Force Majeure Clauses

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INTRODUCTION: OBJECTIVES OF FORCE MAJEURE CLAUSES

By its very nature, a contract will, in general, require the parties to perform the obligations which they have expressly and impliedly undertaken. A party refraining from performing does so at its own risk.[1] If a party fails or refuses to discharge its express and implied obligations, the court will either specifically compel it to do so or will order substituted performance by way of an award of damages in favour of the promisee. A contracting party is, in the absence of some exonerating provision in the contract (express or implied) or in an applicable statute, liable in damages to the other party for failure to perform contractual obligations substantially according to their tenor, even though the

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1. *Scanlan's New Neon Ltd v. Toohеys Ltd* (1943) 67 C.L.R. 169 at 191-192.

promisor may not have been guilty of want of care or other personal fault and may have done all within its personal power to discharge its contractual obligations.

It not infrequently becomes impossible, physically, economically or legally, for one or more of the parties to perform. More frequently, performance will not become impossible in a strict sense; rather, supervening events (sudden or gradual in development) outside the control of the parties may combine to impose an excessive economic burden on one of the parties, may operate to make its performance unforeseeably onerous and unprofitable or might otherwise so transform the contractual setting that, in a loose sense, it could be said to be unjust and commercially oppressive of the promisee to hold the promisor to its bargain. In general, the common law took the attitude that a promisor was, in the absence of express words, undertaking to perform in all events and undertaking, as against the promisee, the full financial risks of its (the promisor's) inability to perform. Thus, parties in general were held to the tenor of their contracts notwithstanding changed circumstances.[2]

The legislation of most European countries includes provisions which deal with the concept known as force majeure. Some countries even have special rules to deal with hardship inflicted on contractual parties by extraneous events occurring after formation of the contract.[3] However, the common law has never embraced a doctrine based on or giving effect to force majeure as such. The common law developed the rather blunt and very unsatisfactory instrument known as the doctrine of frustration. If the contracting parties wish to have the benefit of a concept of force majeure, the contract must expressly provide for that benefit.

In broad terms, one can say that there are two objectives underlying the use of a force majeure clause in a contract; the first is to exclude or diminish the possibility of the contract being discharged by frustration; the second is to give relief to a promisor confronted with changed circumstances rendering performance more difficult or more costly than originally contemplated.

THE DOCTRINE OF FRUSTRATION AT COMMON LAW

The common law appears to have adopted a doctrine of frustration in the second half of the 19th century.[4] The doctrine automatically and without more causes a contract to be discharged prospectively. The

2. *Chitty on Contracts, General Principles* (25th ed., 1982), para. 1521. A similar rule was applied even by courts of equity: *Leeds v. Cheetham* (1827) 1 Sim. 146 at 150; 57 E.R. 533.
3. See L. W. Newman, "Problems with Long Term Contracts: A Practical Viewpoint" [1986] *AMPLA Yearbook* 487 at 488-490; D. Yates, "Drafting Force Majeure & Related Clauses" (1990-1991) 3 *Journal of Contract Law* at 186 (n. 4).
4. Chitty, op. cit., paras 1522-1523; D. W. Greig and J. L. R. Davis, *The Law of Contract*, pp. 1297-1299.

doctrine operates according to changes in circumstances after formation: it has nothing to say to initial impossibility, which may render an attempted contract void from the outset.[5] The contract having been discharged, both parties are relieved from the obligation to perform outstanding promises. However, the discharge does not at common law operate retrospectively so as to exonerate a party from liability under antecedent breaches or so as to affect obligations which have already become due for performance.[6] In the absence of some severance clause or other mechanism requiring contractual promises and obligations to be severed and enabling them to survive, the effect of operation of the doctrine is to discharge the entire contract once and for all, with the qualification that provisions clearly intended to survive termination (for example, arbitration clauses) will not be discharged.[7]

The test for frustration

The courts from time to time have propounded at least three theories to justify termination of a contract on the ground of frustration. These are the "implied term theory",[8] the "construction test" and the "failure of consideration" theory. The implied term theory is the oldest[9] but has been discredited in more recent years. The second fashionable theory was the "construction theory" which emerged during the second war. This theory is also known as the "radical change in obligation theory".[10] The courts have rejected an approach calculated simply to provide a "just and reasonable result".[11] The "change in obligation theory" was entrenched in Australia by the reasons for decision of Stephen J. in *Brisbane City Council v. Group Projects Pty Ltd*[12] which were subsequently endorsed by other members of the High Court in *Codelfa Construction Pty Ltd v. State Rail Authority (N.S.W.)*.[13] During the course of his judgment in *Codelfa*, Mason J. (as he then was) suggested that the test to be applied was to ask whether the situation resulting from the arguably frustrating event was fundamentally different from the situation contemplated by the contract, taking account of its construction and all the surrounding circumstances.[14]

In the *Brisbane C.C.* case, Stephen J. had accepted the statements of principle in what he described as "the leading modern authority", that

5. See e.g. *Sale of Goods Act* (S.A.), s. 7.
6. Greig and Davis, op. cit., pp. 1331-1332.
7. Chitty, op. cit., paras 1570-1573.
8. Greig and Davis, op. cit., p. 1300; Chitty, op. cit., para. 1528.
9. *Taylor v. Caldwell* (1863) 3 B. & S. 826; 122 E.R. 309.
10. The various theories are reviewed in Greig and Davis, op. cit., pp. 1299-1304.
11. Chitty, op cit., para. 1531. In *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] 2 W.L.R. 45 at 57, Lord Wilberforce said that it was not necessary to select between the theories because "they shade into one another" and the choice depends on "what is most appropriate to the particular contract under consideration". But compare the analysis in Greig and Davis, op. cit., pp. 1301-1302.
12. (1979) 145 C.L.R. 143.
13. (1982) 149 C.L.R. 337 at 336-337, 378.
14. Ibid. at 357.

is, the decision of the House of Lords in *Davis Contractors Ltd v. Fareham U.D.C.*.[15] The speech of Lord Reid in that case called for a comparison between the situation as contemplated by the parties (ascertained by construing the contract) and the situation in fact resulting from the allegedly frustrating event. If the promisor's *obligation* has become something fundamentally different, the contract is said to be frustrated unless the frustrating event has been caused by the fault of the party seeking to rely on the doctrine. It is not the change in *circumstances* which frustrates the contract but the change in *obligation* created by changed circumstances.

