FORCE MAJEURE CLAUSES IN COMPARATIVE PERSPECTIVE: THE CANADIAN COMMON LAW APPROACH IN LIGHT OF RECENT DEVELOPMENTS IN THE COURTS OF SINGAPORE AND THE UNITED KINGDOM

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I. INTRODUCTION

Modern commercial agreements typically include a provision for events of force majeure, which operate to fully or partly excuse or delay the contractual obligations of a party in defined circumstances. In terms of defining the events of force majeure, contracts often require a disruptive event to have occurred beyond the control of the contracting parties. In terms of the effects of force majeure, contracts generally require the event to have significantly interfered with the performance of the contract in order to relieve a party of its obligations, though the precise language varies from contract to contract. While force majeure provisions are similar to the contract law doctrine of frustration in that they both deal with the implications of an event that interferes with contractual performance, force majeure clauses are distinct in that the parties themselves define the terms of force majeure including the events that constitute force majeure and the contractual implications that flow from the occurrence of such an event. Furthermore, contracts dealing with events of force majeure can displace the ordinary doctrine of frustration in circumstances where the two overlap. According to a leading text on contract law, "[i]f the contract is worded in such a way as to make an interpretation of the contract to allow frustration contradictory of what the parties have expressed in the contract, or nonsensical having regard to their language, it is not open to the court to give the contract such a construction and apply the doctrine of frustration."[1]

In its interpretation of a force majeure provision, the court will look to the precise language adopted by the parties. Although this focus on the contractual wording suggests the predominance of an individualized assessment in each case, courts have adopted certain approaches to the interpretation of ambiguous force majeure clauses that can be seen in their judgments. In Canada, the judicial approach to force majeure clauses is reflected in the 1975 Supreme Court of Canada case of *Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp and Paper Company Limited*,[2]

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[1] GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 620. See also Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3d ed (Markham: LexisNexis, 2012) at 823.

[2] [1975] 1 SCR 580 [*Atlantic Paper*].

which remains the leading authority on force majeure clauses in the common law of Canada. Part II examines this significant Supreme Court of Canada case and the subsequent judgments of lower courts that have further elaborated the approach of Canadian courts to force majeure clauses. These subsequent cases reveal that lower courts have generally followed the Supreme Court of Canada's 1975 approach with limited exceptions. Despite this apparent certainty in the law, the lack of a case dealing with a force majeure clause at the Supreme Court of Canada in nearly 40 years presents the opportunity to consider more recent illustrations of the judicial interpretation and application of force majeure clauses elsewhere in the Commonwealth, and compare these developments with the Canadian common law approach. Part III looks to a 2011 case from Singapore's highest appellate court that considers whether the Indonesian government's ban on the export of sand constituted an event of force majeure under a contract for the supply of concrete by a Singaporean concrete manufacturing company. Part IV examines two 2013 cases decided by appellate courts in the United Kingdom: (i) whether a crane falling from a building during a severe cyclone in Mauritius and causing damage to an adjacent building constituted force majeure under that country's civil law; and (ii) whether a delay in the departure of a vessel loaded with crude oil, which was caused by a failure to follow the relevant Nigerian export and loading regulations, constituted force majeure under a charter-party and sales and purchase contracts. While each case dealt with a specific force majeure provision in relation to a particular disruptive event or a series of disruptive events, Part V offers a comparative analysis of these cases that provides insight into recent judicial trends in the interpretation and application of force majeure clauses. The insight gained from the comparative study suggests an opportunity for the further refinement of the common law in this area by Canadian courts.

II. FORCE MAJEURE CLAUSES IN CANADIAN COMMON LAW

(A) Introduction

In Canada, as with other common law jurisdictions, force majeure arises from the terms of a particular contract as opposed to operating as an independent legal doctrine that is applied to all contracts. Given the ubiquitous nature of the term in Canadian commercial contracts, it is surprising that there have been relatively few judgments of Canadian courts interpreting force majeure clauses. This is particularly the case at the Supreme Court of Canada where, as described below, the Court has not interpreted a force majeure clause in nearly 40 years. Two things become clear from the Canadian common law jurisprudence in respect of force majeure clauses: (i) the alleged force majeure event must not be an event, or related to an event, of a party's own making; and (ii) the event generally must render performance of contractual obligations impossible. Mere inconvenience or commercial hardship will not suffice. A number of notable Canadian judgments involving the interpretation of force majeure clauses are canvassed below.

(B) Non-availability of Markets

The seminal authority on the interpretation of force majeure clauses in Canada is the 1975 Supreme Court of Canada decision in *Atlantic Paper*. The plaintiffs in that case, Atlantic Paper Stock Ltd. ("Atlantic") and Elliot Krever & Associates (Maritimes) Ltd. ("Elliot Krever"), and the defendant, St. Anne-Nackawic Pulp and Paper Company Limited ("St. Anne"), entered into an agreement for the supply of "waste paper" by Atlantic and Elliot Krever to St. Anne. St. Anne intended to use the waste paper at its mill in the manufacture of a corrugating medium. The supply agreement between the parties contained a minimum purchase obligation of 10,000 tons of waste paper per year for 10 years.[3]

St. Anne was beset by difficulties in marketing its product from the beginning, including problems in the West German market and various other competitive and technological factors.[4] After only 14 months, St. Anne advised the plaintiffs that it would no longer accept any product under the agreement and approximately one year later, Atlantic and Elliot Krever commenced an action for damages before the New Brunswick Supreme Court, Queen's Bench Division.[5] St. Anne denied that it was liable to Atlantic as a result of non-availability of markets under the force majeure clause, which read:

> St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, *unless as a result of 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 nonavailability of markets for pulp or corrugating medium*.[6]

It is interesting to note that while the above clause was interpreted by the Court as a force majeure clause, it did not expressly include the words "force majeure".

Counsel for St. Anne argued that availability of markets should be interpreted to mean the availability of markets that were economically profitable. However, at trial, Justice Barry of the New Brunswick Court found that St. Anne could not avoid liability under the force majeure provision because there were in fact

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[3] *Ibid* at 581.

[4] *Ibid* at 584.

[5] *Ibid* at 581.

[6] *Ibid* at 581. [Emphasis added.]

markets available to St. Anne.[7] Justice Barry refused to read into the clause that the available markets needed to be profitable markets, and found that "there is a market for corrugated medium, albeit a declining one, and very competitive market, and certainly, not an economic market at the defendant's cost per ton."[8]

St. Anne appealed the decision of the trial court, and the Appeal Division of the New Brunswick Supreme Court granted the appeal. The Appeal Division held that "[t]he use of the words 'nonavailability of markets' discloses a different intent than if the force majeure clause had contained the words 'if there is no market for corrugating medium.' The phrase 'available market' necessarily connotes an advantageous or profitable market."[9]

Atlantic and Elliot Krever in turn appealed the decision of the Appeal Division to the Supreme Court of Canada, which granted the appeal. The Supreme Court of Canada characterized the trial court's analysis of market availability as an objective test, and the appeal court's analysis of market availability as a subjective one.[10] Importantly for the force majeure analysis, Dickson J., for a unanimous five-judge panel of the Court, stated:

> The effect of the Appeal Division opinion would be to relieve St. Anne of contractual obligation if St. Anne could not operate at a profit. I doubt that reasonable men would have made such a bargain. It would in my opinion be doing violence to the plain words "non-availability of markets for pulp or corrugating medium" in the context of the entire clause within which the words are found, to permit St. Anne to rely upon its soaring production costs to absolve it of contractual liability.[11]

The Supreme Court of Canada went on to refuse St. Anne's defence on the grounds that St. Anne had brought any condition of nonavailability of markets upon itself,[12] an interesting result given that the clause did not expressly limit it in that way; nothing in the language of the contract expressly stated that St. Anne would not be able to avoid liability if the nonavailability of markets was a situation of its own making.

