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# **FORCE MAJEURE AND ACTS OF GOD**

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**Kelsey Becker Brookes and Jeremy Taitinger**





# Traditional Law of Contract

- Traditionally, the law of contract required compensation in damages from parties who undertook to perform an action and failed to do so
- Even where performance was rendered impossible by unforeseen circumstances
- In other words, once a party had contracted to do something, they were *absolutely liable* to do it



# Damages for Breach of Contract

- If they failed to perform according to the terms of the contract, the other party was entitled to be put in the position they would have been in had the contract been fulfilled
- At least as far as possible in the circumstances



# Exceptions Developed

- Exceptions to the doctrine of absolute contractual liability developed
- Doctrines of impossibility and frustration
- Allow for termination of a contract when performance has become impossible or the fundamental purposes of the agreement are confounded by events outside the control and expectations of the parties



# Drafting of Contracts

- Solicitors responded to the doctrine of absolute contractual liability by expressly allocating risks of non-performance in the terms of the contract
- Including express provisions concerning excusable non-performance allows parties to reallocate risks and specify the consequences



# Force Majeure Clauses Developed

- “*Force majeure*” or “Act of God” clauses
- Primary mechanism by which parties can agree to limit or preclude liability where certain events prevent or delay a party from performing its obligations
- Appear in everything from standard commercial leases and consumer warranties, to the complex agreements underlying multi-billion dollar infrastructure projects



# Acts of God



"I guess this is one of those Acts of God you always hear about."



# Acts of God

- Long common law history as a term employed to excuse non-performance
- A circumstance “which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility”
- “Such operation of the forces of nature as reasonable foresight and ability could not foresee or reasonably provide against”
- “Events which cannot be foreseen, or which if they can be foreseen cannot be guarded against.”





## Acts of God

- An Act of God may absolve a person from the performance of all or part of an obligation
- The supervening event “must be due *exclusively* to natural causes of so extraordinary a nature that it could not have been foreseen and its results not avoided by any action which could reasonably have been taken by the person setting up the plea.”



## Acts of God

- Alberta court back in 1924 considered the concept of an Act of God in the context of a grain threshing dispute
- Snow storm interrupted the thresher's ability to perform the agreed upon contract indefinitely, and the plaintiff farmer refused to pay until the work was completed in its entirety.



## Acts of God

- Judge held that while a “slight storm” did not constitute an Act of God and wouldn’t excuse the thresher from performance, “a permanent break in the weather making threshing impossible for an indefinite period would...”



## Force Majeure

- *Force majeure* is French for “superior force.”
- Unlike Acts of God, *force majeure* has no meaning at common law
- Its meaning is dependent upon its use in an express contractual term and “its intended effect and operation must be found within the express or implied terms or the matrix of the particular contract.”



# Force Majeure

- Important exception: under the Civil Code of Quebec, *force majeure* operates similarly to the common law doctrine of frustration which, when triggered, alleviates both parties of their obligations under the contract
- Important when dealing with contractors or suppliers from Quebec
- Want to specify the operative meaning wherever the term occurs



# Contractual Provisions

- Won't necessarily say "Force Majeure Clause" or "Act of God Clause"
- Presence or absence of these clauses is "objectively" determined
- Wherever the language of the contract functions to excuse parties from performing their obligations for some reason



# Contractual Provisions

- “An act of God clause or *force majeure* clause ... generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.”



# Contractual Provisions

- These clauses deal with risks outside the ordinary course of business - those highly unlikely and highly unexpected incidents over which the parties have no practical defense
- **HOWEVER**, it is important to remember that the precise scope of risks covered by these clauses is determined by their specific *wording*





## Very Basic Clause

- *Any delay in or failure of performance by either party under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond the reasonable control of such party including, but not limited to, acts of God, power outages and governmental restrictions.*



# More Complex Clauses

- Four primary components:
  - (a) A definition of events that will constitute force majeure events;
  - (b) A means by which parties can determine how long a force majeure event continues once it has occurred;



## More Complex Clauses

- *Four primary components: (continued)*
  - (c) A description of the procedure by which one party will give notice to the other party of the occurrence of a force majeure event; and
  - (d) A definition of the consequences that a force majeure event will have on the parties rights and obligations under the contract.



