FORCE MAJEURE — BEYOND BOILERPLATE

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This article discusses a common feature in petroleum contracts, the force majeure *clause. The* force majeure *clause is often overlooked by parties and lawyers alike as mere boilerplate; however, the clause has important implications when certain events preclude performance of an agreement.*

An explanation of what encompasses a triggering event with respect to a force majeure *clause is followed by a discussion of the consequences when the clause is invoked in various contractual situations. The authors show how careful drafting of a* force majeure *clause can minimize the potential for dispute and litigation, with specific regard to the type of contract in which it is placed, the parties involved and the commercial context in which they are dealing. Finally, the article addresses how the courts in Alberta and elsewhere have judicially considered* force majeure *clauses and implications stemming from the cases.*

Les auteurs traitent d'un élément courant des contrats pétroliers: la clause de force majeure. *Bien que cette clause soit souvent classée parmi les paragraphes passe-partout par les parties et les avocats, elle est lourde de conséquences quand certains événements empêchent l'exécution d'une entente.*

L'explication de ce qui peut constituer un événement déclencheur est suivie par une discussion des conséquences quand la clause est invoquée dans diverses situations contractuelles. Les auteurs montrent comment la formulation soigneuse d'une telle clause peut minimiser les différends et litiges possibles, selon le type de contrat où elle figure, les parties engagées et le contexte commercial au sein duquel elles traitent. L'article examine enfin comment les cours de l'Alberta et d'ailleurs traitent des clauses de force majeures *et de leurs répercussions à toutes fins judiciaires.*

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I. INTRODUCTION

Force majeure clauses are common in all sorts of contracts including those used in the petroleum industry. More often than not, the *force majeure* clause is treated as boilerplate to which little thought or reflection has been given by either the parties or their lawyers. This lack of attention is surprising in light of the serious consequences arising from the invocation of *force majeure* and the wide scope for disputes regarding the applicability and interpretation of these clauses. Careful drafting of a *force majeure*

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clause with specific regard to the type of contract in which it is placed, the parties involved and the commercial context in which they are dealing can minimize the potential for dispute and litigation.

A succinct definition of a *force majeure* clause is found in the Supreme Court of Canada decision of *Atlantic Paper Stock Ltd.* v. *St. Anne-Nackawic*:

> An act of God clause or a *force majeure* clause ... generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.[1]

The leading authority in Alberta on *force majeure* clauses used in the petroleum industry, and specifically with reference to the supply of natural gas, is the case of *Atcor Ltd.* v. *Continental Energy Marketing Ltd.*[2] In this case, the plaintiff, Atcor Ltd. ("Atcor"), agreed to supply certain volumes of natural gas on a firm delivery basis and the defendant, Continental Energy Marketing Ltd. ("Continental"), agreed to purchase those volumes. Under the contract, Atcor was required to deliver the gas to a particular interconnection point between the pipelines. During the agreement's term, various compressor breakdowns and pipeline repairs occurred in the NOVA Gas Transmission Ltd. ("NOVA") pipeline system carrying the plaintiff's gas. In each case, NOVA advised Atcor that its firm capacity on the NOVA system would be curtailed and by how much. Because of the curtailment in its transportation capacity, Atcor had to reduce its gas deliveries to its customers, including Continental. During curtailments, Atcor first ceased delivery under its interruptible supply contracts, then reduced delivery to Continental under its firm delivery contract. As a result, Continental contracted for alternative deliveries of gas to its end users at an increased cost to itself. Continental sued Atcor for damages for breach of the contract. Atcor relied on the *force majeure* clause in the contract in order to absolve itself of liability. Kerans J.A., writing for the court provides the following useful overview of a *force majeure* clause:

> The office of the [*force majeure*] clause is to protect the parties from events outside normal business risk. A *force majeure* clause, then, should address three questions:
>
> - How broad should be the definition of triggering events;
> - What impact must those events have on the party who invokes the clause; and
> - What effect should invocation have on the contractual obligation.[3]

Each of these aspects of a *force majeure* clause will be reviewed in the following discussion.

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1 [1976] 1 S.C.R. 580 at 583.

