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Interpretation, Construing and Limitations of Force Majeure Clauses

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13th of June, 2013

I. Force majeure in comparison with the concept of frustration

The doctrine of frustration relates to events outside the control of the parties, rendering performance of a contract impossible and it sets a limit to strict liability. The expression "force majeure" is derived from the French civil law (Code Civil); originally inherited from Roman law[1] and subsequently imported into the English law[2]. It is similar to the concept of frustration as it encompasses circumstances beyond the parties' control sufficient to justify non-performance of a contract but yet, less rigid than the doctrine of frustration and the Law Reform (Frustrated Contracts) Act 1943 according to which a frustrated contract is a dead contract[3] under common law.

Frustration is a common law doctrine[4] and in *Paradine v Jane*[5], which embodies the absolute approach of the English law to contractual performance[6] it was held that: "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract". On the other hand, a force majeure clause is a contractual term the contents of which are agreed and stipulated by the parties, opting out of the narrow and uncertain scope of the common law doctrine of frustration[7], hence the term "force majeure" does not have its exact or accepted definition under the English law[8]. With this in mind, it is crucial to define the applicable force majeure events when drafting a contract and with the same token, the use of the term "force majeure" without any qualification is best to be avoided as if these clauses are constructed generally, the force majeure term may be found void for uncertainty[9]. Nevertheless, when force

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[1] In Roman law, the contractual liability was based on fault – E McKendrick, "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 2, p 21

[2] In *Matsoukis v Priestman & Co* [1915] 1 KB 681, KBD, it was stated that "The words 'force majeure' are not words which we generally find in an English contract. They are taken from the Code Napoleon… the words are understood on the Continent to mean 'causes you cannot prevent and for which you are not responsible'."

[3] [22.03] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[4] Emerged in the nineteenth century to mitigate the common law's traditional approach of absolute liability for failure to perform contractual duties. – [22.07] of McMeel, "The Construction of Contracts"

[5] (1647) Aleyn 26, 82 ER 897

[6] [22.19] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[7] [22.04] of McMeel, "The Construction of Contracts"

[8] See *Matsoukis v Priestman & Co* [1915] 1 K.B. 681 KBD where it was recognised that force majeure should have a more extensive meaning than "act of God" or "vis major"

[9] See *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* (1953) 1 W.L.R. 280 QBD

majeure clauses are properly defined, they can provide a sophisticated mechanism for dealing with consequences of such events and prescribe a range of remedies available to the parties as a result[10].

In terms of the judicial basis of frustration, it has been articulated in *Davis Contractor*[11] that "frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do." In this case therefore the frustrating event occurs after a contract has been formed which would render performance different in substance from what was originally undertaken, in which case the contract is said to have been discharged by frustration and the parties are released from further obligations under the contract[12] due to a radical change in the circumstances in which the a contract is to be performed[13].

For an event to be regarded as a "frustrating event", generally it must have been unforeseeable at the time the contract was entered into[14]. Consequently, a contract cannot be frustrated by circumstances which were in existence at the time of entry into the contract, by an event which was likely to occur or, even, by an event which although not likely to eventuate, would have been considered a possibility by the parties. The underlying logic is that if an event was foreseeable, the parties had the opportunity to provide for this expressly in the contract and the frustration doctrine should not operate[15]. In the case of a force majeure clause however, the parties themselves may allocate the risks of future uncertain events in the contract, which hence will already expressly provide for the consequences of the happening of an event that might otherwise frustrate the contract by operation of law[16]. In this case the parties are able to foresee the risk in that a supervening event may interrupt or interfere with continuing or future performance, they can

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[10] E Kratochvilova and M Mendelblat, "Force Majeure Clauses", (2012) 28 Construction Law Journal 12

[11] *Davis Contractors Ltd v Fareham Urban District Council* (1863) 3 B & S826, 122 ER 309, QB

[12] [22.05] of Willmott, Christensen, Butler, Dixon, "Contract Law"

[13] See *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729 per Lord Radcliffe (approved *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 688, adopted *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337)

[14] See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337

[15] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[16] [22.10] of Willmott, Christensen, Butler, Dixon, "Contract Law"

contract by specific references to that risk. That is the rationale behind force majeure clauses — an attempt to forestall the application of what in common law systems is the somewhat imprecise doctrine of frustration[17]. Generally speaking, contractual obligations are freely assumed and it is possible to limit the obligations of the parties; for example if a promisor wishes to limit his obligation it may be interpreted as bearing the risk of the promised event not coming to pass[18]. A force majeure clause seeks to settle the allocation of risks beforehand in the contract. Although there is no general doctrine of force majeure in English law, parties often use the words force majeure in their contracts[19], which leads to the common law courts having to consider the concept and attribute to them some meaning.