# Definitions

- Parties have opposing interests in defining what constitutes a *force majeure* event
- In a building contract, the owner's interest is better served by very precise definitions that limit the contractor's excuses for non-performance or late performance
- The contractor's interests will be better served by a broader, more general excuse
- Will determine how easily the contractor is excused from its obligations under the contract



# Triggering Event

- Common triggering events specifically referenced in force majeure clauses include:
  - Acts of God, landslide, flood, tempest, washout, fire, lightning, disaster, earthquake, and storm;
  - Actions of military, naval, or civil authority, the Queen's or a public enemy, war, revolution, political disturbance, and terrorism;
  - Civil disturbance;



# Triggering Event

- Expropriation, acts or restraints of a governmental body or authority, and failure to obtain a requisite permit or authorization from a governmental authority by reason of any statute, law, or Order-In-Council, or any regulation or order passed or made pursuant thereto or by reason of the order or direction of any administrator, controller, or board, or any governmental department or officer or other authority, or by reason of not being able to obtain any permission or authority required thereby;



# Triggering Event

- Unusual delay by common carriers;
- Sabotage, rebellion, vandalism, riot, blockade, insurrection, strike, lockout, and explosion;
- Power failure and non-availability of labour, materials service, equipment, goods, or utility; and
- Epidemic and quarantine.



# Triggering Event

- Municipalities are most commonly owners for the purposes of contracting
- Beware of overly broad or vaguely defined *force majeure* events
- Triggering events that define a force majeure should be tailored to the unique circumstances of the particular contract
- By accepting overly broad clauses, a municipality may be taking on more of the risk of a costly mishap than is necessary to reach an agreement





# Triggering Event

- As one Alberta Judge put it: “a broad list of force majeure events offers the risk of turning the bargain on its head if it can be used as an escape clause.”



# Timing and Process

- It is important that the timing and process by which the force majeure clause will be triggered is clear to both parties
- At what point is notice required? To whom? And in what form?
  - What - if any - particulars does the invoking party have to provide to show the force majeure event is the cause of the delay?



## Timing and Process

- “The law is relatively settled that a party giving notice of force majeure must strictly comply with the terms of the notice provision. It is treated as a condition precedent and, if not fulfilled, the party cannot rely on the force majeure clause.”



# Consequences

- Once *force majeure* events and the mechanism of their invocation are defined, it is important that the consequences of the event be clearly understood by all parties
- Is the contractor entitled to more time once the event has occurred? If so, how much more time?
- Who will be responsible for additional costs of delay?



# Consequences

- Will there be payment for partial performance?
- Does it make sense that there would be payment in those circumstances (i.e. is partial completion a benefit?)
- Is the invoking party required to mitigate damages?



# Consequences

- When properly drafted, these components work together to “provide relief from responsibility to perform a contract should unanticipated events render performance of the contract impracticable or impossible...[or] to capture those foreseeable risks that the parties deem to be inconsistent with the performance of the contract as contemplated.”



## Take Away

- When you draft or negotiate a *force majeure* clause, ask yourself:
  - Does the clause clearly outline what events are intended to be covered?
  - Are there any events that you want to expressly exclude?



## Take Away

- Should the party obtaining the benefit of the clause be entitled to additional time to perform its obligations, additional compensation, or a combination of both?
- How short should the notice period be?
- What are the consequences of not providing notice within the required time period?
- Should the clause relieve the Owner from obligations to make payment under the Contract?





## Take Away

- Should the clause permit termination of the Contract if the *force majeure* event continues for a lengthy period of time?
- Watch for words such as “including, but not limited to” or “excluding”



## Take Away

- When you encounter a *force majeure* clause, ask yourself:
  - 1) What event(s) does the clause say will excuse delay or non-performance?
  - 2) What must the party relying on the clause *do* once the triggering event occurs (i.e. notice, etc.)?
  - 3) What are the consequences of a force majeure event (i.e. extensions, allocation of additional costs, termination, etc.)?



## Cases

- ***Atlantic Paper Stock Limited v St. Anne-Nackawic Pulp & Paper Co., 1975***
- ***Walmart v Gerard Developments, 2010***
- ***World Land Ltd v Daon Development Corporation, 1981***
- ***Jack v Morehouse, 2014***
- ***Tsakiroglou & Co. Ltd. v Noble Thorl G.m.b.H, [1962]***



## Example

- *Exclusions from your ASUS Warranty Extension Program including the WEP Limited Hardware Warranty Service:*
  - *...There is damage caused by natural disaster, intentional or unintentional misuse, acts of war, space invasions, abuse, neglect, improper maintenance, or use under abnormal conditions....*

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BARRISTERS SOLICITORS

**Reynolds  
Mirth  
Richards  
& Farmer LLP**



# **Thank You For Your Attention Questions Are Welcome**

**Kelsey Becker Brookes**

**780.497.3304**

**kbeckerbrookes@rmrf.com**

**Jeremy Taitinger**

**780.497.3317**

**jtaitinger@rmrf.com**

**Toll Free: 1.800.661.7673 (RMRF)**

**www.rmrf.com**