

ALBERTA CONSTRUCTION INDUSTRY COMMUNIQUÉ

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CONSIDERING THE KEY ELEMENTS OF *FORCE MAJEURE* CLAUSES

Force Majeure literally means "greater force". These clauses, most commonly found in construction and transportation contracts, excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract, and that party's failure to perform could not be avoided by the exercise of due care. In the absence of a *force majeure* clause, a party will be held to perform its obligations under the contract, or be required to pay damages in lieu, even when that party's ability to perform is impaired or prevented by matters beyond its control.

To effectively protect the parties from events outside normal business risks, the *force majeure* clause must address at least three key issues. It must define: the events which will trigger the operation of the clause; the impact those events will have on the party who invokes the clause; and the effect invocation will have on the contractual obligations (*Atcor Ltd. v. Continental Energy Marketing Ltd.* (1996), 38 Alta. L.R. (3d) 229 (C.A.) ("*Atcor*").

Typically, *force majeure* clauses include natural disasters or other "Acts of God", war, riots, and sabotage as events of *force majeure*. There are some events, like a lack of funds, that are typically excluded as an event of *force majeure*. It is helpful if a *force majeure* clause sets forth some specific examples of acts that will excuse performance under the clause, such as wars, natural disasters, and other major events that are clearly outside a party's control. Inclusion of examples will help to make clear the parties' intent that such clauses are not intended to apply to excuse failures to perform for reasons within the control of the parties. Although boilerplate *force majeure* clauses are available, it is preferable that parties to a contract tailor a *force majeure* clause to their particular circumstances, needs and expectations. For instance, in a licensing contract, it may be appropriate to enable a party to rely upon the failure of a supplier or subcontractor to perform their obligations to the contracting party as an event of *force majeure*, whereas in a construction contract, this is likely less desirable.

Note:

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A party seeking to invoke a *force majeure* clause should provide notice to the other party so as to enable that party to take all necessary steps to protect itself and minimize its losses, if possible. Thus, a well-drafted *force majeure* clause should include a requirement that the party invoking the clause provide written notice of the *force majeure* to the other parties.

Once it is established that a triggering event in a *force majeure* clause has occurred, the next step is to determine how it affects the parties to the contract. In order for a party's obligations to actually be suspended or excused, the party seeking to rely upon it must be unable to perform its contractual obligations or, alternatively, the event must have caused that party to fail to perform its contractual obligations.

Finally, and most importantly, a *force majeure* clause must specify what happens when the clause is invoked. Generally, a *force majeure* clause will provide that upon the occurrence of a triggering event the parties' obligations are suspended for the duration of the *force majeure* event. However, it should be noted that a party wishing to invoke a *force majeure* clause must first mitigate, that is, it must take reasonable steps to avoid having to suspend or abandon its contractual obligations. If the party can mitigate in a "commercially reasonable manner", it is obliged to do so and cannot rely on the force majeure clause to suspend its obligations (*Atcor*). Unfortunately, there are no specific guidelines as to what constitutes commercial reasonableness and that determination will, therefore, be highly fact dependent. Given the lack of guidance in this regard, where practical, a *force majeure* clause should list what specific actions the parties have agreed a party must do in order to mitigate.

If, when considering a *force majeure* clause, the parties pay attention to its key elements, as described above, with specific regard to the type of contract in which it is placed, the parties involved and the commercial context in which they are dealing, the potential for dispute and litigation may be minimized.

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