By contrast, Lord Radcliffe's approach in *Davis Contractors* was to suggest that frustration occurs:

> "whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contractor. Non haec in foedera veni. It was not this that I promised to do."[16]

On this approach, the emphasis is on the significance of the difference between the obligation as originally undertaken and the obligation that was now being required to be performed. This formulation may not cover the special case of supervening illegality.[17]

Both Lords Reid and Radcliffe in the *Davis Contractors* case emphasise that the first step was to construe the terms in the contract read in the light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

> "From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original 'obligation' and what would be the new 'obligation' if the contract was still binding in the circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a 'radical' or 'fundamental' change from the original obligations. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change

15. [1956] A.C. 696.
16. Ibid. at 729.
17. Chitty, op. cit., para. 1525 (n. 21).

in the 'obligation' or the actual effect of the promises of the parties construed in the light of the new circumstances."[18]

It has also been said that the doctrine should be flexible and capable of new applications as new circumstances arise.[19] Whether the doctrine applies is a question of degree.[20] The occurrence of a frustrating event is a matter of fine, subjective judgment notwithstanding the courts' protestations that the test is objective.[21] The doctrine is haphazard and unpredictable in operation. Any contracting party invoking the doctrine of frustration is setting itself afloat upon a sea of uncertainty. A judicial decision as to whether or not a contract has been frustrated depends first upon a judicial impression as to the facts and circumstances of a particular case, as arising out of an alleged frustrating event and, secondly, the judicial impression of the intention of the parties as expressed in their contract.

Factors previously referred to combine to make it self-evident that, in the case of long-term contracts, particularly those involving substantial infrastructures, the contract should be drawn in such a way as to make it impossible for the contract (and for particular fundamental provisions) to be frustrated. To this end, contracts frequently contain clauses dealing with impossibility, force majeure and delay. Such clauses are desirable in long-term contracts in general. They are all the more desirable in long-term joint venture contracts where parties are reluctant to litigate (litigation being destructive of trust and confidence) and where the invocation of the strict legal meaning of a contractual provision against a party which is genuinely and without fault unable to comply would provoke simmering resentment.[22]

The conceptual difficulties of the doctrine of frustration and the reluctance of the courts to apply it arise from a tension between the

18. Ibid., para. 1526; Yates, op. cit. at 191. See generally J. P. Swanton, "Discharge of Contracts by Frustration" (1983) 57 A.L.J. 201. In *Panalpina* [1981] 2 W.L.R. 45, by virtue of the following passage in the speech of Lord Simon at 63, the House of Lords entrenched the *Davis Contractors* formulation of the test for frustration, namely that

> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance."

19. *Panalpina* at 63. Compare *Parkinson (Sir Lindsay) & Co. Ltd v. Commissioners of Works and Public Buildings* [1949] 2 K.B. 632 at 667; *Bank Line Ltd v. Arthur Capel & Co.* [1919] A.C. 435 at 460; *British Movietonews Ltd v. London & District Cinemas Ltd* [1952] A.C. 166 at 185; *Metropolitan Water Board v. Dick Kerr & Co. Ltd* [1918] A.C. 119 at 128; *Lauritzen A. S. v. Wijsmuller B. V., The Super Servant II* [1989] 1 Lloyd's Rep. 148 at 154; [1990] 1 Lloyd's Rep. 1 (C.A.); *Beaton v. McDivitt* (1987) 13 N.S.W.L.R. 162.
20. *Panalpina* at 52.
21. *Pioneer Shipping Ltd v. B.T.P. Tioxide Ltd* [1982] 2 A.C. 724 at 752-754; *Davis Contractors* at 728; *Reid House Pty Ltd v. Beneke* (1986) 5 A.C.L.C. 451; *Almond v. Camrol Pty Ltd* (1984) 3 B.P.R. 9461.
22. Yates, op. cit. at 187.

demands of certainty and the public interest in adherence to contractual obligations, on the one hand, and the need for the law to be fair, on the other hand.[23]

Frustrating events

In the very nature of things, the decided cases provide little more than the proverbial wilderness of single instances.[24] The classes of case in which contracts have been held to have been frustrated are where illegality supervenes due, for example, to a change in the law[25] or to a change in trading circumstances due to a declaration of war;[26] where the subject matter becomes unavailable (through requisition or compulsory acquisition by the Crown);[27] where the exercise by a public authority of a statutory or prerogative power renders performance unlawful or impossible;[28] where the subject matter ceases to exist or is destroyed;[29] where performance is required by the contract in a particular manner but that manner becomes impossible;[30] where delay occurs in the performance of contractual obligations;[31] on cancellation of an expected event which was fundamental to the parties' objectives;[32] on the invocation by the Crown of the doctrine of executive necessity; on the insolvency of a party or of a supplier; on expropriation of an oil concession; on the incapacity, imprisonment or death of a promisor (in the case of a contract of personal services)[33] and where the common objective of the parties is no longer attainable.[34] It is not clear whether a long-term contract for the sale of minerals or petroleum from a particular mine or field would be frustrated by the physical unavailability of output from that mine or field.[35]

But it is not in every case that even impossibility of performance will frustrate a contract or, conversely, provide a defence to an action for breach of contract.[36] Generally, for example, a strike will not be regarded as frustrating a contract.[37] It depends on the nature of the