2 (1996), 38 Alta. L.R. (3d) 229 (C.A.) [hereinafter *Atcor*].

3 *Ibid.* at 236.

II. DEFINITION OF TRIGGERING EVENTS

In drafting *force majeure* clauses, various approaches may be taken when defining the triggering events. Some lawyers prefer to use broad lists of detailed triggering events, while others prefer to rely on a shorter, all-inclusive and general description of triggering events. Similarly, some lawyers will tailor the triggering events to the unique circumstances of the parties to, and the subject matter of, the contract, while others will rely on more standardized language to describe the triggering events. A sample list of *force majeure* triggering events is found in the *Atcor* contract. The contract between Atcor and Continental included the following provision:

> For the purposes of this Agreement, the term "*force majeure*" shall mean any acts of God, including therein, but without restricting the generality thereof, lightning, earthquakes and storms and in addition shall mean any strikes, lockouts or other industrial disturbances, acts of the Queen's enemies, sabotage, wars, blockades, insurrections, riots, epidemics, landslides, floods, fires, washouts, arrests and restraints, civil disturbances, explosions, breakages of or accidents to plant, machinery or lines of pipe, hydrate obstructions of lines of pipe, freezes of wells or delivery facilities, well blowouts, craterings, pipeline tie-ins, pipeline connections, pipeline repairs and reconditioning, the orders of any court or governmental authority, the invoking of *force majeure* pursuant to any gas purchase contracts, any acts or omissions (including failure to take gas) of a transporter of gas to or for Seller which is excused by any event or occurrence of the character herein defined as constituting *force majeure*, or any other causes, whether of the kind herein enumerated or otherwise, not within control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome.[4]

The first part of the list in *Atcor* provides an example of what Kerans J.A. refers to as a "broad list"[5] of detailed and tailored triggering events. It contemplates the specific types of interruptive events that may occur in the context of gas supply contracts. For example, it specifically cites problems with well blowouts and pipelines. The second half of the clause in the Atcor and Continental contract goes beyond the specific events particular to gas supply contracts and uses all-inclusive language describing triggering events as "any other causes, whether of the kind herein enumerated or otherwise, not within control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome."[6] The *force majeure* clause in *Atcor* not only provides detailed and tailored triggering events (first part of the clause) but also an all-inclusive and general catch-all provision (second part of the clause).

A. BROAD LIST OF TRIGGERING EVENTS

Proponents of the view that the triggering events should be a broad list of tailored and specific events must balance the use of a broad list with the risk that a broad list creates too wide an exit through which a party can simply walk away from its contractual responsibilities. This was the concern expressed by Kerans J.A. in *Atcor* when he stated that there is the risk of turning a bargain on its head if the *force*

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4 *Ibid.* at 233-34.
5 *Ibid.* at 236.
6 *Ibid.* at 234.

majeure clause can be used as an escape clause.[7] The list of triggering events should be sufficiently specific so as to permit parties to avoid obligations that cannot be satisfied for reasons which legitimately could not be prevented by forethought and planning on the part of the party claiming *force majeure*; but not so broad as to allow a party to escape those obligations for which it should be reasonably held accountable. Given Kerans J.A.'s statements in *Atcor*, some lawyers would take the position that the number of specific triggering events should be minimized in order to prevent parties from too easily escaping contractual obligations. Alternatively, some may suggest that a *force majeure* clause need not include long lists of triggering events when reliance on simple general language (such as that found at the end of the *Atcor* clause) will adequately cover all possible events. While use of a broad list of triggering events creates the risk of contracting parties using the *force majeure* clause to escape obligations too easily, a different kind of risk arises when parties rely exclusively on lists of specific events. This risk is demonstrated by the following case.

