

# FORCE MAJEURE CLAUSES IN CONSTRUCTION CONTRACTS

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The primary purposes of construction contracts are to clarify responsibilities (including performance and payment obligations) and to allocate risk. It is in regard to the latter purpose that the concept of *force majeure* plays an important role. Such clauses serve to deal with the risk of events which fall short of frustration. Such clauses can be successfully employed to recognize industry or project specific risks. By way of example, a number of years ago the writer dealt with a pipeline claim that arose from the delayed completion of a series of compressor stations and a connecting pipeline through the southern interior of British Columbia. Perhaps the biggest risk on that, and perhaps on any pipeline project, was the inability to reasonably manoeuvre and work on the pipeline right away. As matters transpired, the work was done during an extremely rainy summer. Although very unusual, the amount of rain did not approach one in one hundred year or other bunch numbers that would have clearly have resulted in a *force majeure* event having been triggered. Nevertheless, the work became very slow and very expensive to complete. Only after extensive negotiation and litigation preparation were the potential claims arising from the cost and time of performance resolved. Had the *force majeure* clause in the contract been drafted with the specific project and type of work risk in mind, the dispute could have readily been avoided.

At the time of writing, there are serious shortages of both labour and certain materials in Canada, though the shortages are more acute in some areas of the country than others. Oilsands project construction in Alberta, pre-Olympic construction in British Columbia and general economic expansion in Saskatchewan have all lead to shortages in Western Canada. On other hand, the competition for steel, specialty metals and specialty pressure vessels throughout North America, arguably caused in part by competition from the rapidly expanding economies of both China and India, has focused the need for the careful examination and drafting of both *force majeure* and other risk allocation clauses within construction contracts.

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The issue is highlighted in Alberta where there is a fear that labour shortage could be advanced as a *force majeure* event. These circumstances have sparked some owners of large projects to specifically exclude labour shortage as an event of *force majeure*. This, apparently, despite such shortage neither falling within the idea of the "...unexpected, something beyond reasonable foresight or skill"<sup>1</sup> and despite the fact that many cases in all three of Canada, England and the United States have held the changes in market conditions are not sufficient to fall within a standard *force majeure* clause<sup>2</sup>.

In other areas, rather than face arguments that a *force majeure* event has occurred due to the material shortage, risk allocation clauses have been formulated to specifically address shortages of such materials as steel. For example, a provision written on behalf of the American Institute of Steel Construction provides as follows:

The subcontract price is based upon the agreed prices and surcharges for the steel types and shapes necessary for the project and posted and made publicly available by [steel mill] on [date]. Notwithstanding anything herein to the contrary, any increases or decreases in the price of the steel ordered by subcontractor for the project, or any additional surcharges imposed on the steel ordered by subcontractor for the project, after [date] shall result in a corresponding dollar-for-dollar increase (or decrease) in the subcontract price.<sup>3</sup>

It is the intention of this article to highlight elements that require careful and specific consideration of the drafting of *force majeure* clauses.

## **I. Purpose of Force Majeure Clauses**

*Force majeure* clauses exist to exclude liability where unforeseen events beyond a party's control prevent the performance of its contractual obligations. The Supreme Court of Canada in *Atlantic*

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<sup>1</sup> *Atlantic Paper Stock Ltd. v. St. Anne-Nackwawic Pulp & Paper Co.*, (1975), 56 D.L.R. (3d) 409 (S.C.C.) [Atlantic Paper].

<sup>2</sup> *Atlantic Paper, ibid.*; *Tennants (Lancashire) Limited v. C. S. Wilson & Company Limited* [1917] A.C. 495 (H.L.); *Brauer & Co. Ltd. v. James Clark (Rush Materials), Ltd.*, [1952] 2 All E.R. 497 (C.A.); *Re: Tom Jones & Sons Ltd. v. The Queen in Right of Ontario* (1981), 119 D.L.R. (3d) 684 (Ont. H.C.); *Northern Indiana Public Service Company v. Carnon County Coal Company*, 799 F. 2d 265 (1986); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.* 813 F. 2d 1327 Cert. denied, 108 S.Ct. 99 (1987); *Blythe & Co. v. Richards Turpin & Co.* (1916), 85 L.J.K.B. 1425.

<sup>3</sup> As cited in *Lyman, infra* note 14 at 35.

*Paper Stock Ltd. v. St. Anne-Nackwawic Pulp & Paper Co.*<sup>4</sup>, the leading Canadian *force majeure* decision, describe the purpose of *force majeure* clauses as follows:

[A *force majeure* clause] generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.<sup>5</sup>

The term "*force majeure*" has been variously described elsewhere as meaning an "irresistible force", an "unforeseen event", an "over powering force", or "a fact or accident which human prudence can neither foresee nor prevent."<sup>6</sup> Put another way, *force majeure* events are generally considered to be events "beyond the control and without the fault or negligence" of the party excused.<sup>7</sup>

While the "irresistible" forces contemplated by *force majeure* clauses typically include such things as wars, natural disasters (and other "acts of God") they can also include more conventional commercial events such as the failure of supplies, forms of labour unrest and equipment failure.