23. C. J. R. McKillop, "Commentary on Effect of Changed Circumstances" [1984] *AMPLA Yearbook* 361 at 365-371.
24. Cf. Stephen J. in *Brisbane City Council* (1979) 145 C.L.R. 143 at 162-163.
25. Chitty, op. cit., paras. 1540, 1543-1545; Greig and Davis, op. cit., pp. 1305-1307.
26. Chitty, op. cit., paras. 1538, 1541.
27. Ibid., paras. 1553-1555.
28. Ibid., para. 1542.
29. Greig and Davis, op. cit., pp. 1307-1314.
30. Ibid., pp. 1307-1309.
31. Chitty, op. cit., para. 1548.
32. Ibid., paras 1546-1547.
33. Ibid., para. 1549-1552; Greig and Davis, op. cit., pp. 1307-1308.
34. Chitty, op. cit., paras 1532-1533.
35. M. E. Wright, "Effect of Changed Circumstances on Mineral and Petroleum Sales Contracts" [1984] *AMPLA Yearbook* 355 at 358-359; I. J. Hardingham, "Problems with Long Term Contracts: Change of Circumstances" [1986] *AMPLA Yearbook* 474 at 478-479.
36. Chitty, op. cit., para. 1561.
37. *Metropolitan Water Board v. Dick Kerr & Co. Ltd* [1917] 2 K.B. 1 at 35. However, delay generated by a strike may frustrate a contract: *Pioneer Shipping v. B.T.P. Tioxide* [1982] A.C. 724 at 752-754; contrast *Ringstad v. Gollin & Co. Pty Ltd* (1924) 35 C.L.R. 303.

contract, the relations of the parties, the general circumstances of the case and the nature of the alleged impossibility whether a contract is frustrated. There are a number of types of promises and a number of types of contracts to which the doctrine of frustration simply cannot apply. In general, it will not apply to a mere obligation to pay money. Thus, for example, it will be inapplicable to contracts of guarantee, contracts of indemnity, contracts of insurance, contracts of loan and, in the case of a contract for the sale of goods, will rarely operate to the benefit of a buyer. Generally, a contract is not frustrated simply because of changes in merely economic incidents of the contract.[38]

It is possible for part only of a contractual obligation to be affected by some new circumstance. The most frequent instance of this is supervening illegality and industrial disputes. A contract will not in general be frustrated where only part of an obligation is adversely affected or impeded by a supervening event.[39]

An event cannot necessarily be said to be a frustrating event where the contract makes specific provision for it.[40] One would expect that, where the frustrating event alleged is a change of circumstances which has been expressly contemplated by the parties, then the contract will generally not be regarded as having been frustrated; but the cases go both ways and it is a question first of construction and then of degree whether the parties intended to continue to be bound in the changed circumstances.[41]

> "A clause in the contract intended to deal with the event which has occurred will normally preclude the application of the doctrine of frustration. But sometimes the doctrine has been applied although the parties had inserted in their contract a clause which relates to the event in question but which does not provide that the happening of the event will terminate the contract. The clause may not make complete provision for all the legal issues arising from the event; for instance, it may excuse *one* party, but this does not necessarily mean that he can therefore hold the other party to the contract when the event happens. The court may give a narrow interpretation to a clause which suspends the contract or extends a relevant period of time upon the happening of a contingency: it may be held that the parties did not intend the clause to apply to the actual contingency which happened, because the character or nature of that contingency (for example its probable duration, judged when it commences) could not have been within the contemplation of the parties at the time when the contract was made."

Finally, no consequence of the fault or default of the promisor can be relied upon. This is the proposition against what is known as "self-induced frustration".[42] A party cannot rely on its own actual or

38. Wright, op. cit. at 355-356.
39. Chitty, op. cit., para. 1534.
40. *Claude Neon v. Hardie* [1970] Qd R. 93; *Wates v. Greater London Council* (1983) 25 BLR 1; *Codelfa v. S.R.A.*.
41. Chitty, op. cit., para. 1537; cf. Greig and Davis, op. cit., pp. 1315-1318.
42. Chitty, op. cit., paras 1568-1569.

anticipatory breach of contract as a frustrating event, nor on its own deliberate or voluntary act disabling itself from performing the contract.[43] It thus follows that, in order to amount to frustration, it must be the frustrating event (and not an act of a party) itself which makes performance impossible, and this is a question of causation. There is some uncertainty as to what acts or omissions will qualify as resulting in "self-induced frustration"; and whether there must be "fault or default" in the sense of breach of contract.[44] It also remains unclear whether mere negligence, gross or otherwise could constitute self-induced frustration or whether a deliberate act is required.[45]

Consequences of frustration

At common law, the courts did not have power to adjust the rights and obligations of the parties consequent upon a frustrating event. The law developed no remedies peculiar to a frustrated contract. At law, the "loss lies where it falls".[46] One consequence of this was that, on a contract being frustrated (and thereby terminated), the rights of the parties remained as they were at the date of frustration in so far as concerned moneys paid and property transferred.[47] However, where a party was able to show that, in the circumstances of the particular frustrating event, there had been a total failure of consideration, or where, in a case of a contract for the provision of services or for the doing of work, a substantial amount of work had been done pursuant to and conformably with the contract, the party which had parted with consideration or provided the services or done the work might be able to recover on a common money count based on unjust enrichment or, in traditional language, quantum meruit, quantum valebat, or for moneys paid to the use of the plaintiff on a consideration which had wholly failed.[48] Where some substantial benefit had been received by the performing party, that party could not recover on the last-mentioned basis.

Statutory intervention in frustrated contracts

The Parliaments of Victoria, New South Wales and South Australia have each enacted frustrated contracts legislation. The Victorian *Frustrated Contracts Act* 1959 closely resembles the English *Law Reform (Frustrated Contracts) Act* 1943.[49] Each of the New South Wales and South Australian Acts is radically different from the English and Victorian Acts; each is quite distinctive in form and they lie at different ends of the spectrum of drafting complexity. However, the legislation shares a common purpose: to abrogate the self-imposed inability of the courts to

43. Greig and Davis, op. cit., pp. 1318-1323.
44. Ibid., pp. 1318-1723.
45. Ibid., pp. 1319-1321; Hardingham, op. cit. at 482-483.
46. Chitty, op. cit., para. 1570; Greig and Davis, op. cit., pp. 1332-1336.
47. *Chandler v. Webster* [1904] 1 K.B. 493.
48. Chitty, op. cit., paras. 1572-1573; Yates, op. cit. at 187.
49. As to which see Chitty, op. cit., paras 1574-1585.

adjust the financial position between parties to a partly performed but frustrated contract.

