

MERDE ... AND OTHER FRENCH FOR LAWYERS: THE SEVEN THINGS YOU NEED TO KNOW ABOUT *FORCE MAJEURE*

- M**
1. **Meaning:** “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.”¹
- A**
2. **Address:** A *force majeure* clause should address 3 things:
- i. Triggering mechanisms;
 - ii. The impact that the events have on the party who invokes the clause;
 - iii. What effect invocation should have on the contractual obligations.
- J**
3. **Justify:** Do not accept boilerplate language. Strike a balance between broadly listing detailed triggering events (which are germane to the subject matter) and using general all-inclusive language.
- E**
4. **Extent:** Consider the extent of the impact required for a party to invoke a *force majeure* clause. Need the *force majeure* event render performance of the contractual obligations impossible or is some lesser impact sufficient?
- U**
5. **Ultimate result:** A *force majeure* clause should address the consequences of the *force majeure* event and the related inability to perform or failure to perform. Results can range from suspension of obligations during the *force majeure* event to termination of the entire agreement.
- R**
6. **Require:** Include a notice requirement and a condition that requires the party invoking the *force majeure* clause to mitigate the consequences of the *force majeure* event, to the extent possible.
- E**
7. ***Ejusdem generis (of the same kind):*** Be aware that the breadth of a *force majeure* clause can be circumscribed. Where a list of *force majeure* events is followed by general wording that is not itself expansive, the general wording is usually restricted things of the same type as the listed events.



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¹ *Atlantic Paper Stock Ltd. v St. Anne-Nackawic* [1976] 1 SCR 580.

Sample force majeure clauses for Discussion

Sample *Force majeure* clause from a construction contract:

“*Force Majeure*” or “*Force Majeure Event*” shall mean any cause which is beyond the reasonable control of the Party affected, including, but not limited to: natural disasters, fire, hurricanes, unusually severe and not reasonably anticipatable rain or other inclement weather outside of conditions customarily experienced at the Site (as documented by weather data from Environment Canada) over the past twenty (20) years taking into consideration severity, duration and time of year, tornadoes, dust or sand storms, mudslides, lightning, flood, earthquake, tsunamis, explosions, acts of God, terrorism or the public enemy, strikes or lockouts, vandalism or other public disorder or civil disturbance or disobedience, the presence of aboriginal and/or historical Artifacts, Aboriginal or native land claims or disputes, blockages, insurrections, riots, war, hostilities, sabotage, expropriation or confiscation, epidemic, quarantine, or the unreasonable delay, action or inaction of any Governmental Authority which restrains a Party’s ability to obtain, or to secure the renewal or amendment of, an Applicable Permit from a Governmental Authority through no fault of the Party claiming the *Force Majeure Event*.

Notwithstanding anything to the contrary, the term *Force Majeure Event* or *Force Majeure* shall be deemed not to include: (a) any labor disturbance affecting either Contractor or Subcontractors, to the extent that such labor disturbance involves direct employees of Contractor or Subcontractors who are performing the Work on the Project, except for strikes or lockouts national or regional in scope; (b) the normal climate for the geographic area of the Site; (c) any delay, default or failure (direct or indirect) in obtaining materials, or any Subcontractor or worker performing any Work or any other delay, default or failure (financial or otherwise) of a Subcontractor, vendor or Contractor performing the Work, except as noted previously; (d) any Change in Law; or (e) any act, event, cause or condition that has not been determined to be a *Force Majeure Event* pursuant to the [redacted] Contract.

Sample mitigation proviso from a commercial lease:

provided that:

- (1) within (*) Business Days after a *Force Majeure* event, the party relying on the *Force Majeure* event to suspend its obligations under this Lease shall provide to the other party for approval (which approval shall not be unreasonably withheld) the details of a clear “work-around” plan indicating the steps that the relying party proposes to take in order to minimize the impact that the *Force Majeure* event has on its obligations under this Lease, which may include alternative sources of materials and labour, if the event causing the delay involves the supply of them, provided that the sources of such alternative materials and labours are on commercially reasonable terms and conditions;