A force majeure event must, generally, be beyond the reasonable control of a party and not capable of being overcome by the exercise of reasonable means. However a force majeure event does not need to produce a radical change in circumstances[20]. Limitations to the operation of frustration include that the relevant event must not have been caused by the fault of either party[21] and that it cannot be invoked where there is a reasonable alternative method of performance[22]. It must also be noted that courts do not lightly find that a contract has been frustrated[23]. Certain clauses will effectively deem such examples to be force majeure events by providing that a force majeure event means "an event beyond the reasonable control of a party, including the following". Other clauses will provide that the examples only constitute force majeure events to the extent they are beyond the control of the relevant party; that is, "an event beyond the reasonable control of a party, including the following (provided they are beyond the reasonable control of the relevant party)". It is usually then provided that a party affected by a force majeure event, or whose performance of a contract is delayed, hindered or prevented by a force majeure event is relieved

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[17] D Yates, "Drafting Force Majeure and Related Clauses" (1991) 3 Journal of Contract Law 186

[18] See *Bunge y Born Limitada Sociedad Anonima Comercial Financier y Industrial of Buenos Aires v H. A Brightman & Co* [1925] A.C. 799, 816

[19] E McKendrick, "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 1, p 7

[20] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[21] See *Penrith Rugby League Football Club Ltd v Fittler* (1996) 40 AILR 5

[22] See *Albert D Gaon & Co v Societie Interprofessionelle des Oleagineux Fluides Alimentaires* [1960] 2 QB 334, and *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 ("The Suez cases")

[23] See *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 200 per Latham CJ

from liability to the extent it is unable to perform its contractual obligations due to the occurrence of that force majeure event[24].

At common law, where frustration occurs the contract is automatically discharged and the parties are released from performance of all further obligations. That is, termination for frustration does not require any election to be made by the parties but rather occurs automatically[25]. In the case of a force majeure clause, the consequences will be actually stipulated by the clause itself, including the discharge of both parties, or only one party or that the obligation to perform to be suspended[26] or the contract to be terminated, therefore the effect of a force majeure event depends upon what is provided for in the relevant force majeure clause. In short, force majeure clauses allow parties the flexibility to provide expressly for the consequences which should follow where a party is unable to perform its obligations due to circumstances beyond its control[27]. This also illustrates the narrow range in which frustration operates.

Causation is an essential element of reliance on a force majeure provision because it links together the event with the legal effect of excuse. One way of viewing the causation issue is to see the legal identification of the event and its relationship to the primary obligation as establishing that causal link. Thus, if: (i) the thing that occurred is not within the control of the party claiming force majeure; (ii) the matter could not reasonably have been taken into account at the time of the contractual commitment; and (iii) it could not have been reasonably avoided or its effects overcome, the conditions for a causal link are present[28].

Another question is whether the stipulation of a force majeure clause in a contract is sufficient itself to exclude the operation of the doctrine of frustration. In the case of *Bremer Handelgesellschaft v Vanden Avenne-Izegem PVBA*[29] Mocatta J stated that "there was no room for the doctrine of frustration to apply" because of the elaborate force majeure clauses included in the contract. This approach has been reviewed in later cases[30], and as a matter of authority, it can be stated that the presence of a force majeure clause in a contract does not, of itself, exclude the

[24] A Groom, „Force Majeure Clauses" (2004) AMPLA Yearbook 286

[25] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[26] See *Ringstad v Gollin & Co Pty Ltd* (1924) 35 CLR 303

[27] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[28] D Robertson, "Force Majeure Clauses", (2009) 25 Journal of Contract Law 62

[29] [1978] 2 Lloyd's Rep 109

[30] See *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1

operation of the doctrine of frustration[31], but rather, the inclusion of a force majeure clause may be relied upon as evidence that the parties have made express provision for the frustrating event or at least that the event was one which was within their reasonable contemplation at the time of entry into the contract, states Kendrick. The advantage of a force majeure clause included in the contract is that it offers to the parties the opportunity to escape from the narrowness of the doctrine of frustration by including in their force majeure clause an event, which would not at common law amount to frustration.