The Victorian Act

The Victorian Act is concerned solely with the consequences of frustration and not with the circumstances in which a contract or contractual provision may be said to be frustrated. It is important to note that the Victorian Act, unlike counterparts in other States, operates on impossibility to perform, whether or not the contract is frustrated in the strict sense. Subs. 3(l) provides:

> "Where a contract becomes impossible of performance or is otherwise frustrated or a contract is avoided by the operation of s. 12 of the *Goods Act* 1958 . . . the following provisions of this section shall . . . have effect in relation thereto."

The purposes of the Act, broadly speaking, are to ensure that money paid before frustration is recoverable and that money then payable but outstanding can no longer be claimed by the promisee; to allow a party who has incurred expenditure under the contract prior to its frustration to recover fair remuneration even where a failure of consideration is partial only; and to require a party who has received a valuable benefit from the contract to pay the other for it. The recovery of money paid prior to a frustrating event is dealt with by subs. 3(2) of the Act. Compensation for a benefit derived prior to a frustrating event is provided for in subs. 3(3). The Act reverses the position at common law that where a lump-sum or "entire" contract is frustrated, nothing is recoverable. The Act leaves a number of important matters to the unfettered judicial discretion.[50]

New South Wales

The approach of the *Frustrated Contracts Act* 1978 is quite different. First, any loss that arises by reason of the frustration is to be shared equally between the parties. Secondly, the Act provides a detailed code for the adjustment of the parties' rights on frustration, rather than leaving such adjustment to the unfettered discretion of the court.[51] The New South Wales Act provides not only that money paid prior to frustration shall be repaid (s. 12), but (altering the common law) that any promises due but not performed before frustration (including promises to pay money) are discharged, except to the extent necessary to support an action in damages[52] if there has been a breach prior to the frustrating event. The Act does not apply to partnerships and may not be applicable to joint venture arrangements.[53]

50. See the cases cited in Greig and Davis, op. cit., pp. 1336-1343.
51. The Act is analysed in A. Johns, "An Unduly Complex Act? A Consideration of the Frustrated Contracts Act 1978 (N.S.W.)" Article No. 17, *Australian Current Law* 36075 (October 1988) and in Greig and Davis, op. cit., pp. 1344-1347.
52. Subsection 7(1).
53. Section 6.

The operative part of the Act is Pt III. The key provision of that Part is s. 10 which provides:

> "Where a contract is frustrated and the whole of the performance to be given by a party under the contract has been received at the time of frustration, the performing party shall be paid by the other party to the contract an amount equal to the value of the agreed return for the performance."

Section 11 deals with adjustment where part performance only is received. That provision is of such complexity that it cannot be summarised in any intelligible way. For example, subs. 11(2) provides:

> "Where a contract is frustrated and part, but not the whole, of the performance to be given by a party under the contract has been received before the time of frustration, the performing party shall be paid by the other party to the contract—
>
> (a) An amount equal to the attributable value of the performance, except where the attributable cost of the performance exceeds its attributable value; or
>
> (b) Where the attributable cost of the performance exceeds its attributable value—an amount equal to the sum of—
>
> (i) the attributable value of the performance; and
>
> (ii) one half of the amount by which the attributable cost of the performance exceeds its attributable value."

Section 12 of the Act deals with return of moneys paid and s. 13 deals with the adjustments of certain losses and gains.[54]

The New South Wales Act appears not to be the subject of judicial commentary in any reported case.[55] The intention behind ss. 10-13 of the Act was to provide a self executing scheme for the adjustment of the parties' rights without recourse to the courts. If that were the objective and if the absence of reported decisions is any guide, then the objective has been attained.

South Australia

The South Australian *Frustrated Contracts Act* 1988 came into effect on 1 April 1988. The Act does not deal at all with the concept of frustration in a substantive sense. It is concerned solely with the consequences of frustration. Thus, one must turn to the common law to decide when a contract is said to be frustrated. Frustration is defined by s. 3 to include avoidance of a contract under s. 7 of the *Sales of Goods Act* 1895 which applies where a subject matter of the contract for sale has perished before the formation of the contract. The operative provision of the Act is s. 7 which provides:

54. K. E. Lindgren, J. W. Carter and D. J. Harland, *Contract Law in Australia* (1986) p. 679 observe that at this stage the lawyer passes his file on to an accountant.
55. It was applied by Clark J. in *G. R. Evans & Co. Pty Ltd v. Watts* (unreported, N.S.W. S.C. Common Law Div., Commercial List No. 19003/85).

"7. (1) Where a contract is frustrated, there will be an adjustment between the parties so that no party is unfairly advantaged or disadvantaged in consequence of the frustration.

(2) Subject to this section, for the purpose of the adjustment referred to in subs. (1)—

(a) The value of contractual benefits received up to the date of frustration by each party to the contract will be assessed as at the date of frustration and those values aggregated;

(b) The value of the contractual performance, up to the date party to the contract will be calculated and those values aggregated;

(c) The aggregate amount arrived at under paragraph (b) will be subtracted from the aggregate amount arrived at under paragraph (a), and the remainder notionally divided between the parties in equal shares;

(d) An adjustment will be made between the parties so that there is an equalisation of the contractual return of each at the figure attributed under paragraph (c).

(3) Where the contractual performance of a party to a contract is referable to a number of separate contracts, the value of that contractual performance will, for the purposes of this section, be apportioned between the various contracts in such proportions as may be just.

