Canada trade arbitration disputes arising from the European energy crisis

September 28, 2022

In 2020, Canada was the tenth largest partner of the EU for goods exports and the 16th largest partner for EU goods imports.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) entered into force provisionally on 21 September 2017. As a modern and progressive EU trade agreement, CETA provides EU firms with more and better business opportunities in Canada, supports employment in Europe, and protects consumers and the environment, allowing businesses and entrepreneurs of all sizes to benefit from its improved market access.

Recently, Europe's energy-intensive companies have begun to close their doors in response to high energy prices. As a result of high gas and power prices, dozens of plants across a wide range of industries, including steel, aluminum, fertilisers, and the power industry, have had to close up shop.

A factory in Europe has been closed by the world's second-largest steel producer, due to rising gas and energy prices in the region. The energy crisis has led to the closure of several European stainless steel mills, glass manufacturers, and other industrial operations.

Europe – UNIDROIT

As a non-binding codification of international contract law,

the European rooted Unidroit Principles of International Commercial Contracts serve as a basis for international contract law as a whole. The Principles provide a balanced set of rules tailored to the special requirements of modern international commercial practice, and they are designed to be utilized throughout the world regardless of the legal traditions and economic and political conditions of the countries in which they are to be applied.

When unforeseeable events "fundamentally alter[r] the equilibrium of the contract," a party may request a renegotiation of the contract under the hardship provisions in the Unidroit Principles of International Commercial Contracts. Arbitral tribunals applying Unidroit Principles may terminate or adjust the contract in order to restore equilibrium if renegotiation fails.

Similar hardship provisions are found in other soft law instruments, most notably the Principles of European Contract Law, which includes a provision on change of circumstances.

Parties to an international commercial arbitration may also agree on the UNIDROIT Principles as the applicable law, rather than a specific domestic law or the CISG.

Canada – doctrine of frustration

Common law legal principles have long emphasized the doctrine of frustration. A party to a contract may not be obligated to meet their contractual obligations if circumstances change – without their own fault – that prevent them from performing the contract. It is possible that frustration could be applied to any contract, in contrast to force majeure clauses.

As a result of common law doctrine of frustration, parties can terminate contracts when an event occurs which prevents the performance of a contractual obligation from being performed due to the fact that its performance would result in a thing radically different from the contract's expectations. In the

absence of unforeseen circumstances, any party would be unjustly held responsible for their obligations under the contract, based on the doctrine. In the case of a contract to supply raw materials, the suspension of businesses due to exponential energy prices may frustrate the contract.

In *Naylor Group Inc. v Ellis-Don Construction Ltd*, the Supreme Court of Canada provided guidance on what may constitute frustration describing it as "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract'".

Arbitration to resolve disputes

For Canadian businesses engaged in transactions with European counterparts, being able to resolve a dispute via arbitration provides the advantage of potentially more reliable enforcement and collection procedures.

This is particularly advantageous when the debtor does not have assets in Canada.

The first step would be to review contracts and purchase orders (or any other instruments) to see if there is an arbitration dispute resolution clause.

An arbitration tribunal generally applies the doctrine of frustration narrowly, but in summary, frustration would require substantiation of the following elements:

- It is necessary for the frustrating circumstances or events to arise or occur after the contract has been entered into;
- As a result of the frustrating circumstances or events, the performance of the contract is impossible, illegal, or radically different from what was anticipated when the contract was signed;
- If the applicable frustrating circumstances or events

were caused by the actions or omissions of the party seeking to rely on the doctrine, the doctrine will not apply, or if the relevant risks have already been addressed and allocated by the contract terms.

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