II. Construing of force majeure provisions

The purpose of a force majeure clause is to relieve a party of liability for inability to discharge its contractual obligations due to circumstances "beyond the reasonable control of the parties". As McCardie J put it[32]: "a force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument." In *Lebeaupin v Richard Crispin & Co*[33] the court approved the following definition of force majeure: "[it] means all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus war, inundations and epidemics are cases of force majeure; a strike of workmen." His Honour McCardie J was prepared to accept that the phrase also embraced legislative or administrative interference, such as embargo, an accidental breakdown of machinery, and – whilst not extending to normal bad weather – it might extend to an 'abnormal tempest'[34]. However economic factors, such as a lack of resources would not suffice[35]. Common qualifying force majeure events include: acts of God[36] (natural disasters), industrial action, strikes[37] and lockouts (even if the strikes are anticipated), riots or civil

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[31] E McKendrick, "Force Majeure and Frustration of Contract" (2nd ed, 1995), Chapter 3, p 34

[32] See *Matsoukis v Priestman & Co* [1915] 1KB 681

[33] [1920] 2 KB 714 at 719

[34] For abnormal weather conditions see *Toepfer v Cremer* [1975] 2 Lloyd's Rep 118; *Avimex SA v Dewulf et Cie* [1979] 2 Lloyd's Rep 57; *Bunge SA* v *Fuga AG* [1980] 2 Lloyd's Rep 513

[35] [1920] 2 KB 714 at 720 citing *The Concardoro* [1916] 2 AC 199

[36] See *Matsoukis v Priestman & Co* [1915] 1 KB 681

commotion, acts of war[38] and terrorism, breakdown of machinery[39], Government action[40] (which usually encompass changes in applicable law) and the inability to obtain approvals[41].

The underlying test in relation to most force majeure provisions is whether a particular event was within the contemplation of the parties when they made the contract. The event must also have been outside the control of the contracting party. Despite the current trend to expressly provide for specific force majeure events, case law actually grants an extensive meaning to the term force majeure when it occurs in commercial contracts. There are generally three essential elements to force majeure: (i) it can occur with or without human intervention; (ii) it cannot have reasonably been foreseen by the parties; and (iii) it was completely beyond the parties' control and they could not have prevented its consequences[42]. As McKendrick puts it[43] "we might say that in English law an event will be a force majeure event if it constitutes a legal or physical restraint on the performance of the contract (whether or not occurring through human intervention, although it must not be caused by the act, negligence, omission or default of the contracting party), which is both unforeseen and irresistible".

Other question to be looked at is whether force majeure clauses are exemption clauses, the determination of which is not as straight forward amongst the scholars[44], however the better view is that some force majeure clauses are exemption clauses, whereas others are not[45], depending on if their operation only benefits one party or both. The leading authority for the proposition that force majeure clauses are not exemption clauses is *Fairclough Dodd & Jones Ltd v JH Vantol Ltd*[46] where Lord Tucker noted that "force majeure clauses are of different kinds. In the case of an exemption

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[37] See *Caltex Oil v Howard Smith Industries Pty Ltd* and *B & S Contracts and Design Ltd v Victor Green Publications* [1973] 2 NSWLR 89 at 96

[38] See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4

[39] See *Matsoukis v Priestman & Co* [1915] 1 KB 681

[40] See *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560; *Brauer & Co (Great Britain) Ltd v James Clark* [1952] 2 Lloyd's Rep. 147, and *Mamidoil-Jetoil Greek Petroleum Co SA and Moil-Coal Trading Co Ltd v Okta Crude Oil Refinery* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep 1

[41] See *Coloniale Import-Export v Loumidis Sons* [1972] 2 Lloyd's Rep 560

[42] D McNair, DLA Piper, "Force Majeure Clauses" – Asia Pacific Projects Update

[43] "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 1, p 8

[44] See Chitty, para 14-137: "force majeure clauses have been said not to be exemption clauses, although it is difficult to draw any clear line of demarcation…"

[45] [22.35] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[46] [1957] 1 WLR 136, HL

clause it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of time for performance or for a substituted mode of performance on the occurrence of a force majeure event whether or not such event would have prevented performance". The cases like *The Angelia*[47] and *The Nema*[48] contain inconsistencies with regard to the question whether force majeure clauses should be treated as exemption clauses as they are cited as authorities for the proposition that force majeure clauses 'have been said not to be exemption clauses'[49], but on the other hand they are also cited for authority for the application of *contra proferentem* rule[50], which literally means "against the party putting forward". In *The Super Servant Two*[51] it was stated that a force majeure clause which gave an option to one party to terminate was not an exemption clause[52]. Bingham LJ held that in this case the approach indicated by *Canada Steamship*[53] was relevant, according to which if the clause expressly excludes negligence then effect will be given to it, however if there is no express reference to negligence then the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence and any doubt on this point should be resolved against the party relying on the clause.