(4) Where, in the opinion of a court, there is, in the circumstances of a particular case, a more equitable basis for making the adjustment referred in subs. (1) than the one set out in subs. (2), the court may make an adjustment on that basis rather than on the basis of subs. (2).

(5) For the purpose of giving effect to an adjustment under this section, a court may make orders for—

(a) The payment of money (including interest);

(b) The disposition, sale or realisation of property;

(c) The creation of a charge on property;

(d) The appointment and powers of a receiver;

(e) Any incidental or ancillary matter.

(6) Where—

(a) A party to a contract purportedly performs a contractual obligation, or an act preparatory to the performance of a contractual obligation, after frustration of the contract; but

(b) The party did not know, and could not reasonably be expected to have known, that the contract had been frustrated,

the value of the performance (and of any consequent contractual benefits), will be brought into account for the purposes of an adjustment under this section as if it had occurred before frustration of the contract.

(7) Where two or more persons are jointly parties to a contract in the same capacity, those parties will be grouped together and treated as a single party to the contract for the purposes of this section."

Each of the key concepts referred to in s. 7 is defined by subs. 3(l). The effect of s. 8 of the Act, which deals with limitation of actions, is that each party to the contract has a period of six years following on the frustration of the contract within which to seek relief under the Act.[56] The provisions of s. 7 can be excluded by express agreement between the parties and the effect of that section modified by the express provisions of the contract.[57] Like the New South Wales Act, the South Australian Act does not apply to contracts made before its commencement nor to contracts (other than a charter party) for the carriage of goods by sea; nor does it apply to a contract under which an association is constituted ("association" including "companies") or to partnership agreements.[58] The Act is expressed to bind the Crown (s. 4(3)).

Section 6 of the Act modifies the common law in providing that, subject to subs. (2), the frustration of a contract discharges the parties from all contractual obligations (including obligations that should have been, but were not, performed before the date of frustration). Subsection 6(2) provides that the frustration of a contract does not affect the existence of obligations that according to the proper construction of the contract were intended to survive frustration or a right of action (arising before frustration) for damages for breach of contract. In relation to the latter, the court is directed in any assessment of damages to take into account that the contract has been frustrated and any consequential adjustment under the Act. The Act vests powers in arbitrators.

Finally, s. 5 provides that a contract is not wholly frustrated by the frustration of a particular part of the contract if that part is severable from the remainder of the contract.

Given the broad discretion vested in the court by the Act, the broad powers conferred upon the court by subs. 7(5) and the fact that a party to an allegedly frustrated contract might sit on its rights for up to six years before seeking relief pursuant to the Act, it would clearly be in the interests of parties to major resource contracts whose proper law is South Australian to exclude altogether the operation of the Act by structuring contractual obligations in such a way that a contract can never be said to be frustrated. So far as is known, the Act has not been the subject of judicial comment.

56. Compare *Limitation of Actions Act* 1936 (S.A.), s.35(a).
57. Subsection 4(2).
58. Subsection 4(3).

FORCE MAJEURE

The concept of force majeure is not a common law concept, deriving as it does from the *Code Napoleon* Art. 1148. In French jurisprudence, the phrase (more fully rendered as "par suite de circonstances de force majeure") means "overwhelming force" or "an unforeseeable, insurmountable and irresistible impediment to performance", "force greater than the power of resistance of the promisor". Bailhache J. in *Matsoukis v. Priestman*[59] said:

> "The words 'force majeure' are not words which we generally find in an English contract. They are taken from the Code Napoleon . . . In my construction of the words 'force majeure' I am influenced to some extent by the fact that they were inserted by this foreign gentleman . . . At the same time I cannot accept the argument that the words are interchangeable with 'vis major' or 'act of God'. I am not going to attempt to give any definition of the words 'force majeure', but I am satisfied that I ought to give them a more extensive meaning than 'act of God' or 'vis major'. The difficulty is to say how much more extensive . . . I think that the complete dislocation of business . . . as a consequence of the universal coal strike . . . did come within the reasonable meaning of the words 'force majeure' . . . So far as the shipwrights' strike is concerned it comes within the very words of the exceptions clause. As to delay due to breakdown of machinery it comes within the words 'force majeure', which certainly cover accidents to machinery. The term 'force majeure' cannot, however, in my view, be extended to cover bad weather, football matches, or a funeral."

In *Lebeaupin v. Crispin*[60] the Court approved the following definition of force majeure:

> "Force majeure . . . [means] all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus war, inundations and epidemics are cases of force majeure; . . . [and also] a strike of workmen."[61]

The term "force majeure" has been construed to cover acts of God; war and strikes,[62] even where the strike was anticipated; direct legislative or administrative interference (for example, an embargo); illegality;[63] refusals to grant licences and abnormal weather conditions. It may be that some actual (as opposed to apprehended) impediment is necessary.[64] A force majeure clause has been held to be satisfied where the relevant impediment was actually on foot, and on foot to the

59. [1915] 1 K.B. 681 at 685-687.
60. [1920] 2 K.B. 714 at 719.
61. Compare *Yrazu v. Astral Shipping Co* (1904) 20 T.L.R. 153 at 154-155; *The Concadoro* [1916] 2 A.C. 199 at 202.
62. Cf. *Marburg Management Pty Ltd v. Helkit Pty Ltd* (1990) 100 F.L.R. 458.
63. *Re Parana Plantations Ltd* [1946] 2 All E.R. 214 at 216.
64. *Hackney B.C. v. Dore* [1922] 1 K.B. 431 at 437.

knowledge of the parties, when the contract was formed.[65] Understandably, the cases exhibit a marked reluctance on the part of the courts to construe a force majeure provision as being satisfied by mere increase in cost on the part of the promisor.

As a result of the decision of the House of Lords in *Fairclough Dodd & Jones Ltd v. J. H. Vantol Ltd*,[66] force majeure clauses are interpreted strictly and contra proferentem. The party relying on such a clause, whether the proferens or not, is under a duty to show that the circumstances on which it relies fall within the clause.