The relatively recent case of *Fishery Products International Ltd.* v. *Midland Transport Ltd.*,[8] demonstrates the importance of including a sufficiently broad list of triggering events in the *force majeure* clause which are tailored to the subject matter of the contract in question, and the danger when such a list does not cover the actual type of triggering event that occurred. In this case, the defendant, Midland Transport Ltd. ("Midland"), had a contract with the plaintiff for the transport of fresh fish from Newfoundland to destinations in Quebec and Ontario. The fish were transported in three separate Midland trucks. While the trucks were en route, they were obstructed as a result of a road blockade and a traffic slow-down that occurred on Highway 20 in Quebec. The road blockade and traffic slow-down were caused by independent truck drivers as a political protest to attract the attention of government to perceived problems within the trucking industry. The protest concerned high taxes and government policies that truckers believed were making it impossible for Canadian truckers to compete with American truckers. The road blockage and traffic slow-down caused two of the Midland trucks to be delayed long enough to cause the fish to deteriorate and fail inspection, for which Fishery Products International Ltd. sued Midland. The issue before the court was whether or not section 5 of the bill of lading, which was the *force majeure* provision, relieved Midland of its obligations under the contract.

Section 5 of the bill of lading provided that:

> the carrier should 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 of 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.[9]

As evident from the language used in the clause (and in particular, the references in it to grain and seed), the clause had not been drafted specifically to deal with the

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7 *Ibid.* at 236.

8 (1994), 113 D.L.R. (4th) 651 (Nfld. C.A.).

9 *Ibid.* at 653.

transportation of fish and other highly perishable items, but rather appears intended for contracts for carriage of various types of goods.

The trial judge found that the *force majeure* clause had been properly invoked by Midland and relieved Midland of its obligations under the contract. More specifically, the trial judge found that the action by the independent truckers, blockading Highway 20 and slowing down traffic, fit either within the triggering event of "strikes" or the triggering event of an act of "the Queen's or public enemies." The Newfoundland Court of Appeal overturned the trial judge's findings. After a review of the case law, the Newfoundland Court of Appeal found that "strikes" refers to actions by employees of the company that is invoking the *force majeure* clause and did not extend to the trucker's blockade. Further, the Newfoundland Court of Appeal determined that the "Queen's or public enemies" does not include citizens of the state who merely break the law and, as a result, concluded that the acts of the truckers, characterized by the parties in the agreed statement of facts as political protest, did not fall within the definition of the "Queen's or public enemies." Consequently, the blockade and traffic slow-down did not constitute a triggering event and the *force majeure* clause could not be relied on to relieve Midland of its contractual obligations.

The result seems somewhat harsh for Midland whose performance of the contract of carriage was interrupted by events beyond its control. However, the case does provide a good example of an instance where the court has literally and strictly interpreted and applied the clear terms of the contract including those in the *force majeure* clause. Had this *force majeure* clause contained a triggering event such as "civil disturbances," as was included in the Atcor *force majeure* clause, Midland may have been successful in obtaining relief from its contractual obligations.

B. ALL INCLUSIVE TRIGGERING EVENTS

Given the foregoing risks associated with utilizing lists of detailed triggering events in a *force majeure* clause, a solicitor may wish to exclusively rely on more general and all-inclusive language in drafting the *force majeure* clause of the contract. By general and all-inclusive language the authors mean language similar to that used in the second part of the Atcor *force majeure* clause outlined above. To fall within the scope of clauses which adopt this approach, two hurdles must be overcome, namely: (1) the event being outside of the party's control; and (2) such event must render performance by that party impossible. From the perspective of drafters that rely on this approach, if the two hurdles can be overcome, the party should be entitled to invoke *force majeure*. The *Petroleum Joint Venture* Association model precedent "Contract Well/Facilities Operating Agreement" includes the following *force majeure* clause:

> The obligations of either party will be suspended by written notice from one party to another and for so long as the performance of the obligations are prevented or hindered, in whole or in part, by reason of strikes, acts of God or the Queen's enemies, Provincial, Federal or Municipal regulations, of for any other cause beyond the reasonable control of the party, except lack of funds. Performance will be resumed within a reasonable time after the cause has been removed. A party is not required to settle any labour dispute against its will.

