

How Truly Liberating are *Force Majeure* Clauses?

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What is a *Force Majeure* Clause?

“A contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance [...] or is entitled to suspend performance [...] upon the happening of a specified event or events beyond [his or her] control.”



HG Beale, ed, *Chitty on Contracts*, 30th ed

Don't Overlook Them!



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If you Don't Pay Attention to the Drafting, Courts Will!

Atlantic Paper Stock Ltd. v St. Anne-Nackawich Pulp and Paper Company Limited (Supreme Court of Canada, 1976)



St-Anne contracted for 10,000 tonnes of waste paper, subject only to “an act of God, the Queen’s or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the non-availability of markets for pulp”. 14 months later St-Anne advised Atlantic that the paper was no longer needed and tried to rely on the “*force majeure*” clause.

If you Don't Pay Attention to the Drafting, Courts Will!

Atlantic Paper Stock Ltd., continued

Argument rejected. The Court established 2 principles:

1. The event must clearly be beyond the control of the contracting parties (here event was foreseeable).
2. The event must render performance of contractual obligations impossible (here it was mere commercial hardship: the event prevented St. Anne from operating at a profit).

The Event(s) Must Render the Performance Impossible?

Tom Jones & Sons Ltd v R (Ontario High Court of Justice, 1982)

- Shortly after Tom Jones' bid for the construction of a building for the Government of Ontario was accepted, Tom Jones advised the government that it could not arrange financing for the project.
- The *force majeure* clause did not apply because it was not impossible for Tom Jones to obtain financing in order to go ahead with the project.
- Tom Jones was trying to rely on the clause to avoid its obligations merely because it would not have been profitable for Tom Jones to proceed with the contract.



Or Not?

Atcor Ltd v Continental Energy Marketing Ltd (Alberta Court of Appeal, 1996)

Atcor supplied natural gas to Continental Energy through a pipeline operated by a third party. Because of breakdowns and repairs, the third party was unable to provide the usual quantity of gas to Atcor, who was in turn unable to perform the contract with Continental.



Or Not?

Atcor Ltd, continued

Atcor was allowed to rely on the *force majeure* clause:

“A supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem”

So Far in Canada, Impossibility is the Standard

Domtar Inc. v Univar Canada Ltd (British Columbia Supreme Court, 2011)



Univar bought caustic soda and supplied it to Domtar (owner of pulp and paper mill). The supply price was capped in the contract. The global price of caustic soda rose substantially, and Univar relied on the *force majeure* clause in an attempt to charge Domtar higher supply prices despite the contractual cap.

So Far in Canada, Impossibility is the Standard

Domtar Inc., continued

Argument rejected: Univar did not establish that performance was impossible. Univar could still buy soda from producers and then supply it to Domtar. The fact that the contract became more expensive to perform for Univar was not sufficient.

Choose Your Words Wisely

Fishery Products Internal Ltd. v Midland Transport Ltd. (Newfoundland Court of Appeal, 1994)



Midland was transporting fish to locations in Ontario and Quebec. It got stranded on Highway 20 because of a trucker protest. The fish became unfit for consumption.

Choose Your Words Wisely

Fishery Products Internal Ltd., continued

- Midland relied on the “strike” clause in an attempt to be excused for the breach of contract.
- Argument rejected: “strike” has a precise legal meaning, and the trucker protest did not fall within it.

Force Majeure as Mitigation

Oceanex Inc. v. Praxair Canada Inc. (2014 FC 6)

- Liquid oxygen leaked and damaged a vessel.
- Owners sued for lost revenue during repairs.
- Do owners need to declare *force majeure* to avoid losses?

Force Majeure as Mitigation

Oceanex Inc., continued

- Court holds that there is no requirement to declare *force majeure*.
- Doing so might jeopardize business relationships.

Other Common Law Examples

Castor Petroleum Ltd v Petroterminal De Panama SA **(Supreme Court of New York County, 2012)**

Castor leased Petroterminal's (PTP) facility to store its crude oil. A valve rupture occurred in the facility, causing a spill.