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[7] *Atlantic Paper Stock Ltd. & Elliot Krever & Associates (Maritimes) Ltd. v St. Anne-Nackawic Pulp & Paper Co Ltd.* (1973), 8 NBR (2d) 216, at para 18.

[8] *Ibid*.

[9] *Atlantic Paper Stock Ltd. & Elliot Krever & Associates (Maritimes) Ltd. v St. Anne-Nackawic Pulp & Paper Co Ltd.* (1974), 8 NBR (2d) 207, at para 33, (NB CA).

[10] *Atlantic Paper*, *supra* note 2 at 585.

[11] *Ibid*, at 585.

[12] *Ibid* at 587.

To arrive at that determination, the Court reviewed the list of force majeure events enumerated in the force majeure clause in the agreement and applied *ejusdem generis* to interpret the nonavailability of markets provision.[13] The Court stated that any discharging event provided for in the clause must be limited to "an event over which the respondent exercises no control".[14] Moreover, given that the Supreme Court found that the nonavailability of markets provision was contained within a force majeure clause, it is also likely that the fact that an event of force majeure must be beyond the control of either party, in addition to the *ejusdem generis* interpretation, precluded St. Anne from relying on circumstances it brought about itself.

The Court also offered the following comments on the nature of a force majeure clause:

> An act of God clause or 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.... Was the change so radical as to strike at the root of the contract?[15]

This description of force majeure by the Court makes clear that force majeure may generally only be resorted to where a serious and sudden unforeseeable event makes performance by a party impossible, and that courts ought not to permit parties to evade contractual obligations lightly. Canadian common law courts have duly followed the Court's lead, and have generally found against contractual parties seeking the shelter of a force majeure clause.

The application of a force majeure clause has not been examined by the Supreme Court since the *Atlantic Paper* decision, and it remains the leading authority in common law Canada.

(C) Financing and Force Majeure

One of the first cases to consider the *Atlantic Paper* judgement was a 1982 decision of the Ontario High Court in *Tom Jones & Sons Ltd. v R.*[16] In that case, Tom Jones & Sons Ltd. ("Tom Jones") was the successful bidder for the construction of a building

[13] *Ibid* at 583.

[14] *Ibid*.

[15] *Ibid*.

[16] 31 OR (2d) 649 [*Tom Jones*].

for the Government of Ontario. Shortly after Tom Jones's bid was accepted it entered into a ground lease with the Government of Ontario, and Tom Jones advised the government that it could not arrange financing for the project.[17]

As with *Atlantic Paper*, no clause in the agreement between Tom Jones and the Government of Ontario included the words force majeure; however, also as with *Atlantic Paper*, the Court identified a clause in the agreement as a force majeure clause. That clause was section 7.11 of the agreement, which read:

> 7.11 If by reason of strikes, lockouts, governmental restrictions, acts of God, non-availability of labour or materials, unavoidable casualty, civil commotion, war, fire, hindering subsurface conditions existing on the site, extreme weather conditions (meaning weather conditions deviating from the norm established from Environment Canada records for the preceding five (5) year period) or, any other cause beyond the control of the tenant and not caused by its default or fact of commission or omission and not avoidable by exercise of reasonable effort or foresight, the tenant, in good faith and without default or neglect on its part, is prevented or delayed in the construction or completion of the building...[18]

Notwithstanding that the list of potential force majeure events in section 7.11 was extensive and non-exhaustive, Tom Jones was not able to rely on the provision. Fatal to Tom Jones in that regard was a finding by the trial judge, Justice Galligan, that there was no evidence to show that it would have been impossible for Tom Jones to obtain financing. Instead, Justice Galligan found that "What is clear is that because of the volatility of interest rates in the money-markets at the time it could not get financing at a rate which would make the project an economically advantageous one to Jones upon the terms of its accepted bid."[19] In Justice Galligan's view, Tom Jones's situation was analogous to that of St. Anne in the *Atlantic Paper* case, in that proceeding with the contract would simply not be economically advantageous for Tom Jones. He went on to state that:

> While the rise in interest rates indeed was a matter beyond his control it is my opinion that his failure to obtain financing was not the result of a cause beyond his control. It was economically disadvantageous and probably unprofitable to it to obtain financing at the then current rates but it appears to me on all of the evidence clear that he could have obtained the financing had he wished to pay the market price for it.[20]

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[17] *Ibid* at para 4.

[18] *Ibid* at para 13.

[19] *Ibid* at para 4.

[20] *Ibid* at para 15.

While Justice Galligan found on the facts that Tom Jones could have obtained the financing to enable it to proceed with its obligations under the agreement, he did not address what would result if Tom Jones had been able to show that it was actually impossible for it to obtain the financing. Indeed the language used by Justice Galligan, focusing on Tom Jones' ability to obtain financing with no analysis of whether financial difficulty could even constitute an event of force majeure, suggests that he may very well have accepted a factual inability to obtain financing as an event of force majeure. It is questionable whether such a result could be squared with *Atlantic Paper* and the very concept of an event of force majeure as "a supervening, sometimes supernatural, event".[21]

(D) Impossibility, or Merely a Hindrance?

Two important questions arise in analyzing a force majeure clause in a contract in Canadian common law. First, what events constitute an event of force majeure? Second, what is the requisite degree of interference by the event with the performance of obligations under the contract? In *Atlantic Paper*, the Supreme Court of Canada stated that a force majeure clause generally operates where performance is made impossible, notwithstanding that the clause in the agreement being considered did not include the word "impossible". This standard was reiterated in the *Tom Jones* judgment. In neither case did the clause in question actually specify an 'impossibility' standard.

Notwithstanding the clear language of the Supreme Court, the Court of Appeal of Alberta departed from this standard in its 1996 decision in *Atcor Ltd. v Continental Energy Marketing Ltd.*.[22] In that case, Atcor Ltd.("Atcor") was a supplier of natural gas to Continental Energy Marketing Ltd. ("Continental") through a pipeline operated by a third party. During the term of the agreement the third party suffered a number of compressor breakdowns, and was forced to effect pipeline repairs and connections in the system which resulted in the third party curtailing the gas transportation it provided to Atcor.[23] In an agreed statement of facts, the parties agreed that the events affecting the third party's pipeline were outside of the control of Atcor and were not events that Atcor was able to overcome through the exercise of due diligence.[24]

The contract between Atcor and Continental included a force majeure clause, which read in part:

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[21] *Atlantic Paper*, at 583

[22] 1996 ABCA 40 [*Atcor CA*].

[23] *Ibid* at para 2.

[24] *Ibid*.

> 9. Subject to the other provisions of this paragraph, if either party to this Agreement fails to observe or perform any of the covenants or obligations herein imposed upon it and such failure shall have been occasioned by, or in consequence of force majeure, as hereinafter defined, such failure shall be deemed not to be a breach of such covenants or obligations.[25]

The force majeure clause went on to specify certain events of force majeure, and concluded "or any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome."[26]

At trial, the judge found that the events had caused non-performance by Atcor, and that Atcor was not in breach of any duty to mitigate the non-performance.[27] In arriving at this determination, the trial judge paid particular attention to the wording of the force majeure clause;[28] somewhat unusually, an event of force majeure under the agreement simply had to result in a party's failure to "observe or perform any of the covenants or obligations". The trial judge highlighted the fact that force majeure clauses generally include language such as "unable" to perform, and identified such language as providing a different threshold than "fails to observe":

> In the case at bar, the words in the operative clause are "fail" and "failure" not "unable" or "inability". If the operative clause said "unable", it would be open to Continental to argue that although Nova has curtailed supply to Atcor, there is still "spot gas" to be bought and therefore Atcor is not "unable" to supply gas as according to its firm supply commitment. Atcor has "failed" to provide gas. This is consistent with the clause.[29]

Continental appealed the decision, and the Court of Appeal of Alberta ordered a new trial.