The above clause enjoys simplicity while purportedly covering the waterfront by using broad and all-inclusive language. However, in light of the finding in *M.A. Hanna Co.* v. *Sydney Steel Corp.*,[10] the drafters may be well advised to re-think their strategy. In *Hanna*, the Nova Scotia Supreme Court considered a standard form of *force majeure* clause in the contract between the parties. The *force majeure* clause was part of the boilerplate in the contract provided by the plaintiff, M.A. Hanna Co., and it was the defendant, Sydney Steel Corp. ("Sysco"), that invoked the clause. In its analysis of the *force majeure* clause, the court found that the plaintiff had employed "some broad phraseology"[11] in its definitions of *force majeure* triggering events. As such, the court found that "the broad wording of the clause creates an ambiguity which should, in this case, be interpreted against the drafter."[12] While in *Hanna* the result was the court applying the *contra proferentum* rule to give effect to the *force majeure* clause and relieve the defendant from its obligations under the contract, the important finding was that of ambiguity. According to the Court in *Hanna*, broad language is ambiguous.

The Nova Scotia Supreme Court's references to "broad phraseology" and the "broad wording of the clause" are not the same as Kerans J.A.'s reference to a "broad list"[13] of specific triggering events. The "broad phraseology" referred to in *Hanna* is a reference to general all-inclusive language whereas the "broad list" of triggering events from *Atcor* is, instead, a large and specific list of particular events. *Hanna* illustrates the danger of relying exclusively on broad general language to define the *force majeure* triggering events.

When drafting a *force majeure* clause and defining the triggering events therein, a balance must, therefore, be struck between a broad list of detailed triggering events which are germane to the subject matter of the contract and the use of general all-inclusive language. The draftsperson must also take into account the rules of interpretation such as *expressio unius* and *ejusdem generis* when drafting the *force majeure* clause and including both a sufficiently (but not overly) broad list of detailed triggering events and the more general, all-inclusive catch-all clause.

III. IMPACT OF TRIGGERING EVENTS ON PARTIES

With regard to the impact of triggering events, the Alberta Court of Appeal in *Atcor* makes the following suggestion:

> When the list [of triggering events] is broad, one reasonably expects to see in the contract that the event is tied to meaningful consequences. A good contract would expressly deal with several possible results, and different levels of obligation to mitigate.[14]

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10 (1995), 18 B.L.R. (2d) 264 (N.S.S.C.) [hereinafter *Hanna*].

11 *Ibid.* at 293.

12 *Ibid.*

13 *Atcor*, *supra* note 2 at 236.

14 *Ibid.*

Where the draftsperson of the *force majeure* clause includes a broad list of triggering events, it is prudent to include consequences in relation to specific triggering events and what steps the parties are obliged to take upon invocation of the *force majeure* clause.

Once a triggering event in a *force majeure* clause has occurred, the next step is to determine how it affects the parties to the contract. If there is a *force majeure* event which does not affect the ability of the contracting parties to meet their contractual obligations, the *force majeure* clause may not be relied upon and business continues in the normal course.

Force majeure clauses provide that in order for the parties' obligations to be suspended, the triggering event must have the contractually specified effect: which is to either render the invoking party unable to perform its contractual obligations or, alternatively, the event must cause the invoking party to fail to perform its contractual obligations. In *Atcor*, the court analyzed the difference between a *force majeure* clause which provides that it may be invoked when a contracting party is "unable to perform" its obligations due to a triggering event as opposed to when a contracting party "fails to perform" its contractual obligations due to a triggering event.[15] Ultimately, the Court of Appeal in *Atcor* makes the point that there is really no distinction between these two phrases and they should not be interpreted differently. In rejecting an argued distinction between "fails to perform" and "unable to perform," Kerans J.A. stated that the triggering event need not render performance impossible before a party may properly invoke the *force majeure* clause:

> A supplier need not show that the [triggering] 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, one that makes performance commercially unfeasible.[16]

Notwithstanding the occurrence of the triggering event, if a contracting party can otherwise continue to satisfy its contractual obligations in a commercially reasonable manner, the *force majeure* clause will not operate to absolve that party from its contractual responsibilities.[17]