The term "*force majeure*" is derived from civilian law and encompasses a concept now entrenched in several legal traditions, including the *lex mercatoria*.<sup>8</sup> Its presence in Anglo-American contract law can be directly traced to French *Code Civil*.<sup>9</sup> *Force majeure* is based on the concept that it is fair to allow a party to escape contractual obligations without fault when satisfaction of those obligations is made impossible. Rather than being a universally applicable concept as in French jurisprudence, however, "*force majeure*" in the Anglo-American tradition is a purely contractual right to the suspension or release of one's contractual obligations upon the happening of certain defined events.

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<sup>4</sup> Atlantic Paper, *supra* note 1.

<sup>5</sup> *Ibid.* at 411.

<sup>6</sup> John S. Kirkham, "Force Majeure - Does It Really Work?" (1984) 30 Rocky Mountain Mineral Law Inst. 6 at 3.

<sup>7</sup> *United States v. Brooks-Callaway Co.*, 318 U.S. 120 at 123-4 (1943).

<sup>8</sup> C.f., *Principles of International Commercial Contracts*, UNIDROIT, 1994, Art. 7.1.7.

<sup>9</sup> C.f., Arts. 1148, 1348, 1631, 1730, 1733, 1754, 1755, 1784, 1929, 1934 and 1954 C. civ.

Though related to the common law doctrine of contractual frustration, *force majeure* can be applied much more broadly and flexibly. The late 19<sup>th</sup> century Queen's Bench decision in *Jacobs v. Crédit Lyonnaise*<sup>10</sup> illustrates this point. There, the defendant shippers claimed *force majeure* after it failed to deliver esparto shipments owing to a war that had broken out in Algeria. Under French law, then in force in Algeria, the defendant would not have been subject to claims of damages "when, by means of a superior force (*force majeure*) or an accident, the obligor has been prevented from giving or doing that which he was bound to give or do."<sup>11</sup> The English Court found that while French law may have given relief, English law applied and there was no equivalent common law principle (including frustration) that could ground relief. While the intervening war had disrupted performance, it did not destroy the "entire subject matter" of the contract or the underlying rationale for the bargain as was required for relief under the doctrine of frustration. The contract did not provide *force majeure*, and the defendant shippers were held liable.

About the same time and likely in recognition of the harshness of the result in *Jacobs*, explicit *force majeure* provisions began to appear regularly in English contracts.<sup>12</sup> The emergence of contractual *force majeure* provisions arose, at least in part, as a means to provide relief from contractual obligations where performance is rendered impossible or unfeasible, but where the strict technical requirements for a defence of frustration are not met.

While the use of such clauses is now of long standing usage in common law jurisdictions, the foreign nature of these clauses may, in part, explain the difficulty common law courts have had in dealing with such clauses as is stated in a 1999 article:

The *force majeure* clause is antithetical to common law principles. Under *force majeure* clauses parties avoid contractual obligations and fault or liability as ascribed to neither party to the contract, but rather to a cause beyond the control of either of the parties. Given the great divergence between common law values

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<sup>10</sup> (1884) 12 Q.B.D. 589 (C.A.) [*Jacobs*].

<sup>11</sup> Art. 1148 C. civ. as cited in the head note of [1881-1885] All ER Rep 151, an alternate report of *Jacobs*, *ibid*.

<sup>12</sup> In this sense, the relief gained through Anglo-American *force majeure* clauses is best considered as only indirectly relating to *force majeure* relief found in civilian codes. This has implications for Canadian lawyers - while the *Québec Code* contains numerous references to *force majeure*, the concepts therein are only indirectly related to contractual *force majeure* clauses. See, c.f. Sir Guenter Treitel, *Frustration and Force majeure* 2d ed. (London: Sweet & Maxwell, 2004) at 12-021.

and *force majeure* clauses, it is not surprising that our courts have repeatedly shown great reticence in giving effect to these clauses.<sup>13</sup>

In the U.S., reference is not made to *force majeure* at all, but rather "to impracticability" as arising from the doctrine of impossibility of performance. The U.S. approach was described by William Lyman as follows:

The rule, as often quoted, is that absent a contract provision to the contrary, "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. (*Dugan & Meyers Construction Co., Inc. v. State of Ohio*, 162 Ohio App. 3d 491 at 503)<sup>14</sup>

The doctrine [of impossibility of performance] is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. 'Some factors determining the applicability of an impracticability defense include: foreseeability of the contingency, whether the means of performance will be entirely different than that agreed to, whether the risk of the contingency was allocated to a party, and whether the cost of performance will be vastly increased. It is essentially an equitable defense to the general rule that an obligor must bear the risk that the performance of a contract may become more burdensome or less desirable. Or, said another way in the same decision, the elements for impossibility of performance were the unexpected occurrence of an intervening act, such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and that occurrence made performance impracticable.<sup>15</sup>

Impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. *Restatement (First) of*

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<sup>13</sup> Joni R. Paulus and Derk J. Meeuwig, "Force Majeure - Beyond Boilerplate" (1999) 37 Alta. L. Rev. 302 ¶ 36.

<sup>14</sup> William D. Lyman, "To Pay or Not to Pay - To Stay or Not to Stay: Contractors and Subcontractors Right to Receive Payment for Work performed and the Contractual and Legal Obstacles to Receiving It" (Paper presented to the American Bar Association Forum on the Construction Industry, 12-13 October, 2006) [unpublished] [Lyman].