Castor and PTP were sued in Panama, and the Panamanian court forbade Castor from using the oil stored in the PTP facility in Panama. Castor's business suffered as a result.

Other Common Law Examples

Castor Petroleum Ltd, continued

- Castor asked PTP to reimburse it for the losses, but PTP argued that the Panamanian court decision was an event of *force majeure*.
- The US Court accepted PTP's argument: the Panamanian court order was a true *force majeure* event because PTP could not have foreseen it and it rendered the performance of the contract impossible.

Hurricanes as Acts of God

***Pioneer Natural Resources USA Inc. v. Diamond Offshore Co.* 638 F. Supp. 665 (E.D. La. 2009) & *In re Atlantic Marine* 570 F. Supp. 2d 1369 (S.D. Ala. 2008)**

- An oil rig and a barge come loose from their moorings during Hurricane Ivan and Hurricane Katrina, causing damage.
- Defendants raise the Act of God defence to these tort claims
- One defendant is successful, in part because other rigs came loose.
- The other is unsuccessful, because other rigs closer to the storm did not come loose. As such, this was not out of its control.

Punitive Damages for a “False” Declaration

Wheeling Pittsburgh Steel Corp. v. Central West Va. Energy Co (2007 WL 4959806)

- a party asserting *force majeure* “without a legal, factual basis” was ordered to pay punitive damages.

A U.K. Example

General Construction Co Ltd v Chue Wing & Co Ltd (Judicial Committee of the Privy Council, 2013)



- Owner-operator of a crane (General Construction) sought to avoid liability for the damages caused by the fall of the crane on a multi-story building in Port Louis, Mauritius during the Cyclone Hollanda.
- Argument rejected: cyclones are not uncommon in the Indian Ocean and the owner-operator should have foreseen the occurrence of Cyclone Hollanda and taken steps to ensure that the crane could be operated safely.

For British Courts, *Force Majeure* Events are Rarely Found

Great Elephant Corp v Trafigura Beheer (Court of Appeal of England and Wales, 2013)

Trafigura's vessel could not depart the oil platform until the platform operator paid a \$12M fine to the Nigerian Government.



Great Elephant, owner of the ship, requested Trafigura to pay the full demurrage as a result of the delay. Trafigura argued that the fine was a *force majeure* event.

For British Courts, *Force Majeure* Events are Rarely Found

Great Elephant Corp, continued

Argument rejected: the fine was foreseeable and so was the delay caused by the fine.

“If every arbitrary exercise of power in any country of the world where ships come and go were sufficient to displace serious breaches of contract, that might be an encouragement to lawlessness.”

British Courts will Approach the Wording of the Clause Narrowly

Tandrin Aviation Holdings Ltd v Aero Toy Store (High Court of Justice, 2010)

- The buyer refused the delivery of the aircraft and to pay the balance of the purchase price. The seller asked for the deposit, which was held in escrow.
- The buyer argued that the financial crisis was an event of *force majeure*.
- Argument rejected: The phrase “and any other cause” should be read in the context of the entire *force majeure* clause, which was not intended to include an economical downturn as a triggering event.



British Courts will Approach the Wording of the Clause Narrowly

ED&F Man Sugar Ltd v Unicargo Transportgesellschaft mbH (Court of Appeal of England and Wales, 2013)



- Conveyance belt of the terminal destroyed by fire; charterers unable to load for some time; Ship-owners claimed demurrage.
- Charterers relied on *force majeure* clause: the delay was caused by a “mechanical breakdown” and/or by “government interferences.”
- Argument rejected based on a strict interpretation of the wording of the clause.

Good to Know: Singapore Courts Seem to Be More Pragmatic

Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd (Supreme Court of Singapore, 2011)

- There was a contract to provide sand for a warehouse construction project.
- Indonesia banned the export of sand from Indonesia to Singapore.



Good to Know: Singapore Courts Seem to Be More Pragmatic

Holcim (Singapore) Pte Ltd, continued

- Supplier argued that this constituted *force majeure* because it disrupted the availability of sand and placed the supplier in a commercially impracticable situation.
- Sand could have been sourced elsewhere at a higher price.

