the definition of triggering events. If a defined *force majeure* clause includes an epidemic or a pandemic, COVID-19 would likely qualify as a triggering event within the ambit of this clause.

Force majeure clauses also commonly contain broadly-drafted language such as "any other event beyond the reasonable control of the parties" to trigger events not specifically listed, which were unforeseeable when the parties entered into the contract and were beyond the control of the parties within the ambit of the clause. A determination of whether COVID-19 and the effects the pandemic has had on business' activities fall within the definition of a triggering event pursuant to such language is a matter of interpretation and must be assessed on a case-by-case basis.

The Impact of the Triggering Events

Once it is determined that a triggering event falls within the contract's definition of *force majeure,* the party seeking to rely on the *force majeure* clause must demonstrate that a causal link between the event and the party's inability to meet its contractual obligations exists. Generally, the triggering event must make the performance of the party's contractual obligations impossible.

Unless explicitly provided for in the contract, a *force majeure* clause will not allow a contracting party to discharge its contractual obligations simply because it is commercially unreasonable to do so.

Based on what we've seen so far, COVID-19's impact on business operations is largely economic in nature. One factor in determining whether a *force majeure* clause will operate to discharge or excuse a party's performance of its contractual obligations is the unique impact that the pandemic has or will have on the fulfillment of these obligations and the context of the relationship between the contracting parties.

It is important to remember that contracting parties seeking to invoke *force majeure* clauses have a duty to mitigate the effects of the triggering event and to take commercially reasonable measures to minimize the losses sustained as a result.

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The Effect of Engaging a *Force Majeure* Clause on Contractual Obligations

Generally, parties seeking to invoke a *force majeure* clause must provide notice in accordance with the notice requirements contained in the clause, as drafted.

The invoking party may be excused entirely from meeting its contractual obligations only if:

1. The wording of the *force majeure* clause allows for it;
2. It is determined that the event falls within the ambit of the clause;
3. The event has impacted the party's ability to perform its contractual obligations; and
4. Notice is given that a triggering event has made a party's ability to meet its contractual obligations impossible, if required by the *force majeure* clause at issue.

What if the Contract Does Not Contain a *Force Majeure* Clause?

If there is no *force majeure* clause in a contract, a party that is unable to meet its contractual obligations as a result of an unforeseeable, intervening, and triggering event may rely upon the common law doctrine of frustration.

A party may be discharged of its obligations under a contract by relying on this doctrine where the occurrence of an unforeseen event, through no fault of the parties, causes a radical change that makes the performance of a contract impossible, impractical, or frustrates the original purpose of the agreement. The party alleging frustration bears the onus of establishing the requisite elements of this doctrine. Typically, the doctrine of frustration is harder to establish than reliance on a *force majeure* clause. If a party is successful in establishing frustration, the end result will most likely be termination of the contract.

The impacts of the COVID-19 pandemic are unprecedented, continue to change daily, and will be widespread and far-reaching. These impacts will affect each Canadian business in a unique but substantial manner. Naturally, many businesses may consider invoking *force majeure* clauses or the doctrine of frustration to discharge their contractual obligations in light of the COVID-19 pandemic, which must be assessed on a case-by-case basis.

If you have any questions or would like to obtain legal advice on your contractual obligations in the context of the COVID-19 pandemic, please contact any lawyer in our Litigation group.

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Litigation Group		
A. Irvin Schein Chair T. 416.369.4136 ischein@mindengross.com	**Samantha Bogoroch** Associate T. 416.369.4312 sbogoroch@mindengross.com	**Ian Cantor** Partner T. 416.369.4314 icantor@mindengross.com
Catherine Francis Partner T. 416.369.4137 cfrancis@mindengross.com	**Arnie Herschorn** Partner T. 416.369.4134 aherschorn@mindengross.com	**Rachel Moses** Partner T. 416.369.4115 rmoses@mindengross.com
Sepideh Nassabi Associate T. 416.369.4323 snassabi@mindengross.com	**Samantha Schreiber** Associate T. 416.369.4173 sschreiber@mindengross.com	**Raymond Slattery** Partner T. 416.369.4149 rslattery@mindengross.com