In commercial contracts, as a general rule, force majeure provisions will be construed strictly and in the event of any ambiguity, i.e. where a force majeure clause is akin to an exemption clause, the *contra proferentem rule* will apply. In this context, it means that the clause will be interpreted against the interests of the party that drafted it; however the parties may contract out of this rule. This has also been reflected in *Kleinworth Benson Ltd v Malaysia Mining Corp. Bhd.*[54] where the rule was adopted to be applicable to all ambiguous terms of the contract.

The rule of *ejusdem generis*, which literally means "of the same class", may also be relevant. In other words, when general wording follows a specific list of events, the general wording will be interpreted in light of the specific list of events. In this context when a broad "catch-all"

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[47] *Trade and Transport Inc v Iino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210, QBD

[48] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724

[49] Chitty, para 14-138, note 605

[50] E McKendrick, "Force Majeure and Frustration of Contract" (2nd ed, 1995), Chapter 3, 14

[51] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1957] 1 WLR 136, HL

[52] [22.43] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[53] See Canada Steamship Lines Ltd v R. [1952] A.C. 192, 208

[54] [1988] 1All E.R 714

phrase[55], such as "anything beyond the reasonable control of the parties", follows a list of more specific force majeure events, the catch-all phrase will be limited to events analogous to the listed events. In *Tandrin Aviation Holdings Ltd v Aero Toy Store Ltd*[56], while it was acknowledged that there was no requirement to construe a "wrap up" phrase ejusdem generis, it was held that the phrase should be read in the context of the entire clause and took into consideration the fact that none of the specific examples of force majeure were remotely connected with the economic downturn or market circumstances.[57]

III. Limitations of the application of force majeure clauses

In *Matsoukis v Priestman & Co*[58] a shipbuilding contract was concerned, the delivery of the ship under which was delayed by a combination of universal coal-strike, breakdown of machinery, bad weather and the attendance of the builder's employees at football matches and funeral. The contract contained reference to force majeure and the plaintiff argued that the strike and breakdown of machinery would not be covered thereunder as they must have been taken into account by the defendant prior to entering into the contract. Bailhache J set about providing parameters to the term and at the same time he accepted that the concept of "force majeure" goes beyond that of "vis major" or "act of God". In the circumstances, he concluded that delay due to a breakdown in machinery did qualify as a "force majeure" event, while bad weather, football matches and a funeral did not as these were usual incidents affecting work, which should have been taken into consideration.

In *Lebeaupin v Richard Crispin & Co*[59] it was held by McCardie J that a promisor could not relay on his own act, or negligence, or omission or default as constituting force majeure. Consistently, in *Yrazu v Astral Shipping Co*[60] it was held that a miscalculation by the master and engineer of a ship causing the ship to leave with insufficient coals which resulted in having to call at

[55] D McNair, DLA Piper, "Force Majeure Clauses" – Asia Pacific Projects Update

[56] [2010] EWHC 40 (Comm); [2010] 2 Lloyd's Rep. 668

[57] E Kratochvilova and M Mendelblat, "Force Majeure Clauses", (2012) 28 Construction Law Journal 12

[58] [1915] 1KB 681

[59] [1920] 2 KB 714 at 719

[60] (1904) 9 Com. Cas 100

another port and thereby suffering delay and depreciation of cargo was not force majeure as the deficiency of coals had not been arisen from accident or casualty.

In the above referenced *The Super Servant Two*[61] the defendants agreed to transport the plaintiffs' oil rig by a barge called Super Servant Two, which then later sank, consequently causing a delay in the delivery. The defendants relied on the force majeure clause, which stated that "in the event of force majeure, Acts of God, perils or damages and accidents of the sea, acts of war, war-like operations, acts of public enemies, restraints of princes, rules or people or seizure under legal process, quarantine restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extraordinary periods of delay and similar events and/or circumstances, abnormal increase in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract." The question was whether the defendants, focusing on the words "perils or dangers and accidents of the sea", which, in the context of marine insurance, are accepted as including accidents caused by the negligence of the assured himself[62], could invoke the clause if it was shown that the sinking of the vessel was a result of the negligence of either themselves, their servants or their agents.[63] It was held that the defendants could not invoke the clause.

It was accepted by the Privy Council in *The Concadoro*[64] that the superior force must amount to physical or legal restraint, where it was held that a ship's master who was unable to leave port because he had not been provided with sufficient funds to do so was not restrained by circumstances amounting to force majeure[65].