Notwithstanding that force majeure is a contractual phenomenon rather than a common law principle, the Court of Appeal was critical of the trial judge's analysis of the language in the force majeure clause. The Court of Appeal was particularly critical of the trial judge's conclusion that "fails to perform" differs dramatically from "is unable to perform".[30] Justice Kerens, writing for the Court, compared the

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[25] *Ibid* at para 3.

[26] *Ibid* at para 10.

[27] 1994 CanLII 9041 (AB QB), at para 34 [*Atcor TD*].

[28] *Ibid* at para 22 *et seq*.

[29] *Ibid* at para 9.

[30] *Ibid* at para15.

trial judge's analysis to the "distinction between contracts that permit nullification of contractual obligations when a force majeure event merely hinders execution of the contract, and those where the event prevents execution."[31] Justice Kerens was even critical of the distinction between "prevent" and "hinder", stating:

> In any event, and with great respect to those of a different view, the distinction between hindering and preventing is, in my view, unsatisfactory. This is because they are the two extremes. A "preventing" contract would require the supplier here to show that it was impossible to perform. A "hindering" contract would require it merely to show that the Nova cutback was a nuisance... I repeat that, in my view, the test is this: 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.[32]

While the Court of Appeal acknowledged the *Atlantic Paper* decision, and referred to it in support of the proposition that in analyzing a force majeure clause a court must address what impact a force majeure event should have on the party who invokes the clause, the decision in *Atcor* – and its finding that a force majeure event need only cause a "real and substantial problem" – is difficult to square with the *Atlantic Paper*, which states that force majeure clauses generally operate where performance is made impossible.

(E) Impossibility Remains the Standard unless the Parties Agree Otherwise

The "real and substantial problem" threshold suggested in *Atcor* has not taken hold in Canadian jurisprudence, and it did not foretell any great shift away from the general standard of impossibility in the Canadian common law. The *Atcor* decision has only been referred to in two other decisions, first in a 1996 British Columbia Supreme Court decision dealing with frustration,[33] and more recently in the 2011 decision of the same court in *Domtar Inc. v Univar Canada Ltd.*[34]

In *Domtar*, the defendant Univar Canada Ltd. supplied the plaintiff, Domtar Inc., with caustic soda for use at a pulp and paper mill owned and operated by it in Kamloops, British Columbia.[35] The price of the caustic soda was capped under the agreement at $545 per dry tonne.[36] A few years into the agreement, the price of

[31] *Ibid* at para 16.

[32] *Ibid* at para 17.

[33] *Cortina Foods Inc. v Bari Cheese Ltd.*, 1996 CanLII1470 (BCSC), at para 53.

[34] 2011 BCSC 1776 [*Domtar*].

[35] *Ibid* at para 2.

[36] *Ibid*.

caustic soda, which Univar obtained based on the spot price in Asia, rose dramatically,[37] and Univar sent the following to Domtar in a letter:

> Due to conditions in the global caustic soda market and other factors Univar is declaring an event of "force majeure/excused performance" pursuant to the terms of its contract with you.
>
> The event of "force majeure/excused performance" pertains to pricing terms in your contract only. It does not refer to product availability. We have the ability to ensure product supply, but we can no longer deliver caustic soda to you under the pricing terms of your current contract.
>
> A representative of Univar will be contacting you shortly with details of your revised caustic soda price. The revised price will become effective July 1, 2008.[38]

Domtar continued to purchase caustic soda from Univar until expiration of the contract, on the understanding that it was paying under duress and reserved the right to seek damages.[39] Domtar commenced the action to recover the amounts it paid above the $545 per dry tonne contract price.

The relevant section of the lengthy force majeure clause in the agreement read:

> 15. FORCE MAJEURE
> A. Performance will be excused, and the parties shall not be liable for any failure to perform under this Agreement, when...such performance is prevented or delayed by any cause or condition of force majeure....[40]

The judge hearing the case, Justice Fisher, began a thorough analysis of the force majeure clause with reference to the *Atlantic Paper* decision, stating "Atlantic Paper makes it clear that events described within a force majeure provision normally operate to discharge a party only where the event is unexpected and beyond the control of either party."[41]

In support of its position that force majeure clauses should be interpreted generously, Univar put forward a number of cases, including the judgment in *Atcor*. While not dismissing the language of *Atcor* outright, Justice Fisher distinguished the

[37] *Ibid* at para 30.

[38] *Ibid* at para 16.

[39] *Ibid* at para 22.

[40] *Ibid* at para 9.

[41] *Ibid* at para 77.

decision stating "In my view, this case is particular to a contract for the supply of natural gas through a pipeline run by a third party and is of very limited, if any, assistance in the context of this case."[42]

Justice Fisher went on to conclude that the force majeure clause in the agreement was not well drafted, but that "it cannot reasonably be interpreted to allow Univar to be excused from its obligation to supply caustic soda to Domtar at the contract price where market conditions affect only the price and not the ability to supply the product."[43] She further stated, again channelling the standard articulated by Justice Dickson in *Atlantic Paper*, that:

> Generally, force majeure is resorted to where an event beyond the control of a party makes performance of that party's obligations under the contract impossible. It is not to be resorted to where such an event makes performance of that party's obligations "commercially impractical" unless the parties to the contract have expressly agreed to such a term. There is no such express agreement in this case.[44]

Justice Fisher's characterization of the threshold for force majeure accords with *Atlantic Paper* (and *Tom Jones*), in that generally the standard will be impossibility. If parties wish to derogate from that standard, and incorporate some lesser threshold such as commercial impractability, they can do so – however, such threshold must be incorporated explicitly as the courts will trend toward interpreting an impossibility threshold even where one is not expressly stated.

(F) Conclusion

The Canadian common law in respect of force majeure is in an interesting state, in that the highest court in the land has not pronounced on the interpretation of a clause that appears in many, if not most, commercial contracts, in nearly 40 years. Perhaps unsurprisingly, the lower courts have stuck relatively closely to the Supreme Court of Canada's 1975 analysis although some judgments appear difficult to square with this approach. And, as was the case in 1975, absent language to the contrary, an event of force majeure still must be an event beyond the control of the parties that makes performance of contractual obligations impossible.

Given the lack of recent Supreme Court of Canada direction on the interpretation of force majeure clauses in the common law, it is useful to consider

[42] *Ibid* at para 82.

[43] *Ibid* at para 91.

[44] *Ibid* at para 90.

recent developments in the adjudication of force majeure provisions elsewhere in the Commonwealth.

III. Recent Developments in the Courts of Singapore

(A) Introduction

A 2011 judgment of Singapore's highest court demonstrates the judicial approach to the interpretation of a force majeure provision in a commercial contract in Singapore. The case involved a supply contract for ready-mixed concrete ("RMC") where a shortage of raw materials needed to manufacture RMC was caused by a government-imposed ban on the export of sand from Indonesia to Singapore. The court found that an event of force majeure was made out in the circumstances as the sand ban constituted a disruption to the availability of sand that placed the manufacturer in a commercially impracticable situation. The events were also beyond the control of the manufacturer as it had taken reasonable steps to avoid the effect of the sand ban on its production of RMC.

(B) Concrete and the Sand Ban

In its 2011 judgment in *Holcim (Singapore) Pte. Ltd. v Precise Development Pte. Ltd.* ("*Holcim (Singapore) Pte. Ltd.*"),[45] the Supreme Court of Singapore (Court of Appeal) considered whether an Indonesian government-imposed ban on the export of sand to Singapore constituted an event of force majeur*e* under a contract for the provision of RMC. In 2006, Holcim (Singapore) Pte. Ltd. ("Holcim") entered into a contract with Precise Development Pte. Ltd. ("Precise Development") to supply 90,000 cubic metres of RMC in relation to the construction of a warehouse. Pursuant to the contract, concrete prices set out in the contract were "fixed till 31st Dec 2007".[46] Clause 3 of the contract released Holcim from supplying RMC in the event of force majeure in the following terms:

> The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material[, acts] of God or any other factors arising through circumstances beyond the control of the Supplier.[47]

[45] [2011] SGCA 1 [*Holcim*].