Unfortunately, in *Atcor*, the Court of Appeal did not provide specific guidelines as to what may or may not be commercially reasonable. Despite this lack of guidance, Kerans J.A. does indicate that a good *force majeure* clause should address these matters.[18] Although it would be difficult for a draftsperson to enumerate what reasonable steps must be taken by a party for each and every triggering event, some specific instances of *force majeure* may lend themselves to enumerating specific actions which a party remains contractually bound to take, or, alternatively, those actions which a party is not contractually obliged to take. For example, as outlined in the Petroleum Joint Venture Association *force majeure* clause referred to above, a party who has

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15 *Ibid.* at 237.
16 *Ibid.* at 236.
17 *Ibid.* at 243-44.
18 *Ibid.* at 237.

invoked *force majeure* as a result of strikes or labour disputes is not contractually obliged to settle such a dispute against its will. Although any specific list of steps which are required in the event of *force majeure* will be particular to any given contract, the contract should, at minimum, also include a general requirement that the party invoking *force majeure* take any reasonable steps to remedy the *force majeure.*

A. NOTICES

A well-drafted *force majeure* clause should also include a requirement that the party invoking the clause provide written notice of the *force majeure* to other parties to the contract. An example of such a *force majeure* clause is as follows:

> A party claiming suspension of its obligations due to *force majeure* shall notify the other in writing as soon as practical of any such anticipated delay in its obligations in the nature and details thereof, the anticipated duration of such condition, and the action that party proposes to take with respect to such condition, and shall promptly remedy the cause and effect of the *force majeure* in so far as it is reasonably able to do so; provided that the terms of any settlement of any strike, lockout or any industrial disturbance shall be holding in the discretion of the party claiming suspension of its obligations hereunder by reason thereof and that party shall not be required to accede to the demands of its opponents in any strike, lockout or industrial disturbance solely to remedy promptly the *force majeure* thereby constituted. After a party's ability to perform its obligations hereunder has been restored, it shall promptly notify the other party in writing thereof.

Not only is it important for prompt notice to be provided once a party has been affected by *force majeure*, but, depending on the nature of the contract, it may be appropriate that a notice period is provided at the conclusion of the *force majeure* and prior to the contractual obligations being reimposed on both parties. For example, it may be anticipated that in circumstances where a gas supplier invokes *force majeure*, the purchaser may be required to make alternate arrangements for the supply of gas. If it is anticipated that the alternate supply will be provided under a monthly supply arrangement, the purchaser will want a suitably long notice period before its obligations under the contract with its original supplier are reinstated.

To summarize, in circumstances where a contracting party anticipates that it will require a certain amount of lead time in order to ensure that it can again meet its obligations once the *force majeure* is no longer operative, a notice period should be included in the contract.

IV. EFFECT ON THE CONTRACTUAL OBLIGATIONS

The *force majeure* clause should specify the effect of the triggering event on the contracting parties' obligations. Generally, it will provide that upon the occurrence of a triggering event that the parties' obligations are suspended for the duration of the *force majeure* event. Most often, the suspension will not affect obligations to pay which have accrued to the date of the triggering event and some contracts go further, specifying other particular obligations which are not suspended during the currency of the *force majeure.* Where a party invokes a *force majeure* clause, the court will impose

a duty to mitigate upon that party, prior to permitting the invoking party to have its contractual obligations suspended. If the party can mitigate in a commercially reasonable manner, it is obliged to do so and can not rely on the *force majeure* clause to suspend its obligations.

The use of the phrase "duty to mitigate" in relation to a *force majeure* clause is unconventional. The usual duty to mitigate lies with the party who has suffered damages as a result of a breach of contract by the other party. By contrast, in the case of *force majeure,* it is the party failing to perform that has the duty to mitigate. At first glance, the duty to mitigate in a commercially reasonable manner may appear redundant. What incremental obligation does the duty to mitigate impose on the party invoking *force majeure* given that, before an event will qualify as a triggering event for the invocation of *force majeure,* the event must make it commercially unreasonable for a party to perform its contractual obligations? Is the standard imposed by the triggering event test any different than that imposed by the duty to mitigate? The answer is "sometimes." This is because there may be circumstances where the duty to mitigate goes beyond the test of impact. For example, the triggering event may make performance in accordance with the strict terms of the contract impossible, but it may be possible to achieve the essential contractual objectives through commercially reasonable alternative means. In such a circumstance, in the absence of a duty to mitigate, the party unable to perform its contractual obligations strictly in accordance with the terms of the contract, would have been entitled to rely on the *force majeure* event to suspend its obligation to perform.

