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ARE CONTRACTS ENFORCEABLE DESPITE COVID-19? PART 5: DUTY TO MITIGATE FORCE MAJEURE EVENTS

Last week, in our weekly publication in this series, our colleagues discussed notice requirements in *force majeure* ("**FM**") clauses and outlined the potential consequences of failing to comply with these requirements. This week's article focuses on the requirement to mitigate the duration and effects of an FM event. In essence, we answer the question: "*If an event triggers an FM clause, do I have a duty to mitigate the duration and effect of that event?*"

In short, absent express contractual language to the contrary, the answer is yes. A party seeking to rely upon an FM provision will usually have to show that it has taken reasonable steps to mitigate the event and its consequence.[1] What constitutes effective mitigation efforts will depend on all of the circumstances, including the nature and subject matter of the contract in question, the facts regarding the FM event, and what could reasonably have been done by the party seeking FM relief, to minimize the time period or magnitude of the effects of the FM event.

In *Atcor* for instance, the Alberta Court of Appeal emphasized that the real purpose of an FM clause is to deal with, or respond to, unexpected events beyond reasonable human foresight and skill.[2] The Court held that an FM clause is about the effect of an event and not simply the occurrence of an event. Accordingly, those who wish to rely on an FM clause typically cannot simply sit back and claim absolution; rather, absent express language to the contrary, there is generally a duty to use all reasonable efforts to mitigate the effects of the FM event on the ability to perform the obligations under the contract.[3]

Practically speaking, those wishing to rely on an FM clause in the context of the COVID-19 pandemic must be able to demonstrate steps taken to mitigate the reasonably foreseeable impacts of an FM event on their ability to perform. Affected parties should be proactive. Decisions should be carefully considered with regard to all of the circumstances and be updated if, and as, the scenario changes. The factors being considered, the decisions being made, and the reasons for those decisions should be memorialized as the events unfold. This is important because mitigation efforts are generally evaluated based on the circumstances in existence at the time, not with the benefit of hindsight.[4]

1 *Atcor Ltd v Continental Energy Marketing Ltd*, 1996 ABCA 40, [1996] 6 WWR 274 ("***Atcor***") at paras 29-30; *Cortina Foods Inc v Bari Cheese Ltd*, 1996 CanLII 1470 (BCSC) ("***Cortina***") at paras 53-54; *Roberge v 1102940 Alberta Ltd*, 2012 ABQB 717 ("***Roberge***") at paras 68-70 and 90-100.

2 *Atcor* at para 29.

3 *Atcor* at paras 29-30.

4 *Tangye v Calmonton Investments Ltd*, 1988 ABCA 206 (CanLII) at para 24; *Forsberg v Naidoo*, 2011 ABQB 252 at para 494; *West Edmonton Mall Ltd v McDonald's Restaurants of Canada Ltd*, [1993] AJ No 765, 144 AR 331 at para 44.

Parties seeking to evaluate or challenge FM claims will likely be well-served by requiring contemporaneous records of mitigation efforts to be provided on a real-time basis. Those parties may in fact want to take a more active role, questioning whether certain steps have been considered and why certain steps have or have not been taken.

If COVID-19 is a triggering event for the FM clause in a contract, the duty to mitigate will be shaped by the nature of the contract, the affected obligation to perform, the specific circumstances that gave rise to the FM event, and the reasonably available options for the affected party.

As just one example, COVID-19 may have caused suppliers to miss contractual deadlines in the delivery of products or materials. The duty to mitigate would generally require the supplier to demonstrate its continued efforts to find reasonable alternative means to perform the obligation to deliver, as soon after the deadline as possible. In the construction field in particular, COVID-19 may have caused supply chain disruptions that impacted the ability to complete the project on time. A contractor claiming FM relief will need to demonstrate that it took reasonable efforts to seek alternate suppliers perhaps from alternative locations.

Some contracts specifically outline the extent to which, or manner in which, a party claiming an FM event is required to mitigate. For those contracts that do not have these specifications, the Court of Appeal in *Atcor* provided some guidance by implying a standard of commercial reasonableness. [5]

There is not a wealth of jurisprudence in Canada that fulsomely analyzes the duty to mitigate in the context of FM clauses.[6] This may well change as a result of disruptions caused by COVID-19.

Regardless of whether you are attempting to rely on an FM clause or are responding to an FM claim, your chances of success can be influenced by acting proactively, based on the specific requirements of the applicable FM clause. JSS Barristers has extensive experience relating to contractual disputes arising from the interpretation of FM clauses and the duty to mitigate.

Next week we will provide you with further guidance in the FM field, focusing on causation including the effects of simultaneous events, when some qualify as a force majeure event, and others do not.

Stay tuned and stay safe.

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[5] *Atcor* at para 30; see also *Roberge* at para 90 and *Cortina* at paras 53-54.
[6] For instance, see *Atcor* at para 30.