Good to Know: Singapore Courts Seem to Be More Pragmatic

Holcim (Singapore) Pte Ltd, continued

HELD:

“where a commercial transaction is involved, the process of ascertaining whether or not a particular set of circumstances constitutes a ‘disruption’ or ‘hindrance’ within the meaning of the *force majeure* clause concerned ought to be informed by considerations of commercial practicability”

The Crucial Part: Drafting



What Kind of Event Will Trigger the Clause?

- **Act of God**
- **War**
- **Strike or industrial action**
- **Government action (new law)**



and.....

What Kind of Event Will Trigger the Clause?

“any other event or circumstance beyond the parties’ control...”

The Event Occurs: What Should I Do?

- If the event occurs and falls within the clause, the party seeking to rely on the clause must notify the other party.
- Otherwise the clause will not operate.
- The clause should specify:
 1. The time within which notice must be given;
 2. The facts the notice must contain; and
 3. Where notice should be served.



What Are the Effects of the Operation of the Clause?

- Right to terminate the contract without liability
- Suspension of performance until the event ceases without liability, and re-activation thereafter.
- Right to seek an extension of time for performance without liability, with a right of refusal available to the other party.
- Right for a seller who has only enough goods to fulfil some but not all of its contracts, to prioritize one contract over another.
- Duty on the part of the party invoking the clause to overcome the event to the extent possible.

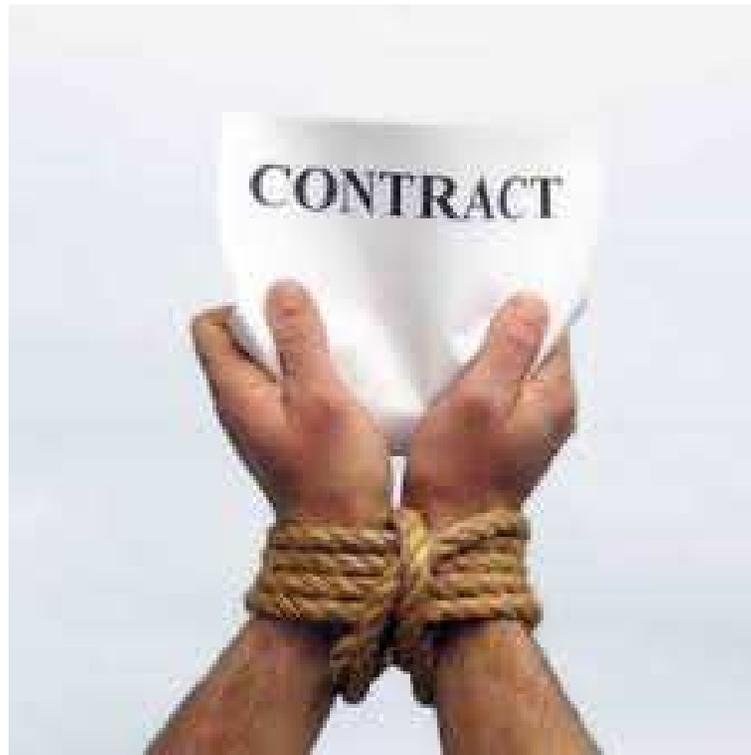
Other “Liberty” Clauses

You can also make use of specific clauses allowing you to:



- Discharge cargo at other ports
- Use alternate routes;
- Store the cargo until it can be properly shipped; or
- Abandon the cargo at another port.

What if There is no *Force Majeure* Clause, or if it Does not Operate?



What if There is no *Force Majeure* Clause, or if it Does not Operate?

If a *force majeure*-type event occurs, you can rely on the exemptions afforded by the *Hague-Visby Rules*, but:

- The event must have been unforeseeable (*Goodfellow Lumber Sales v Verreault*, Supreme Court of Canada, 1971).
- The *Rules* are not always applicable.
- The only possible outcome of the application of the *Rules* is exemption of liability (no suspension, etc.).

Conclusion

- Do not accept a standard *force majeure* clause.
- Be involved in the drafting of the clause.
- Obtain legal advice!



Questions?

THANK YOU

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