In any event, between the impact requirement on a party and the duty to mitigate, it is clear that where there is a commercially reasonable manner in which a party can satisfy its essential obligations, the court will require that party to do so and that party will not be relieved by the invocation of the *force majeure* clause. Kerans J.A. makes the following comment in *Atcor*:

> [T]he obligation to mitigate by re-supply 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. He is excused, however, if that solution, in all the circumstances, is not reasonable.[19]

The concept of what is commercially reasonable will always be highly fact dependent. Kerans J.A. indicates that evidence on the question of whether the cost of replacement gas was a crushing burden for the supplier and evidence on the scope of the supplier's business would have helped to determine what would have been commercially reasonable for the supplier to do in the circumstances.[20] In the result, *Atcor* was sent back to the Court of Queen's Bench for a new trial, with a strong indication from the

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[19] *Ibid.* at 243-44.

[20] *Ibid.* at 245.

Court of Appeal that evidence on the re-supply of gas was required. However, the parties settled this matter and no decision was made with regard to commercial reasonability of re-supply of the gas in this situation.

Given the lack of guidance as to what the court will treat as commercially reasonable for contracting parties to do once a triggering event has occurred, where practical, a *force majeure* clause should enumerate what specific actions the parties have agreed a party must do in order to mitigate. Again, "a good contract would expressly deal with several possible results, and different levels of obligation to mitigate."[21] For example, where a contract for gas supply is in issue and the supplier's ability to supply gas is reduced (though not completely eliminated), the parties can specify in the contract that the supplier is required to distribute its remaining gas supply on a pro-rated basis between purchasers under firm supply arrangements. The Court of Appeal in *Atcor* did not decide whether or not it was commercially reasonable for Atcor to pro-rate its distribution of gas and, in fact, the Court found that there was no duty on Atcor to do so unless expressly provided in the contract.

Duty to mitigate aside, the typical consequence of the invocation of *force majeure* is that all parties' obligations are suspended. However, there are circumstances where it is more appropriate to deal in greater detail with the consequences of the invocation of *force majeure*. When considering the appropriate consequences of the invocation of *force majeure*, the draftsperson should ensure that the consequences of *force majeure* are allocated between the parties clearly and in a manner consistent with the parties' intentions. It is a question of appropriate risk allocation. *Force majeure* clauses, like other clauses in contracts, may rightly represent a negotiated agreement between the parties as to an allocation of risk between them. It must be borne in mind that although a *force majeure* clause relieves a party of obligations under the governing contract, costs, losses and other adverse consequences may nonetheless result from either the *force majeure* event or the events flowing from the invocation of the *force majeure* clause. For example, invocation of the *force majeure* clause under the *Atcor* contract did not absolve Continental from other obligations to supply gas under contracts with third parties. Notwithstanding the invocation of *force majeure*, Continental bore the burden of the increased cost of providing gas to its end-users.

V. CONTRACTS REQUIRING SPECIAL PROVISIONS FOR CONSEQUENCES OF *FORCE MAJEURE*

Many contracts in the petroleum and natural gas industry are both time and volume sensitive. A gas supply contract may provide for the supply of certain minimum and maximum volumes of gas per month over a fixed term. Where a contract specifies that upon the occurrence of *force majeure*, the contractual obligations are suspended, it is clear that the parties intend that the present obligations to deliver and take gas are suspended through the duration of the *force majeure*. However, the intended impact of the *force majeure* on other obligations and terms of the contract may not be obvious and therefore should be clearly set out in the contract.

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[21] *Ibid.* at 237.

