

In an effort to stop the spread of the COVID-19 pandemic (the “Pandemic”) the Government of Ontario has made the unprecedented move to mandate the closure of all non-essential businesses, however what does this mean for the contractual relationships of these businesses? With the closure many businesses find themselves unable to execute existing contractual obligations.

In the normal course of business, there are serious repercussions if a party does not uphold its contractual obligations. Affected parties can bring claims for breach of contract and seek damages that arise from the breach to put it into the position it would be in if the breach of contract had not happened.

However, can a party avoid their contractual obligations because of the Pandemic? Parties may resort to relying on Force Majeure clauses or the Doctrine of Frustration to circumvent their contractual obligations.

Force Majeure Clauses?

The Supreme Court of Canada in, [*Atlantic Paper Stock Ltd. v. St-Anne-Nackawic Pulp and Paper Co.*](#)¹, described a force majeure clause as “generally [operating] to discharge a contracting party when a supervening, sometimes supernatural event, beyond control of either party, makes performance impossible. The common threat is that of the unexpected, something beyond reasonable human foresight and skill”.² Therefore a force majeure clause defines certain unforeseen supervening events that interfere with a party’s ability to perform their duties and obligations, and are typically beyond the control of either party. Should the event outlined in the clause happen, one or all of the parties could be free from liability or obligations under the contract. Some clauses will outline specific events whereas others may be drafted broadly and will be more open ended. It is important to note that these clauses are interpreted narrowly and will only apply where the language in the clause clearly captures the unforeseen event.

Can you rely on a Force Majeure Clause?

The first step in determining whether a party can rely on a force majeure clause is to review the contract you’ve entered, determine whether it includes a force majeure clause, and whether the clause is broad enough to cover the Pandemic. You also need to establish a substantial causal link between the unforeseen event and the party’s failure to perform its contractual obligations. The impact of the Pandemic must make it virtually

¹ 1975 CarswellNB 26F.

² *Ibid* at para 4.

impossible for the party to perform its obligations. Further, a party seeking to rely on a force majeure clause should determine whether the clause allows for the termination of the contract or if it only allows for the temporary suspension of a party's contractual obligations for the duration of the unforeseen event. There are also force majeure clauses that allow a party to terminate the contract if the duration of the unforeseen event exceeds a certain amount of time.

Finally, many force majeure clauses contain notice requirements. If a party elects to utilise this clause they should ensure that any notice requirements are met as outlined in the contract.

The Doctrine of Frustration

The Doctrine of Frustration allows parties to terminate a contract entirely where an unforeseen event renders the contractual obligations impossible to execute or where the contract has radically changed. A party can rely on the doctrine of frustration to extinguish their contractual obligations when the following criteria are established:

1. The existence of a supervening event that occurred at no fault of the contracting parties and it was neither contemplated nor foreseeable at the time of entering the contract;
2. There was no provision in the contract that covered the unforeseen event; and,
3. Performance of the contract has become something radically different from what was originally contracted.

If frustration can be established, then the contractual obligations are deemed to have ended on the date of the supervening event. This will terminate the contract entirely, whereas the force majeure clause could temporarily suspend a contractual obligation. Courts are reluctant to acknowledge a contract as being frustrated, unless extreme circumstances can be demonstrated and shown that there is a severe negative impact on the other parties involved. As established in [*Tskiroglou & Co. Ltd. v. Noble Thorl GmbH*](#)³, where a shipment of Sudanese groundnuts could not take its usual route of the Suez Canal and instead would have to go by way of the Cape of Good Hope. This would make the route go from approximately 4,386 miles to 11,137 miles. Here, the contract was held not to be frustrated as it is not enough for the party relying on the clause to establish that the contract has now become unprofitable, uneconomical, or more onerous.

In the future, it would be prudent for negotiating parties to consider adapting to this new reality and make allowances in their contracts for events similar to the Pandemic and the Government's measures to circumventing its impact on the economy.

³ [1962] AC 93.



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