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COVID-19 AND THE PERFORMANCE OF CONTRACTS

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A. INTRODUCTION

Most charities and not-for profits ("NFPs") are having to deal with the impact of the COVID-19 outbreak, which the World Health Organization characterized as a pandemic on March 11, 2020, as well as the measures taken by governments declaring states of emergencies and ordering the shut-down of non-essential businesses in an effort to "flatten the curve". Businesses, as well as charities and NFPs, have seen their operations come to a halt, disrupting or threatening the performance of contracts with business services providers and other counterparties, such as conference venues, real estate transactions, and the delivery or receipt of goods and services generally. This *Bulletin* provides a brief overview of the impact of COVID-19 and other supervening events on contractual obligations with regard to *force majeure* clauses and the common law doctrine of frustration. However, this *Bulletin* does not constitute and is not a substitute for the need to retain legal counsel to advise a charity or NFP on what it can do in a particular fact situation.

B. FORCE MAJEURE CLAUSES

Commercial contracts often contain a clause expressly relieving one or both parties, either permanently or temporarily, from further performance of any obligations under the contract in the event that a supervening event occurs after the formation of the contract. Such contractual provisions are typically referred to as *force majeure* clauses, also referred to as "Act of God" clauses. In this regard, *force majeure* clauses provide an excuse from the non-performance as a result of a supervening event beyond the control of the non-performing party.

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In *Atlantic Paperstock Ltd. v St. Anne-Nackawic Pulp & Paper Co.*,[1] the Supreme Court of Canada described these clauses in the following terms:

> An act of God clause or force majeure clause […] generally operates to discharge a contracting party when a supervening […] event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

1. Interpretation of *force majeure* clauses

Because *force majeure* clauses are negotiated as part of each contract, the specific terms and types of events specified under various *force majeure* clauses in different contracts may vary. Similarly, the determination of whether or not a particular supervening event, such as the COVID-19 pandemic, falls within the scope of a *force majeure* clause is a matter of contractual interpretation.

As such, the courts will interpret *force majeure* clauses in light of their purpose of excusing non-performance of contractual obligations upon the occurrence of supervening events that make performance impossible, excluding circumstances that do not fall within the specified types of events described in each *force majeure* clause or events that are not beyond the control of the non-performing party. Also, if the contract was formed at a time when the described event was already unfolding, such as a contract formed after March 11, 2020 in the case of COVID-19, that clause might be interpreted to exclude such event.

The types of events typically described under a *force majeure* clause are: acts of God, wars, blockades, insurrections, riots, public health emergencies, epidemics, earthquakes, governmental administrative action, and may sometimes include strikes and failures of suppliers or catch-all descriptions like *any* or *other* circumstances or events beyond the control of the non-performing party to the extent that such circumstances or events make performance impossible or illegal. Note that where a *force majeure* clause does not specifically provide for events such as COVID-19, that *force majeure* clause might still be relied upon by a non-performing party as a result of supervening events, such as government-ordered restrictions or prohibitions in response to COVID-19 that make performance under the contract impossible.

[1] [1976] 1 SCR 580.

Further, where the *force majeure* clause has been inserted in the contract for the benefit of the party who drafted the clause, the principle of *contra proferentum* will apply so that any ambiguity in the clause would be construed against the interests of that party who drafted the ambiguous provision.

2. Invoking a *force majeure* clause

In order for a party to rely on a *force majeure* clause as an excuse for non-performance under the contract, provided that COVID-19 or other supervening events described under the *force majeure* clause apply in the circumstances, the non-performing party would need to show compliance with any notice periods contemplated in the *force majeure* clause. The determination of *when* the notice period starts to run would also depend on the language used in the contract.

The non-performing party would also need to be prepared to show that the event, be it COVID-19 or another supervening event, has affected that party's ability to perform under the contract to the extent that performance is impossible, not simply more onerous, and that the non-performing party has taken the necessary measures to mitigate the damages and find alternative methods of performance in good faith in accordance with the terms of the contract. The *force majeure* clause may require specific due diligence to remedy the situation and remove the cause of the non-performance where reasonable.

Depending on the wording of the *force majeure* clause, there can be a variety of remedial measures available. For example, a non-performing party may be allowed to temporarily suspend its obligations under the contract until the supervening circumstances or event no longer impedes performance. In other circumstances, the non-performing party may be able to invoke the *force majeure* clause to entirely terminate the agreement with respect to both parties. The consequences for the parties with regard to any partial performance already completed will depend on the facts of each case.

C. DOCTRINE OF FRUSTRATION

Where an agreement does not contain a *force majeure* clause, or where the specific event impeding performance by one of the parties is not an event within the scope of the relevant *force majeure* clause, the courts may consider the common law doctrine of frustration.

The doctrine of frustration may provide an excuse for non-performance of a party whose ability to perform has been affected by an extreme, frustrating event that renders performance impossible or where performance is still possible, but the purpose for which one or both of the parties entered the contract is no longer feasible or is beyond what they could have reasonably contemplated at the time the contract was formed.

Depending on the circumstances of each case, the doctrine of frustration may also require that the non-performing party show due diligence in remedying the problem and may exclude circumstances or events which are not beyond the control of the non-performing party.

D. CONCLUSION

Charities and not-for-profits should proactively assess the risks of non-performance and review all contracts to determine whether or not there is a *force majeure* clause and, as applicable, whether the clause applies to the COVID-19 outbreak or any supervening events such as government directives or emergency legislation that make performance of such contracts impossible or illegal. Charities and not-for-profits considering the applicability of such clauses or anticipating that their contractual counterparties may be unable to perform under existing contracts may need to be prepared to negotiate contractual amendments and, if necessary, ensure that any notice obligations under the relevant contract are followed accordingly. However, before any decisions are to be made on the actual or potential non-performance of a contract as a result of COVID-19 or other supervening events, it is essential that legal advice be obtained on the specific fact situations at issue.

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