For example, a supplier may contract to supply a minimum of 12,000 billion cubic feet of gas per annum with minimum volumes specified per month. If the contract is suspended for three months by virtue of *force majeure*, do the parties intend that the annual minimum volume commitment must be nonetheless satisfied or do they intend that the annual commitment be cut back proportionately? Additionally, if the former intention applies, should the supplier be provided with an additional three months in which to meet the minimum annual commitment? The *force majeure* clause must accurately reflect the parties' intentions in this regard, whatever they may be. The parties' intentions should be the subject of negotiation between the parties and will be fact dependent. The circumstances of the contract may dictate how the parties desire to deal with the consequences of *force majeure*. The negotiation of the *force majeure* clause can provide a useful opportunity for the parties to discuss and design innovative solutions to deal with the consequences of a *force majeure* event.

Long-term contracts require additional care with regard to the consequences of *force majeure* due to the duration of the relationship between the parties. Where a contract for supply is for many years, the parties may desire to provide that the consequences of a *force majeure* event will depend on the duration of the *force majeure* event itself. The parties may desire that in the event of a *force majeure*, the term of the contract is extended by the same length of time as the *force majeure* is in effect or, alternatively, the parties may wish to terminate the long-term relationship after a *force majeure* event has continued beyond a specified duration of time. Again, as suggested by Kerans J.A., a triggering event should be tied to "meaningful consequences" and "a good contract would expressly deal with several possible results, and different levels of obligation to mitigate."

Price and volume sensitive contracts also require additional attention to the consequences of *force majeure*. Where, for example, the cost of processing is dependent upon the volume of gas supplied and that volume is reduced or interrupted by *force majeure*, what are the consequences to the contract? If a supplier is required to pay ten cents per cubic foot for the first 1000 billion cubic feet of gas being processed and five cents per cubic foot for any gas thereafter and the supply of gas is interrupted by *force majeure*, does the price for processing remain the same or do the parties intend to account for the operation of *force majeure* and attribute a deemed amount of gas as having been processed during the *force majeure* in order to determine the cost of processing once the *force majeure* has ended? Again, if special treatment is desired, it must clearly be set out in the contract.

A final issue of which to be aware in drafting consequences of *force majeure* clauses for oil and gas contracts is that of demand or fixed charges. For example, in a gas transportation contract, the party for whom the gas is being transported will be responsible for variable charges based on the amount of gas being transported and demand or fixed charges which are a flat-rate charge incurred regardless of the amount of gas being transported. If a *force majeure* has been triggered, preventing the party for whom gas is being transported from providing any gas, the variable charge will fall away as it is based on the amount of gas being transported and, where no gas is being transported no charge will be associated with it. However, the absence of gas to be

transported does not have an obvious effect on demand or fixed charges. Accordingly, when drafting *force majeure* clauses for contracts which have fixed or demand charges, one should take into account these charges and specify whether or not they will be payable during the occurrence of a *force majeure* event. Where the intent is that the demand charges remain payable notwithstanding a *force majeure* event, the parties may wish to provide for termination of the contract in its entirety if *force majeure* prevents the supplier from providing gas for longer than a certain period of time. For example, where the contract is for transportation of gas over five years and includes a termination provision in the event of inability to supply for sixty days due to *force majeure*, and the *force majeure* clause becomes operative, the supplier will be able to terminate the contract after sixty days of *force majeure* and not be obliged to pay demand charges for the entire five-year period.

VI. PROJECT CONTRACTS

Gas supply and other types of oil and gas agreements rarely stand alone. Instead they are frequently part of a set of related agreements which together ensure that petroleum substances are extracted from the ground, processed, transported and ultimately delivered to end-users. A carefully drafted *force majeure* clause will take into account an understanding of the entire project. In the ideal case, the *force majeure* triggering events in each project agreement would mirror those in the other project agreements. A mechanical breakdown in a transportation system which excused the pipeline carrier from performance would also excuse the producer and marketer from their obligations. The *Atcor* clause included the following in the definition of *force majeure*:

> the invoking of *force majeure* pursuant to any gas purchase contracts, any acts or omissions (including failure to take gas) of a transporter of gas to or for Seller which is excused by any event of occurrence of the character herein defined as constituting *force majeure*.[22]

Under the *Atcor* contract, where a *force majeure* event affected a party on whom Atcor relied for its gas supply, the *force majeure* event in the affected party's contract triggered the *force majeure* clause contained in the Atcor contract. However, for various reasons, this mirroring of *force majeure* events is not always possible or practical. For example, the end-user may have retained the services of the marketer in order to avoid supply interruption caused by upstream events that are field or pool specific. The end-user's expectation may be that the marketer will draw from a large supply pool that will not be subject to the same uncertainties of dedicated-reserve-based supply contracts.