<sup>15</sup> *Ibid.*

Contracts, §454.<sup>16</sup> [and] ...a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost. *Roy v. Stephen Pontiac-Cadillac, Inc.*<sup>17</sup>

Under the doctrine of impossibility, a contractor's performance may be excused when a condition that is part of the contract becomes impossible to perform.<sup>18</sup>

[C]ontract performance is rendered impossible only when it is objectively determined that no contractor could perform the work.<sup>19</sup>

A contract is commercially impracticable when performance would cause 'extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.'<sup>20</sup> or "when 'all means of performance are commercially senseless.'<sup>21</sup>

In the result, while different words are employed in different common-law jurisdictions, the nature of the consideration of *force majeure* remains the same.

## II. Present Force Majeure Clause Usage

Though the traditional rationale for *force majeure* clauses involved "unanticipated events" and "impossibility" of performance, more recent practice has been to use *force majeure* provisions as a broader risk allocation tool. *Force majeure* clauses may be used to anticipate those risks that are uninsurable, or that render performance merely inconvenient or uneconomical as opposed to impossible. In short, the clauses deal with risks deemed unacceptable by the parties. For example, problems associated with labour disruptions are often addressed through *force majeure* provisions, even though they may fall outside the traditional rationale of such clauses. In this sense, a *force majeure* clause acts as a risk allocation tool in circumstances beyond the traditional

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, citing 15 Conn. App. 101, 543 A. 2d 775 (1988).

<sup>18</sup> *Connor Brothers Construction Company v. U.S.*, 65 Fed.Cl. 657 at 686 (Fed.Cl. 2005).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, citing *Raytheon Co. v. White*, 305 F. 3d 1354 at 1367 (Fed. Cir. 2002) (citing Restatement (Second) of Contracts § 261 cmt. d (1981)).

<sup>21</sup> *Ibid.*, citing *Jennie-O Foods, Inc. v. United States*, 217, Ct. Cl. 314, 580 F. 2d 400, 409 (1978).

"unforeseeable impossibility of performance" rationale. Contracting parties are not necessarily confined to events which make performance impossible.<sup>22</sup>

The practical utility of *force majeure* clauses becomes clear when contrasted with the common law doctrine of contractual frustration. *Force majeure* clauses and the doctrine of frustration are similar in that they deal with occurrences beyond the control of parties to an agreement.<sup>23</sup> Frustration requires that the entire subject matter or underlying rationale for the contract be destroyed. It normally operates to permanently relieve parties from all of their contractual obligations, including those to perform and to pay, and essentially leaves the pieces of a contract to fall where they may. *Force majeure* clauses, on the other hand, permit a much greater degree of flexibility. The occurrences giving rise to relief can be defined with greater certainty and the entire rationale or subject matter of the contract need not be destroyed in order for *force majeure* to operate. *Force majeure* may also be temporary, allowing the parties to maintain their contractual arrangements once the event passes or is remedied. As a term negotiated between parties, a *force majeure* clause can respond to unpreventable occurrences while still maintaining certain contractual obligations, such as those relating to payment, and temporarily suspending certain others, such as the delivery of product. *Force majeure* clauses can also prescribe differing consequences depending on the nature or type of *force majeure* event. Whereas the doctrine of frustration is a blunt instrument that permanently ends all contractual obligations, a carefully crafted *force majeure* clause is capable of responding to the same events in a more predictable and equitable manner, while maintaining the contractual relationship between the parties.

The breadth of parties' discretion in drafting *force majeure* clauses can be circumscribed, however. A good example is the Supreme Court of Canada's use of this *ejusdem generis*<sup>24</sup> principle to construe a *force majeure* clause in *Atlantic Paper*.<sup>25</sup> There, *force majeure* was claimed by the purchaser of waste paper used in the construction of corrugated medium. This

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<sup>22</sup>See *Atcor*, *infra* note 29 ¶ 35, *Tejas*, *infra* note 45 at 7.

<sup>23</sup>G.H.L. Fridman, *The Law of Contract In Canada* (Toronto: Carswell, 1999) at 591.

<sup>24</sup>"Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified" as per Lord Campbell, C.J. in *Reg. v. Edmundson* (1869), 28 L.J.M.C. 213 at 215 as cited in D.A. Dukelow, *Dictionary of Canadian Law*, 2d ed. (Toronto: Carswell, 1995) at 375; see also a thorough discussion of this rule and its application in R. Sullivan, ed., *Driedger on the Construction of Statutes* 3d ed. (Toronto: Butterworths, 1994) at 203-213.

<sup>25</sup>*Atlantic Paper*, *supra* note 1 at 411.

purchaser-manufacturer claimed that its inability to find a profitable market for its finished product constituted an event of *force majeure* under its purchase contract with its waste paper supplier. The purchase contract in question defined *force majeure* by way of a list of events (i.e. acts of God, war, damage or destruction to production facilities). The list concluded with the phrase "or the non-availability of markets for pulp or corrugating medium."