[46] *Ibid* at para 9.

[47] *Ibid* at para 4. As with *Atlantic Paper*, the clause interpreted as a *force majeure* clause did not include the words '*force majeure*'.

The production of RMC requires a large supply of concreting sand and aggregates as source materials, which are typically imported to Singapore from Indonesia. On January 23, 2007, the Indonesian government announced that it would impose a ban on the export of sand to Singapore to take effect on February 6, 2007. The 'sand ban' caused an immediate increase in the price and decrease in the availability of sand in Singapore.[48] Three days after the announcement, Holcim notified Precise Development that it might no longer be able to supply RMC due to the sand shortage. On February 1, 2007, the Singapore Building & Construction Authority ("SBCA") announced a release of sand from its stockpiles but only to developers such as Precise Development.[49] Holcim had no direct access to the stockpiles.[50]

On February 1, 2007, Holcim wrote to Precise Development that the Indonesian sand ban had caused a sand shortage and escalation in the price of sand "totally beyond [its] control".[51] As a result of the sand shortage and price increases, Holcim advised Precise Development that it was unable to provide RMC at the originally agreed prices. The letter included a new price quote for various grades of RMC, which were 30 to 50 percent higher than the original contracted prices.[52] Shortly before the sand ban took effect, one of Holcim's suppliers terminated its sand supply agreement under the force majeure provision of that contract while another sand supplier advised Holcim that its sand stockpile had been taken over by the SBCA and could only be released with SBCA approval.[53]

On February 5, 2007 Precise Development wrote to Holcim demanding performance of the supply of RMC at the originally contracted prices.[54] In the letter, Precise Development stated that the force majeure provision contained in Clause 3 of the contract was not engaged on the basis that there was no disruption to the supply of RMC due to releases from the SBCA stockpiles. Holcim replied to this letter to state that it had no access to the SBCA stockpiles as it was not a main contractor but only a manufacturer of RMC.[55] In a circular of February 15, 2007, the SBCA increased the price of sand from its stockpiles and imposed limits on the sand that would be released. Sand was to be released from the SBCA stockpiles on a first come first served basis and the SBCA reiterated that only main contractors, such as

[48] *Ibid* at para 11.

[49] *Ibid* at para 12.

[50] *Ibid* at para 12.

[51] *Ibid* at para 13.

[52] *Ibid* at paras 13-14.

[53] *Ibid* at para 15.

[54] *Ibid* at para 16.

[55] *Ibid* at para 16.

Precise Development, would be able to request sand.[56] On March 1, 2007, Holcim wrote to Precise Development to state that while it continued to pursue other sources of sand and aggregates it had no choice but to further increase the price of RMC. In the letter, Holcim stated that it would credit Precise Development with the cost incurred of procuring sand if it were able to provide it with sand obtained from the SBCA stockpiles.[57] On March 20, 2007, Precise Development sent a letter to Holcim stating that it would pay the increased prices to RMC as set out in the March 1 letter under protest in order to avoid disruption to the warehouse project.[58] Precise Development later sued Holcim for failing to supply RMC at the contracted price, claiming damages of more than SGD $5 million. At trial, Precise Development was successful. The trial court held that force majeure was not made out on the basis that a price increase of raw materials was immaterial to any event of disruption. Furthermore, Holcim had failed to take reasonable efforts to ensure that the supply of RMC would not be disrupted.[59]

Writing for the three-judge panel consisting of Chan Sek Keong CJ and VK Rajah JA, Andrew Phang Boon Leong JA noted at the outset of his judgment that previous jurisprudence related to force majeure clauses provided limited assistance in resolving the case. While past cases were useful in relation to a general point of law, each force majeure provision must be interpreted in relation to its specific terms and the factual circumstances of each case.[60] In this case, the main issue was whether Holcim could avail itself of the force majeure provision in Clause 3 of the contract.[61] Andrew Phang Boon Leong JA held that the interpretation of Clause 3 raised two key issues: (i) whether the events 'disrupted' the supply of concrete; and (ii) whether the events were beyond the control of Holcim. Both were conditions of the force majeure provision in Clause 3 and therefore must be made out in order to relieve Holcim from liability for breach of contract.[62]

In considering the meaning of a disruption under Clause 3, Andrew Phang Boon Leong JA noted that there was no case-law in the Commonwealth directly on point interpreting the word 'disrupted'; however, cases looking at similar words were useful to cast light on its meaning.[63] The judicial interpretation of other words also provided a helpful comparative perspective to contrast the meaning of 'disrupted' as

[56] *Ibid* at para 19.

[57] *Ibid* at para 21.

[58] *Ibid* at para 27.

[59] *Ibid* at para 37-9.

[60] *Ibid* at para 1, see also *ibid.* at para 49.

[61] *Ibid* at para 42.

[62] *Ibid* at para 48.

[63] *Ibid* at para 50.

against other words.[64] After surveying several Commonwealth appellate judgments considering the words 'hinders', 'prevents', and 'obstructs', Andrew Phang Boon Leong JA held that a disruption was something less than an event that *prevented* performance (which amounted to an impossibility of performance).[65] Nevertheless, a mere increase in the price of raw materials would be generally insufficient to constitute a disruption.[66] To further define 'disrupted', Andrew Phang Boon Leong JA turned to the *Oxford English Dictionary*, finding that the definitions of 'disrupt' and 'hinder' were similar as both words signified a lower degree of negativity compared to 'prevent' and "both words suggest a datum measure of difficulty that interferes with the successful completion of the transaction concerned."[67] In relation to a commercial contract, Andrew Phang Boon Leong JA held:

> [W]here 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* (bearing in mind, of course, the particular *context* in which the contract had been entered into (*including any relevant commercial practice in the trade and/or resultant dislocation in the trade*)). Hence, if, for example, events occurred which, whilst not preventing *literal* performance of the contract as such, were such as would render continued performance commercially impractical, there would, in our view, generally be a 'disruption' or 'hindrance' within the meaning of the *force majeure* clause in question.[68]

Applying this understanding of 'disrupt' to the case at hand, Andrew Phang Boon Leong JA held that the events related to the sand ban had placed Holcim in a commercially impracticable situation and therefore constituted a disruption to its performance of supplying RMC to Precise Development. Following the announcement of the sand ban by the Indonesian government, Holcim had no readily apparent source of sand. The SBCA released sand from its stockpiles only to developers, not to RMC manufacturers. Furthermore, Holcim's own supplier stopped providing sand to it by relying upon the force majeure provision of its supply contract. Even if sand could have been obtained from the SBCA stockpiles through developers, there was no guarantee that the quantity obtained would be sufficient to produce the RMC required. The circumstances of the sand ban placed Holcim in the situation of having to choose between stopping its performance or performing at the contracted prices by using sand acquired from developers through SBCA stockpiles,

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[64] *Ibid* at para 50.

[65] *Ibid* at para 56.

[66] Although the Court of Appeal left open the possibility that an astronomical price increase alone might constitute a disruption: *ibid*. at para 53.

[67] *Ibid* at para 56.

