

A person in a dark suit is shown from the waist down, standing on a wooden deck. They are in the process of tying their dark leather dress shoes. The background is a warm, orange-toned light, possibly from a sunset or sunrise, creating a soft glow over the scene.

**Whitelaw — Twining**

**Force Majeure: What It Is  
and What You Should  
Know**

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## Why Does Force Majeure Matter?

- + COVID 19 Global Pandemic – First reported December 31, 2019
- + Canada declared a public health emergency and provinces started implementing restrictions on movement and employment
- + Large numbers of people have been infected and many more have had to self isolate and quarantine
- + COVID 19 is having and will continue to have major impacts on construction projects across the entire country in an unpredictable way that we have never seen before

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## Why Does Force Majeure Matter?

- + If challenges related to COVID 19 impact a contractor's ability to complete a project, the Force Majeure provisions in the construction contract could become very important to determine whether the contractor or the owner can cancel the contract and how the contract is cancelled
- + With COVID 19 continuing and government aid likely winding down, the future is very unpredictable with how construction projects will be impacted into the future

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## What is a Force Majeure Clause?

- + A contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from its performance because something happens which is unforeseen, is beyond the control of the party, and it makes the performance of the contract impossible or exceptionally difficult.

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## What is a Force Majeure Clause?

- + Often referred to as an “Act of God”
- + Extreme weather events, war, unforeseen labour stoppages
- + Not a right at law – needs to be expressly provided for in the contract
- + Has to be something more than simple difficulty or just added expense
- + Standard is close to “impossibility”

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## Standard Form Force Majeure Provisions

+ Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCDC 2 (Stipulated Price) state (Similar language in CCDC 4, CCDC 5B w/appendix, CCDC 14, CCDC 17)

6.5.3 If the Contractor is delayed in the performance of the Work by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or

## Standard Form Force Majeure Provisions

.4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

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## Standard Form Force Majeure Provisions

+ Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCDC 3 (Cost Plus) state: (Similar language in CCDC 5B (before appendix))

6.5.3 If the Contractor is delayed in the performance of the Work by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions,
- .4 any Subcontractor's default, insolvency, abandonment, or termination, or



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## Standard Form Force Majeure Provisions

.5 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. Any of the Contractor's Fee, the GMP and the Target Contract Price shall be adjusted as the result of such delay.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

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## Standard Form Force Majeure Provisions Subcontract

+ Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCA 1 (Stipulated Price))

6.5.3 If the Subcontractor is delayed in the performance of the Subcontract Work by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Subcontractor is a member or to which the Subcontractor is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or

## Standard Form Force Majeure Provisions Subcontract

.4 any cause beyond the Subcontractor's control other than one resulting from a default or breach of Subcontract by the Subcontractor, then the Subcontract Time shall be extended for such reasonable time as the Contractor and Subcontractor shall agree that the Subcontract Work was delayed. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Subcontractor agrees to a shorter extension. The Subcontractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant, Contractor, or anyone employed or engaged by them directly or indirectly.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Contractor not later than 7 Working Days after commencement of delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

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## **BUT WAIT:**

### + ARTICLE 2A – CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT

2.1 The requirements, terms and conditions of the Prime Contract as far as they are applicable to this Subcontract, shall be binding upon the Contractor and the Subcontractor as if the word “owner” appearing therein had been changed to “Contractor” and the word “contractor” appearing therein has been changed to “Subcontractor”. In the event of any conflict between the terms of this Subcontract and the Prime Contract, the Prime Contract shall govern.

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## What are the effects of the operation of the clause?

- + Suspension of performance until the event ceases without liability, and re-activation thereafter
- + Right to seek an extension of time for performance without liability
- + Duty on the part of the party invoking the clause to overcome the event to the extent possible.