The *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd*[66] case was concerned with a contract for shipment of goods from Brazil, which provided that it was subject to any Brazilian export licence and also contained the following force majeure clause: "should shipment be prevented or delayed owing to prohibition of export, revolution, riots, strikes, lock-

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[61] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1957] 1 WLR 136, HL

[62] See *Trinder, Anderson & Co. v Thames and Mersey Marine Insurance Co.* [1898] 2 Q.B. 114

[63] E McKendrick, "Force Majeure and Frustration of Contract" (2nd ed, 1995), Chapter 1, p 16

[64] [1916] 2 A.C. 199

[65] E McKendrick, "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 1, p 8

[66] [1952] 2 All ER 497

outs, blockade, hostilities, force majeure or plague, shipper shall be entitled at the termination of such cause or causes to an extension of time for shipment prior to the outbreak of such cause or causes." It was held that shippers of goods are not relieved by a force majeure clause simply because the price of goods was due to action by the exporting country's Government. Singleton LJ considered the sellers had failed to demonstrate they had taken reasonable steps to obtain a licence. He stated that "the sellers may have been entitled to rely on the clause had they been able to demonstrate they could not obtain a licence except on prohibitive terms or terms entirely outside the contemplation of the parties. However there was no such evidence in the present case."[67] Denning LJ stated: "… this clause is a special exemption inserted in favour of the sellers. In order to enable them to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a licence to export during any part of the shipment period."

The *P.J. Van der Zijden v Tucker & Cross*[68] case was concerned with the sale of frozen Chinese rabbits under a contract which provided for extension of delivery dates or cancellation in the event that the sellers were unable to deliver by reason of "war, flood, fire, storm, heavy snow or any other causes beyond their control". Donaldson J held that the sellers could not rely on the protective force majeure clause[69] when they could not obtain the frozen animals due to the fact that they had failed to prove that it was impossible for them to acquire the goods from another source.

In *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd*[70], where, under a contract to sell a quantity of cotton seed expellers from China, the sellers relied upon the force majeure clause which provided that "should [the sellers] fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be duly extended, or alternatively a part/whole of the contract might be cancelled, but [the sellers have] to furnish [the buyers] with a certificate … attesting such event or events." Lord Mustill concluded: "It is convenient to start by considering first what the sellers would have had to establish, to avoid liability, if the clause had ended with the words 'a part/whole

[67] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[68] [1975] 2 Lloyd's Rep 240

[69] E McKendrick, "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 1, p 17

[70] [1995] 1 WLR 404

of the contract might be cancelled.' There was little, if any, conflict about this. The sellers would be required to show, first, that there had been an event of the kind stipulated by the clause operating at the relevant time; second, that this event had adversely affected the supply of the goods by the sellers; and third, that the sellers could not overcome this adverse effect by obtaining from a source other than the one which they had planned goods which matched the requirements of the contract." Authority for these propositions is found in *Van der Zijden v Tucker & Cross*[71], as discussed above.

In *Hyundai Merchant Marine Co. Ltd v Dartbrook Coal (Sales) Pty Ltd*[72] the defendants agreed to charter a ship from the plaintiff to transport coal to the Philippines under a contract which required delivery by them to their purchaser to be effected within a certain period. When the defendants concluded that their purchaser would not perform, they purported to cancel the charter party. The plaintiff terminated the charter party for that conduct as repudiation and sought damages. The defendants relied upon a force majeure clause under which "neither party was liable for any failure to perform … its obligations under this charterparty … where the party is being … prevented from doing so by reason of any force majeure event". It was held that the defendants could not invoke the force majeure provision on the basis of commercial impracticability as if the circumstance under which the contract needs to be performed, becomes uneconomical, it will not be considered a circumstance beyond the control of the party. Also, as illustrated by the *Channel Island Ferries Ltd v Sealink UK Ltd*[73] case, a party intending to rely on force majeure clause must establish that the event in question was beyond his control, and further that there were no further steps that the party could have taken to avoid or mitigate the consequences.

With regard to the limitation of the enforcement of force majeure clause, there is an imposed obligation to provide notice upon the affected party by which the party shall provide details to the counterparty with regard to the nature and cause of the force majeure event and its likely duration, the means proposed to be adopted to overcome the effects of the force majeure event, and the evidence that the affected party has employed these means. In *Bremer Handelgesellschaft v Vanden Avenne-Izegem PVBA*[74] it was held that the 'prohibition of export'

[71] [1975] 2 Lloyd's Rep 240

[72] (2006) 236 ALR 115 at 130

[73] [1988] 1 Lloyd's Rep 323

[74] [1978] 2 Lloyd's Rep 109

clause requiring that the 'sellers shall advise buyers or reasons thereof' was insufficiently precise to be characterised as a condition precedent to the sellers' entitlement to rely on the clause. The force majeure clause needs to list consequences of non-compliance with such notice provision. In terms of the event being foreseeable, unlike in the case of frustration, it is not relevant that the risk was foreseeable upon contract formation and signature as the purpose of the inclusion of a force majeure clause is to allocate contractual risk in the stipulated events.