[68] *Ibid* at para 56.

which would have left it vulnerable to exorbitant prices that could have been charged by the developers.[69] Furthermore, it was not practical for Holcim to have obtained sand from other sources (including other countries) due to a contractual provision that required the delivery of RMC within two days of an order.[70]

In considering whether the events were beyond the control of Holcim, Andrew Phang Boon Leong JA first considered whether there was an independent legal principle inherent in all force majeure provisions that the party claiming the benefit of force majeure must have taken all reasonable steps in the circumstances to avoid the effects of force majeure.[71] In rejecting this position, which was advocated by the leading contracts text *Chitty on Contracts*, Andrew Phang Boon Leong JA held that there could not be any such blanket principle.[72] In each case, whether the party must take all reasonable steps in the circumstances depended upon the precise language of the force majeure provision.[73] Where the provision refers to events beyond the control of the party, however, then the party ought to take reasonable steps to avoid the events stipulated in the provision in order to demonstrate that the events were beyond their control (which may in fact be a component of the vast majority of force majeure provisions).[74]

Andrew Phang Boon Leong JA held that Holcim demonstrated that it had taken all reasonable steps to avoid the events described in Clause 3. It made efforts to inform Precise Development of the sand shortage and offered to credit back sand obtained by Precise Development from the SBCA stockpiles, which were ignored by Precise Development.[75] Andrew Phang Boon Leong JA rejected the trial judge's holding that Holcim's increase of RMC prices, even if the sand was supplied by Precise Development, breached the contract.[76] The inquiry must be whether the events of Clause 3 were made out. If they were, Holcim was relieved from its performance under the original contract and was free to enter into new contractual arrangements with new prices.[77] The question was whether Holcim had taken reasonable steps to avoid the effects of force majeure events described in Clause 3, which it had done by seeking to acquire sand from the SBCA stockpiles through

[69] *Ibid* at para 62.

[70] *Ibid* at para 63.

[71] *Ibid* at para 65.

[72] *Ibid* at para 66.

[73] *Ibid* at para 66.

[74] *Ibid* at paras 66-70.

[75] *Ibid* at para 74.

[76] *Ibid* at paras 51-52.

[77] *Ibid* at para 77.

Precise Development. Precise Development, however, had not shown a willingness to assist Holcim in obtaining the required sand and there was no evidence to suggest this unwillingness was caused by the new RMC price.[78] Not only was Precise Development unwilling to assist Holcim in procuring sand from the SBCA, it did not demonstrate at trial that there were any reasonable alternative supplies of the necessary sand.[79] Given that Holcim's inability to perform the contract was in large measure due to Precise Development's actions, Precise Development could not claim that Clause 3 did not apply in the circumstances. Holcim was not in breach of contract as the force majeure provision in Clause 3 released it from its contractual performance to supply RMC.[80] Andrew Phang Boon Leong JA concluded by writing that the case demonstrated the importance of drafting force majeure clauses with "clarity and precision":

> Although *force majeure* clauses often take the form of 'boilerplate' clauses, lawyers and their clients would do well to pay more attention to the precise language used in drafting the clause(s) concerned.[81]

(C) Conclusion

Holcim (Singapore) Pte. Ltd. illustrates a commercially pragmatic approach to force majeure clauses in Singapore. While it is clear that each force majeure provision must be interpreted by reference to its own particular wording and in light of all of the circumstances of the case, four general observations can be made with respect to the approach of Singaporean courts to force majeure clauses. First, in determining the meaning of the language used in the force majeure provision, the court is likely to consider other cases that have interpreted similar words. Such cases may assist the court, through a process of comparing and contrasting, in determining the requisite "datum measure of difficulty" with the successful performance of the contract that is necessary to trigger the force majeure provision. Second, where the wording of the force majeure provision imposes an interference threshold less than the impossibility or total prevention of contractual performance, the court may take into account and provide significant weight to the relevant commercial circumstances. In such a case, circumstances that make continued performance commercially impracticable, with regard to the relevant commercial context, may be sufficient to constitute an event of force majeure. Third, a force majeure provision that requires the events to be beyond the reasonable control of the parties imposes a burden on the party seeking to rely on the force majeure provision to demonstrate that it took all reasonable steps to avoid the event of force majeure and its impact on contractual performance. Fourth, in assessing whether reasonable steps were taken, parties to a contract will be obligated to assist one another where the assistance is reasonable and effective to avoid an event of force majeure. A failure by one party to provide assistance to the other

[78] *Ibid* at para 79.

[79] *Ibid* at para 100.
[80] *Ibid* at para 100.
[81] *Ibid* at para 101.

when it could have helped minimize interference with contractual performance will prevent it from later claiming that the other party failed to take reasonable steps in the circumstances.

IV. RECENT DEVELOPMENTS IN THE COURTS OF THE UNITED KINGDOM

(A) Introduction

Two appellate court judgments, both from 2013, demonstrate the challenge faced by parties seeking to claim an event of force majeure in British courts. The first case involved a severe cyclone in Mauritius that blew over a crane, which caused damage to a building and its commercial tenant. The second case involved a vessel that loaded crude oil from an offshore terminal where the Nigerian government detained the ship for more than one month. In both cases, the court found that there was no event of force majeure due to the events being either foreseeable or within the reasonable control of the parties.

(B) A Cyclone and a Crane

In its 2013 judgment in *General Construction Co. Ltd. v Chue Wing & Co. Ltd.* ("*General Construction Co. Ltd.*"),[82] the Judicial Committee of the Privy Council, sitting as the appellate court of last resort for Mauritius, considered the legal doctrine of force majeure under the *Civil Code Mauricien*. At issue were events connected to Cyclone Hollanda, which in 1994 caused parts of a crane owned, operated, and erected by General Construction Co. Ltd. ("GCCL") to fall from a multi-story building in Port Louis onto a neighbouring building. The crane caused damage to the building and the property and business of a commercial tenant. The trial court found that GCCL was liable for the damage to both the owner of the building and the tenant, which was upheld by the Mauritius Supreme Court (Court of Civil Appeal).

The Judicial Committee of the Privy Council dismissed GCCL's appeal and held it liable for the damage caused by the crane. Writing for the unanimous five-judge panel, Lord Mance observed that cyclones were a common occurrence in the Indian Ocean. Nineteen cyclones had hit Mauritius between 1960 and the time of Cyclone Hollanda in 1994. Many cyclones, including Cyclone Hollanda, had wind gusts in excess of 200 kilometers per hour, which were therefore foreseeable in Mauritius.[83] Because cyclones formed rapidly, there had been insufficient time to dismantle the crane once it became clear that Cyclone Hollanda had developed into a moderate or severe tropical depression.[84] Nevertheless, GCCL had failed to take

[82] [2013] UKPC 30 [*General Construction*].

[83] *Ibid* at para 5.

[84] *Ibid* at para 6.

reasonable and practicable steps to ensure that the crane could be operated safely in the event of a cyclone with a wind speed exceeding 200 kilometers per hour. It could therefore not rely upon the legal doctrine of force majeure in Mauritius to escape liability for the damage caused by the crane.

Articles 1382 and 1383 of the *Civil Code Mauricien* provide that the acts, negligence, or imprudence of a person at fault (faute) causing damage obligates that person to provide compensation to repair the damage caused. Article 1384 provides that liability flows not just from damage caused by the person's own act but also damage caused by objects that are under a person's custody (gard). Despite this broad imposition of liability, an exclusion is provided under Article 1384 in certain circumstances:

> La responsabilité ci-dessus a lieu, à moins que …. le gardien de la chose ne prouve que le dommage a été causé par l'effet d'une force majeure ou de la faute exclusive de la victime.[85]

Appearing before the Judicial Committee, GCCL accepted that fault (*faute*) was not a necessary element for the imposition of liability under Article 1384 in connection with an object under a person's custody. Lord Mance noted that the provision made the gardien of a chose who benefits from its possession (or in some cases its use) bear the risk of any damage that it caused except in the event of force majeure.[86] Upon reviewing the judgments of French and Mauritian courts and academic authority, Lord Mance identified three elements of an event of force majeure under the Civil Code: (i) extérieur or étranger à la chose; (ii) imprévisible; and (iii) irrésistible.[87] While there was disagreement in the case-law over whether to apply the three elements cumulatively or whether l' irrésistibilité was the critical consideration, Lord Mance adopted a pragmatic approach that considered all of the circumstances constituting the event: "If these are all foreseeable, then it is difficult to avoid the conclusion that steps should have been taken to address them."[88] Although freak accidents are liable to occur, "[t]he duty is to take those precautions which are reasonably and practicably possible in the circumstances of the case, not to make freak accidents absolutely impossible."[89] According to Lord Mance, this approach would be best aligned with the common law in the jurisprudence that developed in the United States following Hurricane Katrina.[90]

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[85] *Ibid* at para 8.