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## Any Other Provision Which Might Apply:

- + Paragraphs 7.2.2 and 7.2.5 of GC 7.2 of CCDC 2: (Similar language in CCDC 3, CCDC 5B, CCDC 14, CCDC 17 and CCA1)

7.2.2 If the Work is suspended or otherwise delayed for a period of 20 Working Days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect.

7.2.5 If the Contractor terminates the Contract under the conditions set out above, the Contractor shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon Products and Construction Equipment, and such other damages as the Contractor may have sustained as a result of the termination of the Contract.

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## What If There Is No “Force Majeure”? Frustration?

- + The doctrine of frustration applies where an intervening event permits the parties to bring the contract to an end, and relieves them of any future performance
- + Frustration occurs 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"
- + Usually more difficult to prove frustration than Force Majeure

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## Force Majeure

+ Recap:

- + Force Majeure event must be unforeseeable
- + Force Majeure event must make completion of contract impossible
- + Contract between parties may spell out relief mechanisms for contractor
- + If there is no Force Majeure clause or it is otherwise silent, frustration could still apply



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# Why Should Sureties Care about Force Majeure Provisions?

- + Any defence available to the obligor is also available to a surety
- + If obligor is unable to complete the contract because of a Force Majeure event, then the surety can similarly rely on those contractual provisions as the surety is not obligated to perform a contract that the obligor is not obligated to perform
- + If an owner makes a claim on a bond, the surety can rely on Force Majeure and frustration if those are available to the obligor
- + Very important to review the contract and the specific terms and provisions dealing with Force Majeure

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## Questions to Ask

- + Are there time requirements that must be met to assert the Force Majeure contractual provisions?
- + Does the contract allow for time extensions to be given to the obligor?
- + Are there contractual provisions allowing the obligor to cancel the contract?

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## COVID-19 and Force Majeure

- + Important to note that the unforeseeability of an event is assessed at the time of making the contract
- + Certain impacts of COVID-19 may have been completely unforeseeable in March but are currently well known
- + A contract entered into in February which subsequently cannot be completed because of government-imposed lockdowns could likely fall within the Force Majeure provisions of the contract
- + However it is much less likely that government lockdowns would be viewed as being unforeseeable for any contract entered into today

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## COVID 19 and Force Majeure

- + The foreseeability of future events is difficult to predict
- + Many provinces have opened back up and some never imposed lockdowns on the construction industry
- + Thus, it could be argued that severe lockdowns or major labour shortages could be unforeseeable into the future
- + Many of the players in the construction industry are now entering into more tailored agreements that specifically reference COVID 19 and pandemics
- + Whether the contract is preferable to the owner or general contractor depends on their bargaining position

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## COVID 19 and Force Majeure

- + Important to consider whether obligors are entering into contracts where they take on the entire risk associated with COVID 19 challenges
- + If a Force Majeure clause specifically states that pandemics or government shut downs are not force majeure events, then a surety would be liable if a contractor defaults as a result of Covid 19
- + Also important to consider this issue in any completion contracts being entered into
- + Make sure to read these provisions in the main contract that the completion contracts refers to so that the surety is not assuming significant risk on the completion of the project

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## What to do if Obligor defaults and invokes Force Majeure Clause

- + Review contract to determine what it says about Force Majeure, delays, and cancelling the contract
- + Investigate the cause of the default to ascertain whether a Force Majeure event actually caused the default
- + Obtain and preserve as much documentation and information as possible that is relevant to the hurdles the contractor faced in completing the project
- + Try to determine what the parties' knowledge of COVID 19 would have been at the time the contract was formed

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## What to do if Obligor defaults and invokes Force Majeure Clause

- + Determine whether the Obligor attempted to mitigate the challenges posed by COVID 19 and obtain documentation evidencing this mitigation
- + Determine whether surety can rely on Force Majeure or frustration
- + Ensure any completion contracts specifically set out responsibilities and obligations regarding COVID 19

# Whitelaw — Twining

**Thank you.**

Please reach out in the future with any questions!

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