Force majeure clauses are particularly common in major construction contracts, such as contracts relating to shipbuilding, public works, infrastructure projects and in joint ventures, management and marketing agreements, long-term transport contracts and other contracts requiring a regular performance of services or delivery of goods from a particular source of supply. It is prudent practice to insert them in a contract when the risk of non-performance is one against which one or both parties could not readily and inexpensively insure.

It is wise for a promisor to insist on protection by means of an express force majeure clause in long-term contractual relationships involving the periodic or indefinite supply of goods or the regular performance of services. In the course of performing such long-term contracts, legislative, economic, political or social circumstances may change fundamentally in a manner entirely unforeseen by the parties. The Cooper Basin gas producers have had occasion to become familiar with the impact which changes in political attitudes and in bureaucratic fashions can work on long-term contracts.

It will not be appropriate for a force majeure necessarily to benefit each party to contract; generally, such a clause should assist only a party whose obligation is other than the payment of money. Thus, a party who is merely a buyer of goods has no right to expect to benefit from a force majeure clause.

Cost escalation and renegotiation clauses have a similar, although more limited function. They are common in transactions where the costs of production or the price of the product are volatile. These clauses, similar to the familiar "rise and fall" clause in building contracts, are particularly prudent in times of high inflation or shortage of supply.

Force majeure, delay and other exoneration clauses may be self executing, operating automatically once a defined event occurs. Alternatively, they may be triggered by notice of claim or by invocation of an arbitral or mediation process. Usually they operate to terminate, suspend or modify a contractual obligation. Alternatively, the force majeure clause may allow or require the parties to renegotiate certain aspects of the transaction, with a view fairly to apportioning the consequences of the changed economic background and ensuring the survival of the contractual relationship.

65. *Reardon Smith Line Ltd v. Minister of Agriculture* [1959] 3 All E.R. 434 at 456-457; [1961] 2 All E.R. 577 at 595 (C.A.).
66. [1957] 3 W.L.R. 921. See e.g. *Brauer & Co. (Great Britain) Ltd v. James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497 at 500, 501 (C.A.) overruling [1952] 1 All E.R. 981.

"Hardship" and "intervener" clauses are also in common use in the settings referred to above.

> "The object of a *hardship* clause is, by way of renegotiation, to convert the contractual relationship from one that is frozen at the point of formation into an evolutionary one. The new circumstances which have unexpectedly created a fundamentally different situation may not necessarily torpedo the business relationship between the parties if an adjustment in the contractual equilibrium originally envisaged is possible. The hardship clause thus represents an agreement to *negotiate* but it does not create an obligation on the parties to *reach agreement*. . . .
>
> *Intervener* clauses can be used to resolve disputes resulting from materially changed circumstances occurring during the life of a contract. These clauses typically provide for the appointment of a third party intervener, who does not perform the function of an arbitrator, but rather encourages the parties to reach a settlement. He may even be given the power under the contract to impose a solution that he considers to be fair. If the parties have faith in his integrity and skill, they may be more inclined to implement his decisions. Alternatively, the intervener may be empowered merely to make recommendations."[67]

Yates deals further with the concept of third party intervener clauses:

> "In certain cases the intervention of a third party may help the parties in the implementation of their contract. Such third-party intervention is not restricted to the resolution of difficulties which are due to the subsequent change in fundamental circumstances—the proper area normally covered by a hardship clause. Third-party intervention is also useful in so-called 'open' contracts. These are agreements by which the parties intend to be legally bound but in which they have only laid down the fundamentals of their contract. They have left the filling in of the details for later, and it is these details that cause difficulties of opinion. Here a third-party intervener may indicate the most reasonable and equitable solution. Such differences arise particularly frequently in joint ventures where the parties often only regulate their relationship with the third-party, the employer, but fail to give sufficient consideration to the relationship inter se."[68]

Clearly, force majeure, hardship and intervener and similar clauses may not be appropriate to all situations. A hardship clause may be an appropriate rider to an obligation to pay money whereas a force majeure clause would not. Their use will depend on and reflect a myriad of factors known at most only to the contracting parties and their advisers and on the contemporaneous and foreseeable contractual setting. Some circumstances might require the absolute contractual obligation imposed by the ordinary law of contract or the all-or-nothing solution embodied in the common law doctrine of frustration, with the result that the

67. Yates, op. cit. at 188; Wright, op. cit. at 347-348; McKillop, op. cit. at 382, 386-387.
68. Yates, op. cit. at 210.

consequences of failure to perform (for whatever reason) are for decision by the courts.

Force majeure clauses must be used with great care in conjunction with an express exclusion clause and with circumspection even where there is merely a limitation of liability clause: exclusion, limitation and force majeure clauses all have as their objective the exoneration, whole or partial, of the promisor. This creates the potential problem. A force majeure clause may be held to be impliedly inconsistent with an exclusion or limitation clause. The one type of clause may render the other nugatory. In general, a force majeure clause should be confined to external events, whilst an exception clause should be confined to acts within the power or control of the promisor. But the dividing line between those two classes of events may be illusory (consider industrial unrest over wages affecting the promisor).

Those with a predisposition to contractual absolutism must bear in mind the inability of the written word accurately to embody human intentions in a way that will operate satisfactorily in all times and in unforeseeable circumstances. Those familiar with the drafting, interpretation and application of contractual instruments are aware of the ease with which uncertainty and ambiguity can insinuate themselves into the most detailed and painstakingly drawn document. The effect is that the goal of contractual certainty can be illusory; words which seem clear when the contract is signed may become obscure and doubtful during the course of performance.[69]

Finally, one must be ever conscious of the applicable legislation. In the case of domestic sales contracts, the humble *Sales of Goods Act* should be consulted in so far as it deals with risk, passage of property in the subject matter, destruction of the subject matter and so forth. The Vienna Convention 1980 (dealt with below) now regulates international sales of goods to which an Australian interest is a party.