Ultimately, some party must bear the risk of increased costs arising from the need to obtain an alternate supply of gas. If such matters are not adequately dealt with in the contracts between the various parties, the matter may be left to be determined by the courts which, in allocating liability, will apply a test of what is commercially reasonable in the circumstances. To leave such matters to the courts is a risky proposition as their view of what is commercially reasonable may differ from that of industry participants. A sound understanding of the entire project coupled with well-

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[22] *Ibid.* at 234.

drafted contracts which accurately reflect this understanding, can alleviate the uncertainties and risks of court imposed solutions.

VII. JUDICIAL INTERPRETATION OF *FORCE MAJEURE* CLAUSES

Today, *force majeure* clauses are common in many contracts used in the energy sector. Notwithstanding this common usage, the concept of *force majeure* is foreign to our common law legal system. The concept of *force majeure* was imported from the Code of Napoleon when the common law courts began dealing with matters of merchant law.[23] The foreign nature of these clauses, in part, may explain our courts' difficulties in dealing with *force majeure* clauses. Fundamentally, the common law system is an adversarial system in which the courts' function is to assign liability between the two adversarial parties on the basis of either tort or contract principles. Under this system, the sanctity of contract is paramount and liability is imposed where a party to a contract fails to perform its contractual obligations.

The *force majeure* clause is antithetical to common law principles. Under *force majeure* clauses parties avoid contractual obligations and fault or liability is 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 and *force majeure* clauses, it is not surprising that our courts have repeatedly shown great reticence in giving effect to these clauses. In this regard, *force majeure* clauses bear many parallels with other clauses intended to exempt parties from liabilities. We are all familiar with the cases dealing with the courts' narrow and strict construction of exculpatory clauses in service contracts and exclusion from liability clauses in insurance contracts. We expect that exculpatory and other exclusion from liability clauses will be given this severe treatment by our courts and we draft accordingly. Unfortunately, we have not always treated the drafting of *force majeure* clauses with the same expectation of strict and narrow construction by our courts. By more closely aligning our expectations with the philosophy and practice of our courts, we would draft *force majeure* clauses that would stand a greater likelihood of judicial interpretation consistent with the parties' expectations and intentions. In some circumstances, this may mean that we are better advised to remove certain matters from within the scope of the *force majeure* clause and to locate them outside its purview. In a gas supply contract between a marketer and purchaser, a clause which specifies that, in the event of a supply shortage caused by certain upstream circumstances, the marketer is required to pro-rate its supply between purchasers, need not be included in the *force majeure*. The parties in such case have turned their minds to the possibility and, with specificity, have allocated responsibilities. The matter has been dealt with and understanding is not enhanced by the inclusion of this negotiated solution in the *force majeure* clause. Outside the context of a *force majeure* clause, the courts may be more prepared to enforce the terms of the contract without resort to special rules which may inadvertently distort the parties' intent.

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[23] *Matsoukis* v. *Priestman & Co.*, [1915] 1 K.B. 681; 84 L.J.K.B. 967; 113 L.T. 48; 13 Asp. M.L.C. 68; 20 Com. Cas. 252; [1914-15] All E.R. Reprint 1077.

VIII. SUMMARY

The *force majeure* clause in a contract is more than simply boilerplate. The *force majeure* clause, in fact, is a further allocation of risk and obligations between the parties to the contract. A well-drafted *force majeure* clause will strike a balance between a broad list of detailed and tailored triggering events and a more general all-inclusive clause which will provide for any events beyond the control of a party which prevents a party from performing its contractual obligations. To minimize potential disputes or litigation, the parties should specify the consequences of *force majeure* and any particular steps which must be taken by either party in the event of *force majeure*. Without a well-drafted *force majeure* clause, the parties risk having the court determine the allocation of risk and responsibility between them in the event of *force majeure*, using the judicially imposed standard of commercial reasonableness.