In determining whether the market situation faced by the manufacturer fell within this concluding phrase of the definition, the Court applied the *ejusdem generis* principle to hold that the phrase relied upon must be interpreted so as to limit its application to events like those previously described, "over which the [party claiming suspension of the contract] exercises no control,"<sup>26</sup> and which "makes performance impossible".<sup>27</sup> Since the market for the products of the purchaser-manufacturer had been found to be materially unchanged from the time of the execution of the contract, the purchaser's claim that the lack of a profitable market for its finished product constituted an event of *force majeure* could not be sustained. The purchaser had simply entered into a business arrangement which at the time of contracting, and at the time of the alleged *force majeure*, was unprofitable. There, despite the *force majeure* provision, Dickson J. (as he was then) refused to uphold the *force majeure* provision defined by the "non-availability of markets":

I do not think St. Anne can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude that the whole St. Anne project for the manufacture of corrugating medium was misconceived. The problems which plagued it proceeded, however, not from non-availability of markets for corrugating medium but from [a] lack of an effective marketing plan ... and inordinate operating costs... The project, conceived in ephemeral hopes and not the harsh realities of the market place, resulted in failure for which St. Anne and not changes in the market ... must be held accountable.<sup>28</sup>

Where *Atlantic Paper* circumscribes the effect of *force majeure* provisions through the use of principles of interpretation, the Alberta Court of Appeal has indicated that a standard of

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<sup>26</sup> *Ibid.* at 411-12.

<sup>27</sup> *Ibid.* at 411.

<sup>28</sup> *Ibid.* at 411.

"commercial reasonableness" may also be used to circumscribe such provisions. In *Atcor Ltd. v. Continental Energy Marketing Ltd.*,<sup>29</sup> the Court was faced with the question of whether a gas pipeline operator declaring *force majeure* as a result of pipeline damage was required to effect repairs as soon as possible, regardless of cost. Moreover, during the period in which the pipeline was being repaired, the Court was asked to consider if the operator is required to source alternate supply for a buyer in order to mitigate *force majeure*, is the cost or inconvenience of doing so relevant? Some agreements deal with such issues explicitly, but where the agreement is silent, an implied standard of "commercial reasonableness" was held to exist by the Alberta Court of Appeal. What may or may not be "commercially reasonable" in any given case will be extremely difficult to predict. In this sense, the 1996 *Atcor* decision has arguably changed the face of *force majeure* interpretation, at least in Alberta.

*Atcor* was a supplier of gas to Continental through a pipeline owned by Nova Corporation. The supply contract included a *force majeure* clause that *Atcor* relied on when Nova's pipeline experienced mechanical problems that reduced pipeline capacity. *Atcor* was forced to curtail its shipments and thus could not meet all of its supply obligations. Rather than curtailing the gas shipped to all of its customers on a proportionate basis, however, *Atcor* chose to selectively declare *force majeure* such that Continental received no gas while other *Atcor* customers received their full supplies. Continental was forced to purchase gas supplies at a higher rate and argued that *Atcor* could not "cherry pick" customers in a *force majeure* situation. Rather, *Atcor* had a duty to mitigate by pro-rating deliveries to all customers and/or sourcing alternative supply. Continental's argument was dismissed at trial on the basis that the written agreement did not mention any pro-rata obligation, nor an obligation to provide alternative supply. Continental appealed.

The Alberta Court of Appeal took a more nuanced approach than the trial judge. It reasoned that as a general proposition, a supplier is not only required to mitigate the *force majeure* event itself, but also the effect on the other party of the *force majeure* event. The Court further held (relying on English authority) that these obligations to mitigate are not infinite but are limited by "commercial reasonableness":

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<sup>29</sup>(1996), 38 Alta. L.R. (3d) 229 (C.A.) [*Atcor*].

A supplier need not show that the event [of alleged *force majeure*] made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible.<sup>30</sup>

In sum, and in the absence of clear words to the contrary, the supplier was 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. The supplier would be excused, however, if that solution, in all the circumstances, is not reasonable.<sup>31</sup>

A new trial was ordered and *Atcor* and Continental settled prior to trial. Accordingly, it is difficult to predict just what the reference to "commercially unfeasible" would have meant when applied to the facts of that case. One case on point, and which was referred to in *Atcor*, is the English case referred to as the *Wildhandel*,<sup>32</sup> a case involving sale of Chinese frozen rabbits. The supplier claiming *force majeure* was unable to meet the heavy burden imposed on it to establish that it was unable to acquire an alternate supply, regardless of price, in order to gain the benefit of *force majeure*. This result seems harsh and may also ignore the concept of commercial reasonability. However, it might still be considered consistent with the heavy burden on the party seeking to demonstrate the lack of commercially reasonable mitigation measures when *force majeure* is declared.

Based on the *Atcor* decision, parties negotiating *force majeure* clauses must be aware of an additional implied duty to mitigate, on commercially reasonable terms, the adverse effects on the other party which may arise from *force majeure* events. Any ousting of this implied duty will, as stated in *Atcor*, require clear and unequivocal language.<sup>33</sup> The existence of a standard of "commercial reasonableness" provides significant room for uncertainty and ambiguity to the unwary or careless drafter. In order to avoid disputes and unforeseen liabilities, the extent to which a party declaring *force majeure* must mitigate the event and its consequences should be specified in the contract.

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<sup>30</sup> *Ibid.* ¶ 11 (and repeated for good measure at ¶ 17).

<sup>31</sup> *Ibid.* ¶ 35.

<sup>32</sup> *P.J. Van Der Zijden Wildhandel N.V. v. Tucker & Cross Ltd.*, [1975] 2 Lloyd's Rep. 240 (Q.B.) [*Wildhandel*].

<sup>33</sup> *Atcor*, *supra* note 29 ¶ 35.