The structure of force majeure clauses

A force majeure clause should be drawn with an eye firmly on its objectives. A force majeure clause will almost invariably have as its primary purpose the qualification of apparently absolute obligations created by the contract. A secondary and related purpose is to preclude frustration (and consequent discharge) of the contract (in whole or in part). Given the terms of the legislation reviewed above, a secondary objective must be the preclusion of that legislation. This last objective could theoretically be achieved by a contractual formula for re-adjustment of rights in certain defined events. But the complexities of drafting such a clause readily present themselves.

Like all contractual provisions, a further purpose of a force majeure clause is to preserve certainty in the dealings between the parties. This

69. One is reminded of the words of Confucius:

> "Words exist only to conceal the meaning of thoughts; sentences exist only to conceal and confuse the meaning of words."

last statement indicates the paradoxical nature of force majeure clauses. By their nature, they temper absolute, unqualified obligations intended to be certain in operation and application. The tempering inevitably creates some uncertainty but not the uncertainty inherent in the doctrine of frustration and its aftermath. In addition, it must also be recognised that the operation of a force majeure clause may inflict hardship and loss on the promisee.

A force majeure clause must be expressed consistently with the affirmative provisions of the contract. Provided that it is possible for a force majeure clause to be given some effect that is not inconsistent with the operative terms, it will not be rejected as repugnant to or inconsistent with the principal clauses in the agreement. Nor will it be construed as destroying the contract by rendering the parties' undertakings vague, illusory and discretionary.[70]

Like all clauses interfering with or modifying the ordinary legal consequences of non-performance, a force majeure clause will be construed according to its natural and ordinary meaning, read in the light of the contract as a whole, giving due weight to the context in which the clause appears and to the nature and object of the contract and, in the case of ambiguity, construing the clause *contra proferentem*.[71] As with the interpretation and application of exemption clauses, the threshold task in the construction of a force majeure clause is one of determining (1) whether the clause is intended to operate as an *excuse* for what would otherwise be a breach of an obligation (express or implied) imposed or arising as a result of other terms of the contract, as determined apart from that clause (in which case a finding of inconsistency or repugnancy is much more likely); or (2) whether the clause has a part to play in *defining* those obligations in the first place, that is, in deciding whether the obligations are absolute and unqualified or, by contrast, conditional. As a matter of drafting, the clause should make it clear that its role is one of definition of *obligation* and not one of exclusion or limitation of *liability*.

If the policy decision to employ a force majeure clause is taken, the clause should be specifically drawn to meet the particular relationship of the parties. Unthinking use of a standard clause designed for one type of contract may cause more problems than it solves if transposed word for word into another contract.[72] The clause must be drawn having regard to its objectives and with a view to precluding the frustration of the whole or part of the contract. No force majeure clause should be sought to be superimposed on an obligation under which a party has expressly warranted to achieve a result beyond its control: to do so could create a patent inconsistency in the contract.

If it be accepted that the doctrine of frustration depends upon the proper construction of the contract in the events that have happened, it

70. Cf. *Thorby v. Goldberg* (1964) 112 C.L.R. 597 at 607; *Hong Guan & Co. Ltd v. Jumabhoy & Son Ltd* [1960] 2 All E.R. 100 at 106.
71. *Darlington Futures Ltd v. Delco Australia Ltd* (1986) 68 A.L.R. 385 at 391-392; Yates, op. cit. at 193; Greig and Davis, op. cit., pp. 621ff.
72. B. J. Cartoon, "Drafting an Acceptable Force Majeure Clause" (1978) *Journal of Business Law* 230 at 232; McKillop, op cit. at 382-384.

follows (as has been stated above) that a force majeure clause will not necessarily exclude the operation of the common law doctrine of frustration. A contract containing a force majeure clause will not be frustrated if the contract sufficiently and unambiguously applies to the events which have happened and prescribes an outcome or for modified, deferred or suspended obligations, in those events. However if, the court having construed the force majeure clause and the other terms of the contract together, the parties are found to have failed to make sufficient provision for the situation created by the frustrating event, then it will still be open to the court to find that the contract has been frustrated. The result of this is that it is not enough simply to define force majeure events; it is necessary to define the desired consequences of those events.

The choice having been made to insert a force majeure provision, a series of subsidiary choices must be made on the following topics:

(a) whether the exonerating clause is to be applicable to all rights and obligations or merely to some.

(b) the ambit or spread of events capable of attracting an exonerating clause.

(c) whether to insert a force majeure clause in the strict sense or, by contrast, a series of obligations the performance of which is conditional.

(d) the effect of the exonerating events: are they simply to entitle the affected party to delay its performance of its contractual obligations or are they, either generally or in specified instances, to entitle that party to a discharge from its obligations.

The first subsidiary choice is whether there should be mutuality or whether the clause is to benefit one party. Resolution of this choice will reflect the nature of the contract and the respective bargaining power of the parties. Changing circumstances, totally outside the control of the parties, may cause exceptional difficulty for one party. By contrast, it may be foreseeable that the other party will be indefinitely immune from supervening events. This will depend upon the manner in which the parties have expressly allocated risks, particularly that of non-delivery, and on the location at which delivery is to be made and accepted. There may be cases where one party will need no force majeure protection at all. A seller will need to consider how far, if at all, the buyer should be afforded force majeure protection when its sole obligation is to pay money. The standard boilerplate force majeure clauses are usually drafted only in favour of the seller.[73] It is difficult to conceive in what circumstances the common law doctrine of frustration would release a mere buyer from his obligations under the contract in the case of force majeure, yet it may be vital for a buyer to have such protection. It will be noted that none of the clauses in the Appendices permit exoneration or delay in the case of an obligation to pay money.

73. Cartoon, op. cit. at 232-233; Kelly, "Commentary on Effect of Changed Circumstances on Mineral and Petroleum Sales Contracts" [1984] *AMPLA Yearbook* 389 at 398; D. Green, "Force Majeure Clauses and International Sale of Goods—Comparative Guidelines for the Common Lawyer" (1980) A.B.L.R. 369 at 379.