Importantly, parties cannot invoke a force majeure clause if they are relying on their own acts or omissions. Force majeure clauses are construed restrictively to ensure that the party seeking to rely on an event to exonerate it must take reasonable steps to avoid the event or mitigate its impact[75]. It was stated in *B & S Contracts and Design Ltd v Victor Green Publications Ltd*[76] by Griffiths LJ: "clauses of this kind have to be construed upon the basis that those relying on them will have taken all reasonable efforts to avoid the effect of the various matters set out in the clause which entitle them to vary or cancel the contract." Kerr JL also observed that it was always difficult for a party to rely on a strike by its own workforce and stated that "it is clear that where an exception of strikes is involved, then like all other exceptions it is subject to the principle that the party seeking to rely on it must show that the strike and its consequences could not have been avoided by taking steps which were reasonable in the particular circumstances." The claimant had failed to use all reasonable endeavours to settle the dispute and ensure that the contract was properly performed[77] and as a result could not invoke the force majeure clause in the contract.

Another generally established principle is that a party must not have contributed to the occurrence of the relevant event claimed to be beyond its control is found in the *Mamidoil-Jetoil Greek Petroleum* case[78], in which it was held that the phrase 'shall give prompt notice to the other party' was imperative[79] and in the absence of such notice, the force majeure clause could not be relied on. In *Thames Valley Power Ltd v Total Gas & Power Ltd*[80] it was held that in relation to a

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[75] [22.56] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[76] [1984] ICR 419, CA

[77] J Hughes, J Dudbridge at Collyer Bristow LLP, "A Force to Be Reckoned With"

[78] *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep 1

[79] [22.26] of McMeel, "The Construction of Contracts, Interpretation, Implication and Rectification", Oxford 2nd ed (2011)

[80] [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441

gas contract, Total was not entitled to provide notice of force majeure in respect of a rise in gas prices, which would have made it uneconomic to continue to supply gas.

In *Yara Nipro*[81] a fertiliser supply contract included a force majeure clause exempting liability for delay or failure to perform caused by circumstances beyond the reasonable control of parties, "including without limitation, fire, flood, act of God, strikes, lock outs, stoppage of work, trade disputes, loss of banking facilities, non-supply to Interfert of Product or shipping services or any act of war or terrorism." The defendant argued that its failure to perform was caused by a circumstance beyond its reasonable control, the circumstance being the non-supply of the product constituted by the failure of third party (usual Russian supplier) to supply. It was held that force majeure clause could not be relied upon as there should have been sufficient time to seek out alternative supplier, which was within the parties' reasonable control to do so.

In *Watts and Company Ltd v Mitsui & Company Ltd*[82] the defendants were shipowners who had entered into a charterparty with the plaintiffs, which provided that a steamer should carry a cargo to Japan through the Azov Sea. The charter contained a clause on arrest and restraints of princes. The name of the steamer was supposed to be declared at least 21 days before the expected date of readiness and on the 1 September 1914 the charterers requested the owners to declare the name of the charter to which the owners replied that it must be considered cancelled with the explanation that the British Government had prohibited steamers from going into the Black Sea. The owners assumed that the Dardanelles would be closed as a result of Turkey entering into the First World War, but in fact there had been no such closure when the owners gave the cancellation notice only a month later. Lord Dunedin concluded: "… it may be possible to invoke the exception when a reasonable man in face of an *existing* restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continues the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear". This suggests that a force majeure clause will not adequately protect a party unless it gives him the right to suspend performance if he considers that a force majeure event might be imminent.[83]

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[81] *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd (No 2)* [2010] QSC 019

[82] [1917] A.C. 227

[83] E McKendrick, "Force Majeure and Frustration of Contract", Lloyd's of London Press,(2nd ed) 1995, Chapter 5, p 80

The Australian unreported case of *Asia Pacific Resources Pty Ltd v Forestry Tasmania (No. 2)*[84] noted that as a general rule a party cannot invoke a force majeure clause due to 'circumstances beyond the control of the parties' which, to the knowledge of the party seeking to rely upon the clause, were in existence at the time the contract was made. This case must be contrasted against *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*[85] which held that there was no settled rule of construction that prevents a party to a force majeure clause from relying on events in existence at the time the contract was entered into as events beyond that party's control[86]. Kerr J in *Trade and Transport Inc v Iion Kaiun Kaisha Ltd, The Angelia*[87] stated that ordinarily a party would be debarred from relying upon a pre-existing causes as an excepted peril if: (i) the pre-existing cause was inevitably doomed to operate on the contract; (ii) the existence of facts that show that the excepted cause is bound to operate is known to the parties at the time of contract, or at least to the party who seeks to rely on the exception. His Honour then added as an alternative to (ii); (iii) If the existence of such facts should reasonably have been known to the party seeking to rely upon them and would have been expected by the other party to the contract to be so known. Given the above, it seems that causes beyond the control of the parties that were known at the date of contracting may excuse performance only where they were of a temporary nature and are not doomed to operate on the contract[88].