The extent of *Atcor's* influence on Alberta *force majeure* jurisprudence is, however, an open question. The 2000 decision of the Alberta Court of Queen's Bench in *H&R Drilling Inc. v. Aquilo Energy Inc.* is a case in point. H&R was building a drilling rig for Aquilo, who needed the rig for a specific well that could only be drilled shortly after the scheduled completion date. When the rig was about 90% complete, a fire occurred, triggering *force majeure*. As a result, H&R delivered the rig later than originally contemplated. In the interim, Aquilo was forced to look elsewhere for a rig to get the job done. Aquilo tried to set-off the costs it incurred in seeking an alternate rig against the amounts it paid to H&R. The *force majeure* clause contemplated a specific duty to mitigate:

The performance of any suspended obligation shall be resumed as soon as reasonably possible after such [*force majeure*] cause ceases to exist.<sup>34</sup>

Aquilo alleged that H&R did not use its best efforts to complete the rig after the fire,<sup>35</sup> and also argued that in any event, H&R was responsible for mitigating the effect on Aquilo of the *force majeure* event by finding and funding an alternate rig. It was accepted that H & R had a duty to complete the rig despite the fire through the extent of that duty was debated. The Court limited this duty by imposing a *de facto* commercial reasonableness standard, stating that H&R was only required to complete the rig "as fast as reasonably and prudently possible" as opposed to as fast as possible as had been urged by Aquilo. The Court held that H&R had done so.

The Court also refused to hold H&R responsible for finding and funding a replacement rig. The reasoning is very brief, and seems to be based on the view that such an obligation to mitigate the effect of the *force majeure* would need to be expressed clearly in the written contract. The doctrine of commercial reasonableness was not addressed in this context, nor was the *Atcor* case cited.<sup>36</sup> That being said, the Court had obviously entertained both evidence and argument on the measures taken to reduce the effects on Aquilo of late completion. The "commercial reasonableness" of H&R's conduct was thus considered relevant to whether H&R had satisfied any duty to mitigate the effects of the *force majeure* event. Though *H&R* does not shed light on the nature of "commercial reasonableness" required in the context of *force majeure*, it does

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<sup>34</sup>2000 ABQB 420 ¶ 14.

<sup>35</sup>*Ibid.* ¶ 15.

<sup>36</sup>*Ibid.* ¶ 23.

appear to support the concept there may be a duty to mitigate both the event and the effect of *force majeure*.

It is submitted that if by raising the concept of "commercial reasonability" the Alberta Court of Appeal intended to move away from the strict interpretation historically accorded to such clauses as demonstrated by the Supreme Court of Canada in the *Atlantic Paper* case, the result is arguably to introduce additional uncertainty into a concept that has historically proven itself to be troublesome of interpretation for common law courts. That said, it may be that the concept of "commercial reasonableness" is simply a recognition of events closer to what is generally perceived to be impossibility of performance as referred to in *Atlantic Paper* and consistent with the use of the term "impracticability" in the U. S.

Certainly, other Canadian courts have proceeded by way of strict interpretation in interpreting such clauses. In *Fishery Products International Ltd. v. Midland Transport Ltd.*<sup>37</sup> the defendant contracted to transport fresh fish from Newfoundland to central Canada by truck. While en route, the trucks were obstructed by independent truckers conducting a political protest which caused two of the three trucks to be delayed sufficiently to cause the fish to fail inspection. The Bill of Lading under which the contract was being carried out provided in part as follows:

"The carrier shall not be liable for the loss, damage or delay to any of the goods described in the Bill of Lading caused by an act of God, the Queen's or public enemies, riots, strikes, a defect or inherent vice in the goods, an act or default of the consignor, owner or consignee, authority of law, quarantine, or difference in weights of grain, seed or other commodities caused by a natural shrinkage."<sup>38</sup>

An appeal to the Newfoundland Court of Appeal arose after the trial Judge found that the *force majeure* clause had been properly invoked by Midland and that it relieved it of its obligations. The Court of Appeal overturned that decision finding that "strikes" referred to actions by employees of the company invoking the *force majeure* clause and that it did not extend to the truckers' blockade. Further, the court held that the "Queen's or public enemies" did not include citizens of the state who simply break the law.

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<sup>37</sup> (1994), 113 D.L.R. (4<sup>th</sup>) 651 (Nfld. C.A.).

<sup>38</sup> *Ibid* at 653.

At the heart of the common law of contract is the notion that where a party agrees to a contractual obligation, that party is liable for damages when the obligation is not met. It is presumed that parties intend to be bound to perform their bargain. Consistent with this notion, Courts are wary of those terms that attempt to remove or limit liability for non-performance. Exclusion clauses, restrictive covenants and limitations are examples of this type of clause. Such "exculpatory" provisions tend to be interpreted narrowly or "strictly" because they tend to relieve parties from contractual obligations. Insofar as *force majeure* provisions are considered to be exculpatory, which undoubtedly they are, they will be strictly and narrowly construed.<sup>39</sup>

When interpreting contracts, Courts strive to give effect to the intention of the parties to a contract. The intention of parties is generally to be derived exclusively from the words of the contract itself, as evidence of subjective intent is inadmissible. To assist in determining contractual intention, numerous interpretive rules have developed. Some of these rules have particular relevance for parties drafting and considering *force majeure* clauses: (i) the concept of "strict construction" including the *ejusdem generis* rule; (iii) the concept of "commercial reasonableness"; and (ii) the *contra proferentem* rule.