[86] *Ibid* at para 11.

[87] *Ibid* at para 12.

[88] *Ibid* at para 20.

[89] *Ibid* at para 20.

[90] *Ibid* at para 21 where Lord Mance refers to *HRD Corp. v Lux International Corp.*, 2007 WL 2050366 where the U.S. District Court for the Southern District of Texas adopted the definition of an act of

Applying his analysis of force majeure to the case at hand, Lord Mance held that GCCL was not required to start dismantling the crane when it became aware of Cyclone Hollanda given that there was insufficient time and "it would have been very foolish to have been caught half way through dismantling the crane when the cyclone struck."[91] The problem for GCCL was that it had assumed but not verified that it could safely operate the crane during a cyclone with wind gusts exceeding 200 kilometers per hour as experienced in Cyclone Hollanda. While the crane had been used by GCCL in Mauritius for a period of 12 years without incident, no cyclone during that time had exceeded a wind speed of 200 kilometers per hour until Cyclone Hollanda (although a significant number of cyclones had reached this level of intensity in the past). GCCL did not have to take precautions against a freak accident in operating the crane but it was required to take precautions that were reasonable and practicably possible in the circumstances of the case. Here, GCCL should have made enquiries to ensure that the crane would have safely survived a cyclone of a type that had previously occurred where wind gusts exceeded 200 kilometers per hour.[92] Had it done so, it would be open to GCCL to argue force majeure in the event of the crane causing damage due to an external event such as "some freak cyclonic action" breaking the crane's collar, which no reasonable crane operator in Mauritius could be expected to reasonably guard against.[93] However, given GCCL's failure to take the necessary precautions for operating the crane in the foreseeable conditions of cyclones with a wind speed exceeding 200 kilometers per hour, there was no event of force majeure and GCCL was liable for damage caused by the crane.

(C) Delays in the Shipment of Crude Oil

In its 2013 judgment in *Great Elephant Corp. v Trafigura Beheer B.V.* ("*Great Elephant Corp.*"),[94] the Court of Appeal (Civil Division) considered whether a force majeure provision of a charter-party contract operated to reduce the full demurrage rate owed by the charterer of a vessel to the ship-owner. At issue was the delay in the loading and transport of 1 million barrels of crude oil from a deep-water oil and gas terminal located in the Niger Delta approximately 100 miles from Port Harcourt, Nigeria. The vessel *Crude Sky*, owned by the Great Elephant Corporation, was chartered by Trafigura Beheer B.V. ("Trafigura") to load crude oil that it had purchased from Vitol "free on board" at the terminal operated by Total Upstream Nigeria Ltd. ("Total"). Given concern in relation to the theft of crude oil, the

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God as an "accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have prevented."

[91] *Ibid* at para 22.

[92] *Ibid* at para 30.

[93] *Ibid* at para 33.

[94] [2013] EWCA Civ 905 [*Great Elephant Corp.*].

Nigerian government imposed a number of loading procedures and regulations that were carried out through the Department of Petroleum Resources ("DPR"). Regulations required clearance from the DPR before loading crude oil and the presence of a DPR representative to observe the loading operation.

Upon the arrival of *Crude Sky* at the terminal on August 29, 2009, it was discovered that the resident DPR official had left the terminal unexpectedly. While hose connections were made to *Crude Sky* the following day, the loading of crude oil could not begin as the export valve was padlocked and could only be unlocked by a DPR official. Total's supervisor was advised by the DPR office in Port Harcourt that a new official would arrive on September 1. Upon further discussion with the DPR's Head of Operations in Port Harcourt, Total's supervisor understood that he was authorized to sever the padlock on the export valve and begin loading *Crude Sky*'s cargo of crude oil, which took place the same day.

On September 1, the new DPR official arrived at the terminal and Total's Lagos office asked for written loading clearance from the DPR in Lagos. The written clearance was granted but revoked a few hours later. Now already loaded, the hoses were disconnected from *Crude Sky* but the vessel was not permitted to leave due to the absence of the necessary documentation in relation to the export of crude oil. On September 3, the laytime under the charter-party expired and the use of the vessel began to be charged on the demurrage rate. On September 7, the DPR threatened to take sanctions against Total for committing an 'economic crime' by loading *Crude Sky* without having followed the required loading procedures and regulations. Nigerian navy personnel boarded *Crude Sky* to ensure that the vessel could not sail away until the matter was resolved. On October 9, the Ministry of Petroleum Resources imposed a USD $12 million fine on Total to be wired to an account in New York, which Total paid two days later. Following the completion of the cargo documentation by the DPR on October 16, *Crude Sky* was released and sailed for its port of discharge.

The terms of the charter-party provided a one-half reduction with respect to laytime or demurrage, as applicable, in the event of force majeure:

> 21. Laytime/Demurrage/Force Majeure
>
> Any delay(s) arising from adverse weather or sea state conditions, fire, explosions, breakdown … or failure of equipment, plant or machinery in or about ports or places of loading and/or discharge, Act of God, act of war, labour dispute, strike, riot, civil commotion or arrest or restraint of princes, rulers or peoples shall, provided always that the cause of the delay(s) was not within the reasonable control of Charterers or Owners or

> their respective servants or agents, count as one half laytime or, if the Vessel is on demurrage, at one half of the demurrage rate.[95]

At trial, the Queen's Bench Division (Commercial Court) held that the charter-party required Trafigura to pay the full demurrage rate from the time the laytime expired on September 3 until September 7 when navy personnel boarded *Crude Sky* and the 'restraint of princes' provision reduced the demurrage rate to one-half. Trafigura could in turn claim against Vitol because it had failed to give it quiet possession of the crude oil during the period of September 1-7 but Vitol (and companies who had transacted the crude oil further up the chain of sale) could rely on the force majeure clauses of their sales and purchase contracts from September 7 to October 16 due to government interference or unforeseeable events. The sales and purchase contract for the crude oil between Trafigura and Vitol provided that the seller (Vitol) was to pay to the buyer (Trafigura) demurrage for laytime in excess of allowable laytime but provided an exclusion in the case of force majeure as stipulated in Article 21:

> Neither the Seller nor the Buyer shall be held liable for failure or delay in the performance of its obligations under this Contract, if such performance is delayed or hindered by the occurrence of an unforeseeable act or event which is beyond the reasonable control of either party ("Force Majeure")
>
> The act or event constituting Force Majeure shall include, but not [be] limited to I. Act of God, II. Act of Government intervention, directive, or policy (whether war, Federal or State government).[96]

The judgment at trial was reversed by the Court of Appeal (Civil Division). Writing for himself and Lord Justices Tomlinson and Underhill, Lord Justice Longmore held that a force majeure event had not occurred in the circumstances. According to his approach, a force majeure clause must be construed on its own terms; however, two general rules apply to such provisions. First, a force majeure clause is an exceptions clause, which means that any ambiguity in its construction must be resolved against the party who seeks to rely on it.[97] Second, force majeure establishes a "high hurdle" in that it contemplates an event beyond the control of a party, which will only apply in rare circumstances in commercial contracts since corporations are treated as having a significant degree of control over their own business.[98] In looking at the charter-party between Trafigura and the Great Elephant Corporation, Lord Longmore observed that despite a general exceptions clause in the agreement, force majeure was specifically catered to in relation to demurrage. The

[95] *Ibid* at para 13.

[96] *Ibid* at para 14.

[97] *Ibid* at para 25.