In *Hackney Borough Council v Dore*[89] the appellants were liable for penalty for failing to supply electricity, but subject to inevitable accident or force majeure. Two of the appellant's workmen had refused to do the work necessary to maintain supply. The appellants contended that had they dismissed the workmen, it would have probably resulted in all their employees terminating their engagement. It was held by Bankes LJ that "force majeure applied only to physical or material constraints, and although it applied to strike actually proceeding, it did not apply to fear, however reasonable, of the consequences of threatened action. The appellants yielded to a threat, and so failed to persist in an attempt to do the work which might have been successful."

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[84] (1998) Aust Contract R 90-095; (Supreme Court of Tasmania, 5-7 & 10 November 1997; 5 May 1998)

[85] [1962] 1 QB 42

[86] D McNair, DLA Piper, "Force Majeure Clauses" – Asia Pacific Projects Update

[87] [1973] 2 All ER 144

[88] D McNair, DLA Piper, "Force Majeure Clauses" – Asia Pacific Projects Update

[89] [1922] 1 KB 431

Finally, in the Canadian case of *Atcor Ltd v Continental Energy Marketing Ltd*[90] in the attempt of interpreting the intended operation of a force majeure clause in a gas supply contract, the court has placed principal emphasis upon its understanding of the commercial purpose of the clause. The Alberta Court of Appeal found that the force majeure clause should address: (i) how broad the definition of triggering events should be (the triggering event, often called the 'force majeure event' is a question of fact); (ii) what impact must those events have on the party who invokes the clause; and (iii) what effect should invocation have on the contractual obligation[91]. It was held that it was contrary to the intention of the parties to interpret the clause in such a manner as to allow the defendant, effectively, to terminate the contract at will merely because an event disruptive to the defendant's business occurred. Rather the intention of the parties, and the framework against which the clause should be interpreted, was that the seller did not need to show that the relevant event made performance impossible but needed to show that the relevant event created, in commercial terms, a real and substantial problem. If the consequences of the event could be rectified by commercially feasible means, the defendant was required to employ such means[92]. The Court of Appeal stated: "the obligation to mitigate by resupply must be commercially feasible. On the one hand, the supplier should not be able to cancel a contract merely because an expected profit will not occur as a result of new events. On the other hand, the purpose of the term is to protect the supplier from effects that are, in terms of what is commercially feasible or reasonable, out of his control. In sum, and in the absence of clearer words to the contrary, a supplier is not excused from non-performance by a force majeure event if the sole consequence of that event is to drive him to buy from another supplier and make a smaller profit."

IV. Current issues challenging our understanding of force majeure clauses

Several recent Australian cases have considered performance that becomes uneconomical will not be a circumstance beyond the control of a party to a contract. Spiegelman CJ in *Gardiner v Agricultural and Rural Finance Pty Ltd*[93] citing the above discussed *Hyundai Merchant Marine Co Ltd*

[90] [1996] 6 W.W.R. 274

[91] L Sanderson, B Kahane, G Lafleur Henderson LLP, "Force Majeure: Drafting For the Unexpected"

[92] A Groom, "Force Majeure Clauses" (2004) AMPLA Yearbook 286

[93] (2008) Aust Contract R 90-274; [2007] NSWCA 235

v Dartbrook Coal (Sales) Pty Ltd[94] stated that commercial impracticability may not be sufficient[95]. Nevertheless, it is an interesting question whether a severe downturn in the economy would constitute an event of force majeure. In situations where the force majeure clause in a contract expressly provides for a specific economic contingency or loss which has occurred (such as a direct reference to material or adverse changes in market conditions), the courts have previously accepted this as an event of force majeure. Due to the undefined nature of "force majeure", attempts have been made to increase its scope for commercial advantage. An example for this is Donald Trump, an American business magnate, who has attempted to invoke the current financial crisis as means to excuse payment on a real estate loan, under the pretext of force majeure, which he was hoping it would excuse him making payments on a real estate loan[96]. The case raises interesting questions over the scope of force majeure during periods of national and/or international crisis[97].