One interpretive principle often utilized to arrive at a narrow construction is *ejusdem generis*. The principle is as follows:

Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.<sup>40</sup>

*Ejusdem generis* is of particular relevance to *force majeure* clauses that include a detailed list of triggering events. A good example is the use of this principle to construe a *force majeure* clause in *Atlantic Paper*.<sup>41</sup> *Force majeure* was being claimed by the purchaser of waste paper used in the construction of corrugated medium. This purchaser-manufacturer claimed that its inability to find a profitable market for its finished product constituted an event of *force majeure* under its purchase contract with its waste paper supplier. The purchase contract in question defined *force*

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<sup>39</sup>*Atcor*, *supra* note 29.

<sup>40</sup>*Reg. v. Edmundson* (1869), 28 L.J.M.C. 213 at 215 per Lord Campbell, C.J. cited in D.A. Dukelow, *Dictionary of Canadian Law*, 2d ed. (Toronto: Carswell, 1995) at 375; see also a thorough discussion of this rule and its application in R. Sullivan, ed., *Driedger on the Construction of Statutes* 3d ed. (Toronto: Butterworths, 1994) at 203-213.

<sup>41</sup>*Atlantic Paper*, *supra* note 1 at 411.

*majeure* by way of a list of events (i.e. acts of God, war, damage or destruction to production facilities). The list concluded with the phrase "or the non-availability of markets for pulp or corrugating medium."

In determining whether the market situation faced by the manufacturer fell within this concluding phrase of the definition, the Court applied the *ejusdem generis* principle to hold that the phrase relied upon must be interpreted so as to limit its application to events like those previously described, "over which the [party claiming suspension of the contract] exercises no control,"<sup>42</sup> and which "makes performance impossible".<sup>43</sup> Since the market for the products of the purchaser-manufacturer had been found to be materially unchanged from the time of the execution of the contract, the purchaser's claim that the lack of a profitable market for its finished product constituted an event of *force majeure* could not be sustained. The purchaser had simply entered into a business arrangement which at the time of contracting, and at the time of the alleged *force majeure*, was unprofitable.

### **III. Requirements for Force Majeure**

Generally, reliance upon a *force majeure* clause requires that one or more of the following conditions be fulfilled:

- (1) the specified event is beyond the control of the claiming parties;
- (2) the event prevents or delays, in whole or in part, the performance of the contract;
- (3) the event makes performance of the contract imprudent, substantially more difficult or substantially more expensive;
- (4) the event was not due to the fault or negligence of the claiming party; and
- (5) the claiming party has exercised reasonable diligence to overcome or remove the specified *force majeure* event.<sup>44</sup>

When drafting *force majeure* clauses it is necessary to ensure that four key components are addressed:

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<sup>42</sup>*Ibid.* at 411-12.

<sup>43</sup>*Ibid.* at 411.

<sup>44</sup> Don Greenfield and Bob Rooney, "Aspects of International Petroleum Agreement" (1999) 37 Alta. L. Rev. 352 ¶ 72

- (i) a description of events that can trigger *force majeure*;
- (ii) terms that define the duration of that condition,
- (iii) a notice provision describing how a declaration of *force majeure* is to be communicated; and
- (iv) a description of the affects that a *force majeure* event will have on the contractual obligations of the parties.

Each of these elements is discussed below.

#### **IV. Triggering Events**

The Anglo-American legal tradition is to expressly define the event or events that will enable a declaration of *force majeure* rather than merely relying on the general concept of *force majeure*. Commonly included "acts of God" flood, fire, war, civil disturbance, governmental or judicial orders or actions, sabotage, explosion, landslides, lightning, earthquakes, fires, storms, floods and washouts are commonly included as events that trigger *force majeure*. As noted, in common-law jurisdictions it is also common to customize a *force majeure* to the type of project or industry to which it is being applied.

#### **V. Duration/Mitigation**

The duration of the *force majeure* condition must be defined within the contract. Usually, it is expressed to correspond to the period during which the situation giving rise to it cannot be overcome. Any well drafted *force majeure* clause will carry within it an express duty to mitigate. In most contracts, the party declaring *force majeure* must, so far as possible, remedy the situation with due diligence or "with all reasonable dispatch". While the obligation described clearly includes a duty to mitigate the *force majeure* event itself, what is less clear is whether the duty to mitigate also includes a duty to mitigate the affects of the *force majeure* event.

As a matter of concept, the distinction may appear subtle but it can be of great importance as illustrated by several cases decided in Alberta and Texas in relation to gas supply contracts. In *Tejas Power Corp. v. Amerada Hess Corp.*<sup>45</sup> a number of Amerada's wells froze, which limited its upstream supply and which was contemplated as a triggering event under the *force majeure*

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<sup>45</sup> Tex. App. LEXIS 6014 (C.A. 14<sup>th</sup> District Houston, 1999) [*Tejas*].

clause. Amerada curtailed its supply of natural gas to some but not all of its customers and instead selectively chose those to whom it would make deliveries. Tejas made two arguments seeking to hold Amerada responsible for failing to mitigate, not the *force majeure* event, but the effect on Tejas of the *force majeure* event. In that regard, it argued firstly that Amerada ought to have apportioned its limited supply of gas among all affected customers. This argument was rejected on the basis that the court held that Amerada could allocate as it pleased so long as such allocation was "fair and reasonable". The only expert testimony presented at trial indicated that Amerada's allocation was indeed fair and reasonable.