[98] *Ibid.*

relevant cause was the "arrest or restraint of princes, rulers or peoples", which was required to be beyond the reasonable control of the parties or their respective servants or agents.[99]

Under the charter-party, Trafigura was responsible for the loading of *Crude Sky* at the terminal, which was operated by Total. According to Lord Justice Longmore, the delay was not beyond the reasonable control of Total. For reasons unknown, Total's office in Lagos did not ask for clearance from the DPR in Lagos before it started to load *Crude Sky*, which was its ordinary means of obtaining the necessary loading clearance. Instead, Total chose to deal with the DPR office in Port Harcourt through the terminal supervisor, which carried a risk and breached the regulations in that (i) there was no written clearance obtained in advance of loading; (ii) there was no DPR official present during the loading; and (iii) the padlock was severed and not unlocked by a DPR official. "Exercising a choice which carries a risk is doing something which is within one's control. Using the usual channels which would carry no risk is also within one's control. It was not beyond Total's reasonable control to exercise one choice rather than another."[100] Given that the delay was within Total's reasonable control, the question arose as to whether this finding extended to Trafigura to deny it the use of the force majeure provision in the charter-party. Lord Longmore found that the charter-party was intended to make Trafigura bear responsibility to the ship-owner for anything that went wrong with the loading operation for any reason, which included the work of its servants or agents. In this case, Trafigura contracted with Total as the terminal operator to load the vessel. If Total damaged the ship during loading, Trafigura would be liable for that damage to the ship-owner given that the damage would have been caused by its immediate contracting party. Total therefore acted as the agent of Trafigura with respect to the loading operation. If events were within the reasonable control of Total, Trafigura was liable under the charter-party to the Great Elephant Corporation for the consequences of those events.[101] Therefore, the force majeure provision in the charter-party could not relieve Trafigura of liability as the delay was within the reasonable control of its agent Total. The full demurrage rate was owed by Trafigura to the Great Elephant Corporation.

Turning to the sales and purchase contract between Trafigura and Vitol, Lord Longmore observed that the force majeure provision in Article 21 excused the liability of the seller (Vitol) to pay the buyer (Trafigura) demurrage in the event that performance was delayed by an unforeseeable act or event beyond the reasonable control of either party. This provision imposed the additional requirement that the event must be unforeseeable unlike the charter-party that simply required the event to

[99] *Ibid* at para 26.

[100] *Ibid* at para 28.

[101] *Ibid* at para 30.

be beyond reasonable control.[102] Despite this difference, the word 'unforeseeable' did not add much to the concept of the event being beyond reasonable control in the circumstances of the case. According to Lord Longmore, a delay that was within the reasonable control of Total was likely to be foreseeable. Even the imposition of an illegal fine by the Nigerian government could not amount to an intervening act to break the chain of causation as it was immaterial to the delay: "It was certainly foreseeable in this case that if loading took place without inward clearance and without the presence of a DPR representative on board (let alone by severing the padlock on the loading connection), questions would be asked and the vessel would not be allowed to leave until they were answered."[103]

Unlike the charter-party, the sales and purchase contract made no mention of servants or agents.[104] However, Lord Longmore rejected the argument that force majeure under this contract concerned itself with what was beyond only Vitol's reasonable control in relation to its obligations. Here, the contractual obligation of the seller was to place the cargo "free on board" the vessel, which meant that Vitol was responsible to Trafigura for the operation of loading the crude oil just as Trafigura was responsible to the Great Elephant Corporation under the charter-party.[105] The contractual wording that the force majeure event must be beyond the reasonable control of "either party" meant that it had to be beyond the reasonable control of the contracting parties *or* any party to whom performance had been delegated by one of the contracting parties.[106] As the delay was within the reasonable control of Total, which operated as Vitol's agent under the sales and purchase contract, no event of force majeure had occurred. In addition, the contract required the parties to ensure that their agents and contractors complied with all rules, regulations, and other directives necessary for the performance of their obligations, which Vitol had failed to do as Total had not complied with the regulations.[107] Allowing Vitol to excuse itself from its contractual obligations to Trafigura by way of the force majeure provision would be an absurd interpretation of the sales and purchase contract given that Vitol's breach of contract was responsible for the delay in the first place.[108] However, Vitol could in turn claim against China Offshore Oil (Singapore) International Pte. Ltd., which had sold it the crude oil and was responsible to Vitol for clearing the crude oil for export and obtaining loading

[102] *Ibid* at para 31.

[103] *Ibid* at para 32.

[104] *Ibid* at para 31.

[105] *Ibid* at para 33.

[106] *Ibid.*

[107] *Ibid* at para 34.

[108] *Ibid* at para 34.

clearance, which it had failed to do given Total's failure to comply with the regulations.[109]

(D) Conclusion

Both *General Construction Co. Ltd.* and *Great Elephant Corp.* indicate reluctance on the part of the British courts to find an event of force majeure that will excuse contractual or other legal liability in the absence of truly exceptional circumstances. Although the force majeure provision in *General Construction Co. Ltd.* formed part of the *Civil Code Mauricien*, the adoption of the pragmatic approach by Lord Mance in that case seeks to reconcile force majeure in the *Civil Code* with the approach of the common law. The approach in this case can therefore be seen as part of the general approach of the British courts to considering a claim of force majeure.

While it is clear from these two cases that each force majeure provision, whether it appears in legislation or a contract, must be read on its own terms as drafted and all the circumstances constituting the event carefully considered, four observations can be made with respect to the approach of British courts to the interpretation and application of force majeure clauses. First, British courts will adopt a strict construction of force majeure provisions to give maximum effect to the contractual allocation of risk (to the extent this can be determined) given that an event of force majeure would excuse contractual obligations or legal liability for damage or loss. Any ambiguity in the wording of a force majeure provision will be interpreted against the party seeking to rely on it. Second, events that take place beyond the reasonable control of a person or a corporation will be a rare occurrence as persons are seen to have a high degree of control or autonomy over their actions and are responsible for the consequences of those actions. If the party can be seen as having increased the risk of the event's occurrence, it is unlikely to be treated as an event of force majeure. For example, if a party choses a course of action that ultimately brings about the event complained of, especially if the event was not likely to occur had a different choice been made, it will be difficult to argue that the event's cause is truly external and beyond the reasonable control of the party. Third, the burden is on the party claiming force majeure to demonstrate that it took appropriate steps to address foreseeable risks. While the courts will not impose an impossible standard in terms of preventing the event, given that freak accidents do occur, parties have a duty to take all precautions that are reasonably and practicably possible in the circumstances. Fourth, there is a strong presumption that parties cannot avoid responsibility for performance through delegation to third parties even where the force majeure provision does not expressly contemplate performance carried out by servants or agents. British courts appear sensitive to the possibility of a contracting party taking advantage of its own wrong to escape liability. If an event is foreseeable or within the reasonable control of a third party, the event is likely to

[109] *Ibid* at para 34.

be treated as within the reasonable control of the contracting party that delegated the performance to the third party.

V. COMPARATIVE REFLECTIONS ON FORCE MAJEURE CLAUSES IN CANADIAN COMMON LAW

The force majeure clause is ubiquitous in modern commercial agreements. Given that it is treated as 'boilerplate' language, it is often paid short shrift at the time of drafting the contract. While this is understandable given that most boilerplate language is given similarly little attention, force majeure clauses can have significant consequences for a party as demonstrated in the above cases. In effect, a force majeure clause is a form of insurance for the contracting parties, whereby they agree in certain circumstances to fully or partly excuse or delay the performance of contractual obligations. Parties entering into a contract would be wise to give more consideration to the force majeure clause given its potentially far reaching consequences. Given that a force majeure clause can operate to absolve one party from liability for non-performance, it is in the interest of both contracting parties to clearly set out what exactly those circumstances entail.

While the precise terms of a force majeure clause are established by contract as opposed to a generally applicable contract law doctrine such as frustration, many contracts are vague as to the circumstances in which it can be invoked and the requisite degree of interference with a party's contractual performance. In the face of non-specific language, courts have adopted an approach that reads such clauses in a manner that maintains a narrow scope of application, even on occasion reading in language or principles not apparent on the face of the plain language of the clause.

