

Flooding and Force Majeure Clauses

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In Manitoba, the start of spring after a long cold winter is traditionally a welcome event. However, in recent years, the start of spring has become synonymous with another, less welcome event: flood season.

This spring, several areas of Manitoba are dealing with record high water levels and many areas of the Province have faced difficulties with flooding.

For the construction industry, flooding and other adverse weather events may have severe impacts on project schedules and costs. If you're faced with a situation where your work will be impacted by causes outside of your control, you will want to consult the force majeure provisions in your contract.



So what is *force majeure*?

The direct translation of force majeure is “greater force”, or in other words a force that is out of the hands of any party to the contract. Typically, these clauses are inserted into contracts to excuse a party from liability if an event which could not be foreseen prevents that party from fulfilling its contractual obligations. Examples of typical force majeure events include natural disasters, insurrections, war or “Acts of God”. The Supreme Court of Canada has indicated that a force majeure event is one that is “...unexpected, something beyond reasonable foresight and skill.”

Aside from being an occurrence which is truly unforeseen, a force majeure event must be of such significance that the failure to perform in accordance with the contract could not be overcome by the reasonable efforts of the party claiming relief.

The essential purpose of the force majeure clause is to allocate the risk for unexpected events between the owner and contractor (or contractor and sub-contractor or supplier). Generally speaking, an owner will want a tightly worded force majeure clause which limits the events considered to be force majeure to specifically enumerated events like natural disasters and wars. On the other hand, a contractor will generally be looking for a more inclusive (or loosely worded) clause which would leave the definition of force majeure open to

other events, including the failure of third parties to perform services or supply materials.

Apart from the issue of agreeing as to what constitutes a force majeure event, parties to a contract should also ensure that their agreement includes specific provisions on what happens if a force majeure event occurs. Is the contractor entitled to an extension of time and additional costs? Just an extension of time - or just additional costs? If an extension of time and/or additional costs are to be awarded, do the parties use a change order procedure or is there a separate procedure to account for these claims? Are there specific notice requirements for a party advancing a force majeure claim? All of these questions should be answered in a good force majeure clause.

Parties should be aware that even where a force majeure event occurs, parties are not released from their obligations completely - they remain under a positive duty to take reasonable steps to mitigate the damage caused by the event.

So if you find yourself on the wrong side of Mother Nature this spring and need guidance as to whether you've got a valid claim for additional time and/or costs, look to the force majeure provisions of your contract.

*Jonathan M. Woolley has been appointed a Judge of the Court of King's Bench of Manitoba in Winnipeg and is no longer at TDS. Please contact **Meghan Ross** at mcr@tdslaw.com to connect with a lawyer on this topic.*

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