Second, Tejas argued that the availability of gas on the spot market would have allowed Amerada with "due diligence" to "overcome" the affects of the *force majeure* event as required by the contract.<sup>46</sup> Tejas' position was that a duty existed to mitigate the affects of *force majeure* as opposed to the event itself. The Texas Court of Appeal rejected this argument noting that to accept the argument would be to "rewrite a contract or interpret it in a manner the parties never intended".

In the recent Alberta case of *Androskoggin Energy LC v. Producers Marketing Ltd.*<sup>47</sup> a large number of Producers' wells were shut-in by an Alberta regulatory board and *force majeure* was declared by Producers. As the Learned Trial Judge observed:

Section 15.2(b) requires the non-performing party, in this case the seller [Producer's Marketing], to exercise all reasonable efforts to continue to perform its obligations under the agreement and to remedy expeditiously its inability to do so. If the seller is unable to supply gas due to an event of *force majeure*, any reduction in supply is to be apportioned among the various purchasers who share similar contracts as the buyer on a pro rata basis.<sup>48</sup>

In the result, the court ordered Producers Marketing to "do all things necessary to assure the supply of 11,000 gigajoules per day of natural gas" to Androskoggin.<sup>49</sup> Accordingly, in this

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<sup>46</sup> *Tejas*, *supra* note 45 at 6.

<sup>47</sup> [2003] A.J. No. 1701 (QL) [*Androskoggin*].

<sup>48</sup> *Ibid.* ¶ 14.

<sup>49</sup> *Androskoggin*, *supra* note 47 ¶ 32.

sense the court found a duty to mitigate not just the *force majeure* event itself, but also the effects of the *force majeure* event.

On the other hand, a different result arose from the decision in *Apache Corp. v. Virginia Power Energy Marketing Inc.*<sup>50</sup> This case arose from litigation flowing from hurricanes Katrina and Rita in 2005. As a result of the hurricanes, Apache's ability to produce and deliver gas was disrupted and Apache declared *force majeure* and curtailed deliveries to Virginia Power. The contract between the parties provided in part as follows:

"11.2: A Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a *force majeure* and to resolve the event or occurrence once it has occurred in order to resume performance."

Virginia Power contended that Apache should have delivered gas to alternate delivery points are found on the open market other gas for delivery at the alternative delivery points. The court rejected these arguments and noted that Apache's obligations expressly required all reasonable efforts at resumption of performance but they did not expressly require alternate performance in case of a *force majeure* event. At trial, it was held that there was no obligation to supply gas at alternate delivery points and further noted that in any event, an implied obligation to purchase alternate supplies on the open market would be an unlimited obligation, and would render the *force majeure* provisions all but meaningless.

Based on the recent U. S. cases it appears that the courts there are applying a strict and narrow interpretation to the obligation to mitigate, particularly with respect to the extent of mitigation required of the declaring party. Until other cases arise, it is unclear whether the standard of "commercial reasonableness" will cause the Alberta court, and those of other provinces, a more expansive view of that requirement.

When drafting, it may be important to expressly disclaim certain aspects of the duty to mitigate. For example, in relation to labour disputes, the parties will wish to ensure that they are not subject both to the demands of its work force during the dispute and the possibility of having to

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<sup>50</sup> Cause No. 2005-76899 (D.C. 157<sup>th</sup> District Texas, 2007) [*Apache*].

pay contractual damages for failing to settle labour disputes. Accordingly, many *force majeure* clauses recognize this reality by including clauses such as the following:

The obligations of the party giving notice of *force majeure* so far as they are affected by such *force majeure*, shall be suspended during the continuance of any inability so caused, but for no longer period, such a cause, shall, so far as possible, be remedied with all reasonable dispatch; provided however, that this provision shall not require the settlement of strikes or other concerted acts of workers by exceeding to the demands of the opposing parties when such course, in its sole discretion, is considered unreasonable.

While the duty to mitigate assumes that *force majeure* events (and their effects) are only temporary. The question arises as to what happens when an event triggering *force majeure* becomes permanent? For instance, many *force majeure* clauses state that certain detrimental changes to statutory or regulatory environments can amount to *force majeure*. These events may be permanent, and if so, may effectively terminate the contract. In this sense, the terminology of "temporary" and "permanent" seems inapt because a law, a regulation or order can always be repealed and is therefore never permanent in the literal sense. However, literal permanence is not required. *Commonwealth Edison v. Allied-General Nuclear Services*<sup>51</sup> explained the difference between temporary and permanent conditions in *force majeure* clauses:

The point of distinguishing between temporary and permanent conditions constituting impossibility or impracticability or *force majeure* is merely to prevent the promisor from walking away from the contract because of some transitory impediment to performance. When conditions preventing performance persist throughout the life of the contract, they are permanent enough to excuse liability. It would be neither efficient nor fair to impose on the promisor a perpetual duty of readiness to perform if and when the regulatory ban was lifted.<sup>52</sup>

The concept is clear, but at what stage a *force majeure* condition has sufficient permanence and impact to allow abandonment of all contractual obligations is not. The Court in *Commonwealth*

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<sup>51</sup>WL 37744 (Mar. 23, 1990), affirming 731 F. Supp. 850 (N.D. 111 1990) [*Commonwealth Edison*].