As discussed earlier, the 1975 *Atlantic Paper* case of the Supreme Court of Canada remains the leading authority on force majeure clauses in the common law of Canada. In that case, the Supreme Court of Canada interpreted a force majeure clause in a contract that provided a minimum purchase obligation "unless as a result of ... the nonavailability of markets." While nothing in the plain language of the clause precluded circumstances brought about by the party seeking to rely on the provision, the Court applied *ejusdem generis* to the provision and held that the "'nonavailability of markets' as a discharging condition must be limited to an event over which the respondent exercises no control."[110] However, the opinion of the Court that a "nonavailability of markets" event must be beyond the control of the purchaser was also likely informed by the Court's assertion that a force majeure clause "generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance

[110] *Atlantic Paper*, *supra* note 2 at 583.

impossible",[111] and the Court's finding that the clause in which the nonavailability of markets provisions was found was a force majeure clause.

Since *Atlantic Paper*, though with the notable exception of the *Atcor* decision, lower courts in Canada have adhered closely to the Supreme Court of Canada's comments in *Atlantic Paper* about how a force majeure clause "generally operates". In *Tom Jones*, *Atcor* and *Univar*, courts addressed the issue of the requisite degree of interference with contractual obligations that an event of force majeure must have. *Tom Jones* and *Univar* each reiterated the 'impossibility' standard. Both decisions have been referred to with approval in subsequent case-law. *Atcor*, on the other hand, where a lesser standard of commercial unfeasibility was advocated, has not been referred to favourably by other courts in respect of force majeure clauses, and thus it does not represent a repurposing of the general standard away from impossibility.

Courts in other Commonwealth jurisdictions have also grappled with the interpretation and application of force majeure clauses. The judgment in *Holcim (Singapore) Pte. Ltd.* of the Supreme Court of Singapore (Court of Appeal) highlights, in particular, the difficulty in determining the requisite interference with contractual performance to find an event of force majeure. In *Holcim (Singapore) Pte. Ltd.*, the force majeure clause absolved the supplier from liability where "supply has been disrupted" by events beyond the control of the supplier. After concluding that there was no case-law in the Commonwealth directly on point interpreting the word 'disrupted', the Court went on to conduct an extensive analysis of the meaning of disrupted and its place in a force majeure clause. The Court concluded that the word disrupted connotes an interference threshold of something less than that of impossibility. It is questionable whether a Canadian court would interpret disrupted as language clear enough to deviate from the general standard of impossibility given the 1975 holding of the Supreme Court of Canada in *Atlantic Paper* and the general trend in the subsequent case-law. The *Holcim (Singapore) Pte. Ltd.* judgment also stands for the sensible and practical principle that the position of a party opposing force majeure will be viewed skeptically by the courts where it had the ability to cure the force majeure, as did Precise Development in that case.

In the United Kingdom, a pair of appellate court judgements of the Judicial Committee of the Privy Council and the Court of Appeal (Civil Division) reveals that a restrictive approach to the interpretation of force majeure provisions is not unique to Canada among Commonwealth countries. The judgment of the Judicial Committee of the Privy Council in *General Construction Co. Ltd.* considered the application of force majeure under the *Civil Code Mauricien*, and is an interesting judgment given that force majeure is originally a creature of the civil code. While the

[111] *Ibid.*

toppling of a crane in a hurricane might indeed, on its face, seem a typical 'act of God', the Judicial Committee of the Privy Council refused GCCL's request to rely on the doctrine of force majeure. Lord Mance concluded that where circumstances are foreseeable, "then it is difficult to avoid the conclusion that steps should have been taken to address them." This conclusion is in step with Justice Dickson's comment in *Atlantic Paper* that the common thread of force majeure is "that of the unexpected, something beyond reasonable human foresight and skill."[112] Foreseeability of an event or circumstance would quite likely preclude a party from relying on a force majeure clause in the common law of Canada, as well, unless the contract expressly stated otherwise.

The decision of the Court of Appeal (Civil Division) in *Great Elephant Corp*. is also consistent with the approach in Canada. *Great Elephant Corp.* followed the well-established principle, emphasized in both *Atlantic Paper* and *Tom Jones*, that parties cannot rely on force majeure clauses in respect of circumstances or events within their control. Trafigura was responsible under the charter-party for loading the fuel, which was undertaken by Total. The Court found that any delay was within the reasonable control of Total, and therefore also within the reasonable control of Trafigura. The second part of the decision in *Great Elephant Corp.* involved the application of a force majeure clause in the purchase agreement between Trafigura and Vitol, from whom Trafigura had purchased the oil. Under that agreement, it was Vitol, as opposed to Trafigura, who had the obligation to load the oil onto the *Crude Sky*. Vitol claimed that the delay resulted from an event of force majeure to avoid being liable to Trafigura for delay in loading the oil. While adjudicating a slightly different force majeure clause, which added the requirement that the act be unforeseeable in addition to beyond the control of the party, the Court found that as the delay was within the reasonable control of Total, which in that case operated as Vitol's agent, it was not an event beyond the reasonable control of Vitol and therefore could not constitute an event of force majeure. The judgment in *Great Elephant Corp.* is entirely consistent with the judgements in *Atlantic Paper* and *Tom Jones*, and it adds the sensible principle that in analyzing whether a particular event or circumstance was within the control of a contracting party, that contracting party will be deemed to have control over events which its agents, in the course of exercising the contracting party's contractual obligations, had control.

Review of the Commonwealth case-law on the interpretation of force majeure clauses reveals that contracting parties should be alert to a number of considerations in entering into an agreement with such a clause, which acts as a form of risk allocation. Perhaps most importantly, absent express language to the contrary, the general threshold for interference with performance of contractual obligations in Canadian common law will be impossibility of performance. If parties wish for a contract to contain some lesser standard, they would be wise to clearly express their

[112] *Ibid* at 583.

intention in the language of the clause. Contracting parties should also be live to the fact that courts will generally require events of force majeure to be beyond their control of the parties or their agents, to prevent the moral hazard associated with a contracting party being responsible for causing a state of affairs (or failing to prevent it) and then trying to evade its contractual obligations as a result.

The authors submit that a restrictive approach to force majeure clauses, consistent with the comments of the Supreme Court of Canada in the *Atlantic Paper* judgment, is the correct one. Of course, given that force majeure is a purely contractual principle in the common law, parties are free to set any standard they desire in a force majeure clause, including what events might constitute an event of force majeure, and the requisite degree of interference with contractual obligations. However, to the extent such language has the opportunity for multiple interpretations, it should be construed restrictively. In *Atlantic Paper*, there was no threshold of interference specified by the contract and the Supreme Court of Canada interpreted the threshold as one of impossibility. The Supreme Court of Canada's statement that 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" should be interpreted to mean that unless otherwise explicitly stated by the contract, an event of force majeure is only one that makes performance impossible. It is not entirely clear whether the difficulty faced by the appellant in *Holcim (Singapore) Pte. Ltd* was anything more than financial, but the authors submit that to the extent difficulty in meeting contractual obligations is merely economic, the fact that performance of contractual obligations might be economically unfavourable can never constitute an event of force majeure unless the contract specifically states otherwise. Further, it is imperative that events of force majeure must continue to be interpreted as events beyond the control of the parties, to avoid the inevitable moral hazard that would result from a less restrictive interpretation. While of course parties might specify that such events need not be beyond the reasonable control of the parties, it is not immediately obvious why any contracting party would agree to such a provision.

Contracting parties are free to agree to whatever circumstances they see fit over which a force majeure clause should operate; but to the extent they desire such circumstances to be something other than events beyond the reasonable control of either party that make performance impossible, they must expressly and clearly reflect that desire in the contract.