In recent years, virulent virus strains have been a cause for major concern on a global scale. In 2002 there was an outbreak of the SARS virus, resulting in over 750 deaths and widespread panic globally. 2009 featured the H1N1 a.k.a. swine flue virus. These viruses all have the potential to be devastating to commercial enterprise. Some force majeure clauses refer to "epidemics" or "pandemics" as part of the non-exhaustive list but otherwise the general force majeure wording will apply. What constitutes an "epidemic" or a "pandemic" may not be clear. Establishing this could be difficult and classifications given by the World Health Organisation or respective Governments could be crucial. Equally, steps taken to mitigate the consequences – such a quarantine and hygiene education – could be important in demonstrating an intention to mitigate the consequences and/or avoid it altogether[98].

Another interesting topic relative to the force majeure application is natural disasters. During Queensland's recent flood events most major coal producers (Xstrata, BHP Billiton, Anglo American, Macarthur Coal, Rio Tinto and Peabody Energy Australia) invoked their force majeure clauses, which allowed them to break or suspend customer sales contracts without penalty. Further, at one point, about 85% of the state's coalmines shut down and more were affected when cyclone Yasi

[94] (2006) 236 ALR 115

[95] D McNair, DLA Piper, "Force Majeure Clauses" – Asia Pacific Projects Update

[96] See *Trump, Donald J. et al v. Deutsche Bank Trust et al*, New York Supreme Court, Queens, 026841/2008

[97] FM Casgrain LLP, M Carrière, N Issley, S Teasdale and S Lloyd at FMC Law „Force majeure as a business strategy" (2009)

[98] J Hughes, J Dudbridge at Collyer Bristow LLP, "A Force to Be Reckoned With"

swept through the northern part of the state in February 2011. These market leaders are now changing the way force majeure contracts are struck. Due to strong demand for coking coal after the floods severely reduced supplies, mining heavyweights have decided they are being disadvantaged by their current force majeure clauses and want to cancel delivery rather than 'carry it over' at the old price. Until the 2008 floods, force majeure was not so much in focus as there was no massive 'carry over' after devastating natural disasters.[99] Force majeure clauses have for too long been relegated as to the back section of contracts and not considered a key commercial consideration. Increasing frequency of extreme weather may cause natural disasters to no longer be considered as extraordinary events that are beyond the reasonable expectation of either party. They may even be considered foreseeable, similarly to 'bad whether', which – as looked at in *Matsoukis v Priestman & Co*[100] above - would not have been taken into account, as it should have been foreseen by the parties upon formation of the contract.

As Robert Milbourne phrased it[101], "with these extreme weather events occurred in Queensland in the recent years including flooding and bushfires, it might be suggested that these events are predictable and moreover, perhaps they should not provide an excuse for not delivering. If we say weather-events are foreseeable then they need to be more expressly dealt with in the force majeure negotiations as a fundamental commercial term". He also discussed how Australia has become a riskier place to do business because of a string of big natural disasters over the past few years. As a result, companies should feel the need to adjust their strategies accordingly as investors start to evaluate weather management as a significant factor when considering investment in resource companies or associated infrastructure projects.

We now do have the adequate technological resources that allow us to more accurately predict natural disasters as to when and where they will strike, which makes them more predictable and hence reasonably foreseeable. This whole process may impact the future construction of contract terms and place force majeure stipulations as an important part of commercial negotiations.

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[99] Resources Contracts: Mining for Profits After Force Majeure, Published: March 29, 2011 in Knowledge@Australian School of Business

[100] [1915] 1KB 681

[101] See "The legal implications of severe weather on mining contracts – Force majeure events (14/07/2011) – published as a video link on Norton Rose global website

V. Summary

Force majeure is not a general principle of law but nevertheless, it is an important issue in the construction and enforcement of contracts, and this research paper intended to provide a brief overview on the nature, the application and the limitations thereof, including the general approach taken by the English and the Australian courts regarding the interpretation of such clauses. The term force majeure is widely used by lawyers and contracting parties within various jurisdictions, but due to the fact that it does not have a unified legal definition, the parties should make sure they address force majeure provisions to reflect their true intentions within the risk allocation process, and preferably by providing an explicit list of events they wish to include thereunder, as failure to properly define force majeure events could potentially result in the affected party being solely reliant upon the limited relief of the common law doctrine of frustration.

There should be an even greater emphasis regarding the priority allocation of risks relative to force majeure clauses upon contract drafting. Severe whether and major disruption events together with other challenges we are facing in the 21st century, should be made part of the commercial negotiations prior to contract entering.