<sup>52</sup>*Ibid.*

*Edison* provided some assistance in this respect, stating that the applicable duty to mitigate did not require performance if, after a temporary *force majeure* moratorium was lifted, performance would be "materially more burdensome" than if the *force majeure* event had never occurred. How this "materially more burdensome" standard might be interpreted in a given case is difficult to predict and has not been tested in any significant body of case law. Reference to the requirements of contractual frustration (destruction of the "entire subject matter", or of the underlying rationale of the contract) could also be relevant when considering this issue.

## VI. Notice

A third key aspect *force majeure* clauses is a notice requirement, providing a condition precedent to a declaration of *force majeure*. Typically, a *force majeure* clause will include a fairly general notice provision, such as in the following example:

Upon such party giving notice and reasonably full particulars of such *force majeure* in writing to the other party within a reasonable time after the occurrence of the cause relied on ...<sup>53</sup>

When notice is properly given, *force majeure* protection normally commences (retroactively) from the time of the triggering event itself. In many instances, *force majeure* clauses will treat a failure to give notice within a particular timeframe as a barrier to valid declaration – even where a *force majeure* triggering event has been known to occur (such as a hurricane, for example). The logic to providing a reasonable notice period after the triggering event is to give a party an opportunity to cure or mitigate the *force majeure* event without necessarily having to make a declaration. In some instances, the "acts of God" and other events enumerated within a *force majeure* clause may not have a major impact upon operations, and in such instances, declarations of *force majeure* may prove to be counter-productive to the party entitled to make such a declaration.

A failure to properly give notice will be fatal to a defence based upon a *force majeure* clause.<sup>54</sup> Strict adherence to notice requirements is usually necessary. For example, in *International*

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<sup>53</sup>*Ibid.*

<sup>54</sup>*International Minerals & Chemical Corp. v. Llano, Inc.*, 770 F. 2d at 885; *Resources Investment Corp. v. Enron Corp.*, 669 F. Supp. 1038 at 1043-44 (D. Colo. 1987); *Superior Oil Co. v. Transo Energy Co.*, 616 F.Supp. 98 at 108-109 (W.D. I-a. 1985).

*Minerals & Chemical Corp. v. Llano, Inc.*,<sup>55</sup> a buyer notified the seller that its gas consumption would be reduced because of testing, but not that its reduced consumption would be permanent. The buyer argued that the notice was sufficient to allow a permanent reduction in volumes under the *force majeure* clause. The United States Court of Appeal found that this was not proper notice within the meaning of the *force majeure* clause which required that "the party whose performance ... is so affected shall immediately notify the other party of all pertinent facts ...". The notice did not indicate the pertinent fact that reduced consumption would be permanent.<sup>56</sup>

## **VII. Effect on Contractual Obligations**

The precise effect of a *force majeure* event on the contractual obligations of the parties must also be addressed in the contract. For example, particular contractual obligations may be ended, suspended, or merely altered. The following is an example of a clause under which contractual obligations (but only those not involving payment) are suspended for a limited period coinciding with the *force majeure* event:

Except with regard to Buyer's or Seller's obligations to make payments due under this Agreement, in the event either party hereto is rendered unable, wholly or in part, by *force majeure* to carry out its obligations under this Agreement, and which by the exercise of due diligence, such party could not have prevented or overcome, it is agreed that, then the obligations of the party giving notice, so far as they are affected by such *force majeure*, from its inception, shall be suspended during the continuance of any inability so caused but for no longer period. Either party's inability to perform shall, as far as possible, be remedied with all reasonable dispatch.<sup>57</sup>

When drafting *force majeure* clauses, it is important to separate the contractual obligations that remain in force throughout the event (if any) from those that are suspended or modified. Moreover, if the underlying contract contemplates obligations contingent on the passage of time, the *force majeure* clause ought to address the effect that any suspensions due to *force majeure*

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<sup>55</sup> 770 F. 2d at 885 (1985).

<sup>56</sup> *Sabine Corporation v. ONG Western, Inc.*, 725 F.Supp. 1157 at 1169 (W.D. Okla. 1989).

<sup>57</sup> Vector Pipeline Inc., "Line Pack Gas Purchase Agreement" (Dresdon, ON: Vector Pipeline). Online <[http://www.vector-pipeline.com/media/news\\_releases/pdf/nr\\_20001027.pdf](http://www.vector-pipeline.com/media/news_releases/pdf/nr_20001027.pdf)>. Accessed August 15, 2007 [Vector Agreement] at Article 12.

might have on these periods. Although the protection of *force majeure* is intended as temporary protection against unavoidable events, the passage of key timeframes (such as an expiration or termination date) while a party is within the protection of *force majeure* may lead to unintended consequences unless directly contemplated and addressed within the clause.

Parties drafting or negotiating contracts involving *force majeure* clauses will also want to turn their minds to whether all triggering events should have the same impacts on contractual obligations. For example, does an operational failure or labour strike really warrant the same relief from performance obligations that might otherwise be appropriate in an earthquake?

### **VIII. Conclusion**

The drafting of *force majeure* clauses, rather than merely involving the selection of boiler plate wording, should be approached from the perspective that it represents both a central part of the proper risk allocation scheme of a particular project but also an opportunity to select wording which can assist in reducing uncertainty and ensuring that risk ultimately resides where intended.

It is accordingly critical that a thorough review of the fundamental elements of such clauses including trigger events, duration, notice and the effect the events described in the clause are to have on contractual obligations be considered as constituent elements of a well drafted clause.