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ARE CONTRACTS ENFORCEABLE DESPITE COVID-19? PART 6: THE PRINCIPLES OF CAUSATION

Last week, our colleagues explained that parties are usually required to show that they have taken [reasonable steps to mitigate](#) the *force majeure* event, and its consequences, to successfully invoke a *force majeure* clause. The obligation to mitigate exists because force majeure clauses are designed to provide relief only for unexpected events “beyond reasonable human foresight and skill.”¹

Along the same lines, because *force majeure* clauses can only be triggered by particular events beyond the party’s control, Canadian Courts are careful to assess whether the triggering event is causally connected to the party’s inability to carry out their end of the bargain. Indeed, most *force majeure* clauses explicitly require that a party’s inability to perform under a contract actually be *caused* by the triggering event - it is not enough for the event to have simply occurred. As the Alberta Court of Appeal explained in *Atcor Ltd. v Continental Energy Marketing Ltd.*:

[...] In my view, the contractual requirement for a causal tie between event and non-performance evidences the intention of the parties that the relationship between the two must be substantial, not incidental. A supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible. ²

As such, if a *force majeure* event has occurred, but did not actually prevent the party seeking to rely on the clause from carrying out its contractual obligations, then relief may not be available. For instance, in *Prairie Well Services v Tundra Oil & Gas*, the Manitoba Court of Queen’s Bench held that *force majeure* relief was not available despite the fact that a *force majeure* event, as defined in the contract, had occurred.³ The party claiming *force majeure* responded to the *force majeure* event (a strike by its employees) by selling off its equipment. The Court found that it was the party’s decision to sell off its equipment - and not the strike - that prevented contractual performance.

¹ *Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Co.*, [1976] 1 SCR 580, pp 583

² *Atcor Ltd. v Continental Energy Marketing Ltd.*, [1996] AJ No 131 [ABCA], para 11 [*Atcor*]

³ *Prairie Well Services v Tundra Oil & Gas*, 2000 MBQB 52, para 12 [*Prairie*]

In the context of COVID-19, this means that it may not be possible to rely on a *force majeure* clause which lists “pandemics”, “epidemics” or “orders” from civil or public authorities as triggering events, if those events did not directly cause a party’s non-performance.

With that in mind, what if two (or more) simultaneous events occur which prevent a party from performing under a contract? American and British jurisprudence provides some guidance in answering this question.

In the British case of *Seadrill Ghana Operations Limited v Tullow Ghana Limited*, the Court held that, based on the wording of the *force majeure* clause at issue, the triggering event was required to be the **sole cause** preventing performance.⁴ The Court explained that its interpretation:

[...] is consistent with the approach of the Court of Appeal in *Intertradex v Leiseur* [1978] 2 Lloyd’s Reports 509 where it was held that where two causes operated to prevent a seller from shipping goods a *force majeure* notice had to be given in respect of each of them. Where notice had only been given of one the seller could not rely upon the *force majeure* clause. **That decision is regarded as one which establishes the proposition that a *force majeure* event must be [the] sole cause of the failure to perform an obligation [...] Ultimately, however [...] the question is one of construction of the contract before the court. [Emphasis added.]**⁵

This issue was also considered by the 10th circuit of the United States Courts of Appeal in *Aquila Inc v CW Mining*.⁶ In that case, the contractual definition of *force majeure* included circumstances that either wholly, or partially, prevented performance. The party seeking to rely on the clause argued that it was entitled to *force majeure* relief because a labour dispute at a mine occurred concurrently with geological issues at the mine. However, the Court disagreed - it found that the defendant’s inability to perform was caused by the geological issues (which did not constitute a *force majeure* event), and not the labour dispute (which was a *force majeure* event). As such, it held:

[...] we cannot accept [the Defendant]’s subsequent assertion that a partial *force majeure* could excuse it from performance difficulties arising from what the district court fairly found to be other, entirely independent causes.⁷

These international authorities - together with Canadian Courts’ emphasis on the importance of [interpreting force majeure clauses narrowly](#), in part to “exclude events which are not truly beyond the

⁴ *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm), para 67 [*Seadrill*]

⁵ *Seadrill*, para 79

⁶ *Aquila Inc v CW Mining*, 545 F 3d 1258 (UT Cir Ct App 2008) [*Aquila*]

⁷ *Aquila*, 1265

parties' control"⁸ - suggest that a party may not be relieved of its obligation to perform if a *force majeure* event occurs concurrently with a non-*force majeure* event which also impairs performance. However, each case will require its own assessment, based on the particular circumstances leading to the non-performance, along with the contract at issue.

What is clear is that, regardless of whether you are seeking to rely on a *force majeure* provision or argue that it is not applicable, the issue of causation is of vital importance. JSS Barristers' lawyers have extensive experience litigating issues of causation in the context of contractual breaches, and would be pleased to assist in either case.

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⁸ Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd Ed (LexisNexis: Toronto, 2016), pp 343, citing *Atcor*, paras 11 and 14