

## Prepared for the Unforeseen?

### A Primer on Force Majeure Contract Provisions

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Major equipment fails... Underground fire halts production... Railroad goes on strike... Waterway is frozen... Flood washes out only bridge from mine to rail yard... Coal transportation halted for months? When you hear these words from your transportation/logistics manager, it's the wrong time to learn what your coal supply and transportation contracts say about "Acts of God" or other force majeure events.

Based on decades of experience counseling companies in the coal industry, a key to avoiding litigation costs is drafting well-written force majeure and make-up provisions in your contracts. Failure to have these provisions reviewed during negotiations may lead to either paying damages to end-users or paying your attorneys later to litigate poorly drafted and inconsistent force majeure and make-up clauses in your coal supply and transportation contracts. Missing key terms or inconsistent definitions ultimately leads to dissatisfied customers, costly litigation, or worse yet—both!

Assume, for example, that your transportation/logistics manager tells you that a flood has halted the rail transportation of your coal for up to two months. Assume further that this same coal could not be economically delivered within those two months to an end-user as required under a coal supply contract. The various rights and obligations resulting from this unforeseen event could depend on (i) the force majeure and make-up provisions of both the transportation contract with the railroad and the coal supply contract with the end-user and (ii) Uniform Commercial Code (UCC) provisions, including provisions for cover (replacement coal) and damages.

A well-drafted force majeure clause in both the transportation and supply contracts may excuse you from your obligation to perform under the contract for this "Act of God." Force majeure events are generally defined as unforeseen events outside the control of the parties to a contract, such as natural disasters, that could not be evaded through the exercise of due care. A force majeure clause typically excuses a party from its obligation to perform under the contract for certain defined events or effects. If you desire to rely on a force majeure event, such as a flood, to excuse your performance, the burden is on you to prove that the event was beyond your control or fault, within the scope of the force majeure clause, and that proper notice was given. As such, it is imperative to incorporate a well-drafted force majeure clause to clearly define the scope of unforeseeable events that might excuse your contractual performance and the notice that must be given to all parties to the contracts.

Well-drafted force majeure clauses avoid the use of boiler-plate provisions and, instead, define the specific events prevalent to coal suppliers, such as strikes, floods, explosions, equipment failures, geological risks, and regulatory orders. The specific events that regularly interrupt the production and transportation of coal must be detailed in your force majeure clauses because courts look to the express contract language that

the parties bargained for when determining whether an event excuses your performance.

Whether you will be excused from liability for your failure to provide coal based on a flood or some similar event also may depend on whether the force majeure clauses in your coal supply and your transportation contracts are consistent. Coal producers/sellers must strive to avoid a contract that excuses the railroad's performance under the transportation contract, but does not excuse their own performance under the coal supply contract.

You should also include well-defined make-up provisions in your contracts. If your make-up clause is not tailored to suit your needs, the end-user may be allowed to force you to continue to provide coal beyond the contract term at a price established years in advance of the force majeure event. Alternatively, a poorly drafted force majeure or make-up clause may allow the end-user to purchase cover coal on the spot market and seek damages for the increased costs of the cover coal over the price negotiated in the your contract.

As our experience, and this simplified example, illustrate, a well drafted contract can bring clarification to a series of issues that can be negotiated before problems occur. In the long run, proper planning not only prevents poor performance, it will save litigation costs and prevent damaged client relationships.