In point of form, a force majeure clause will consist principally of two related elements. These elements should appear distinctly and in different subclauses. First, the clause will catalogue the events which are to constitute force majeure ("the catalysing events"). Secondly, it will provide for the effects of those events. At this point, a series of policy choices must be made. Is the clause to contain a general exoneration, or is it to be restricted to extending the time for performance of the contract either for a specified period or for the duration of the catalysing event? Within the framework of a clause of the latter kind, a subsidiary choice arises as to how long performance might be suspended without bringing the contract to an end or, in the alternative, giving the promisee a right of cancellation. Thus, the clause might provide that, if the event which constitutes force majeure continues after the expiration of a designated period, each party or, in the alternative, the promisee, is entitled to cancel the contract. In addition, the clause should in general require the promisor to take reasonable steps to overcome the impediment or its effects. Different catalysing events may be expressed to have different consequences. The Appendices contain three examples of force majeure clauses employed in the resources industry. It will be seen that the clause in Appendix B merely suspends temporarily the obligation or performance. By contrast, the clause in Appendix A has both that function and general exoneration.

"Force majeure" has no fixed and settled meaning in our legal system. Thus, a force majeure clause should set out with more or less precision the catalysing events or states of affairs which will excuse performance. (The first two clauses in the Appendices are of this kind.) Where catalysing events are of a kind capable of being overcome by the promisor at a cost, the patent purpose of the force majeure clause is to benefit the promisor only and to ensure that a promisor who is unable to manufacture, procure or deliver in accordance with its obligations is specifically relieved from the obligation entirely or for a definable period or is relieved from an express or implied obligation to seek alternative sources of supply. The force majeure clause should express this beneficial purpose unashamedly. This consideration applies in drafting clauses referring to labour disputes, where their resolution lies, in a sense, within the financial control of the promisor.

One should not employ imprecise and meaningless phrases such as "usual force majeure conditions apply" or "unforeseen circumstances excepted". They may have no effect;[74] worse, they may have an effect quite contrary to the expectations of the parties.

The application of the ejusdem generis rule (that is, the rule that general words used in conjunction with specific words which describe but one genus of events will be read down so as to be merely a further reference to that genus) should always be considered. Prudently, it should be expressly excluded by an appropriate form of words. In this respect, the clauses in the Appendices are to be contrasted. The ejusdem

74. The term "usual force majeure clauses to apply" was held void for uncertainty in *British Electrical & Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd* [1953] 1 All E.R. 94.

generis rule will not apply to the interpretation of force majeure clauses containing intrinsically dissimilar catalysing events.[75] Should there be a closed list or not? No matter with what care and prudence the drafter draws up the list of exculpatory events, it will prove impossible to contemplate every eventuality. Depending on the circumstances, a force majeure clause might conclude, after listing the various eventualities against which the drafter wishes to provide for protection, with the words ". . . or, without prejudice to the generality of the foregoing, any other circumstance or occurrence beyond the reasonable control of the seller".[76] If it is intended that the force majeure clause should excuse non-performance in relation to circumstances existing at or prior to formation of the contract, the clause should expressly refer to the existence of those present events; generally, where a catalysing event is already in existence at the date of execution of the contract and where, to the knowledge of the parties, it was likely to doom the contractual venture, then such a cause is likely to be held to be outside the ambit of a force majeure clause.[77]

The selected catalysing events will be various specified causes over which the promisor has no control,[78] such as strikes, war, hostilities, prohibition of export and blockade. The qualifying events should be defined objectively; that is, no force majeure clause should operate on the mere opinion or belief of the promisor; and the catalysing events should be the subject of specific professional consideration and should not merely be copied verbatim from a contract dealing with a different subject matter. For those engaged in the resources industry, specific attention should be paid to idiosyncrasies of the location where production is to occur or where processing or refining is to take place. Perhaps more importantly, specific attention should be paid to the legislative framework against which mining and petroleum production occurs in this country: sacred sites legislation, natural heritage legislation, the export licensing requirements, environmental impact assessment procedures. It may be appropriate to distinguish between various foreseeable impediments to performance: in the case of major impediments, such as obtaining an export licence, the promisor's obligations may be made truly conditional, for example, on obtaining the licence. In the case of minor impediments, the force majeure clause could be allowed to apply to extend the time for performance.[79]

It is prudent drafting that the force majeure clause provide that the party claiming the extension of time for performance should give the

75. See *Reardon Smith Line Ltd v. Ministry of Agriculture* [1961] 2 All E.R. 577 at 589; [1959] 3 All E.R. 434 at 454.
76. Cartoon, op. cit. at 233; Yates, op. cit. at 204.
77. *Trade & Transport Incorporated v. Lino Kaiun Kaisha Ltd (Angelia)* [1973] 2 All E.R. 144; *The Nema* [1981] 2 All E.R. 1030.
78. Were the clause to contain catalysing events within the control and ordinary resources of the promisor, and if it contained a wholesale exoneration from or suspension of obligation, the contract would be discretionary, illusory and thus void.
79. Cf. McKillop, op. cit. at 385-386. Kelly, op. cit. at 394, has suggested that one can divide force majeure events into three classes: first, those which give rise to a right to terminate the agreement; secondly, those which are permanent but which prevent only part of the performance of contractual obligations; finally, the more usual events of force majeure which will operate to suspend performance partly or wholly.

other party notice, or several notices, such as a warning notice (before the event, when the obstacle to performance becomes foreseeable) and a final notice.[80] It will be generally imperative in the interests of the promisee that notice be given in order that the promisee be aware of the need to make alternative arrangements for the supply or provision of the subject matter of the suspended promise. It is conceivable that during a period of suspension created by a force majeure clause, another catalysing event may arise. In such a case, the relevant clause should ensure that notice is given in respect of the supervening event of force majeure occurring during a period of suspension arising out of the initial notice.[81]

In general, automatically operating or self-executing termination clauses are most undesirable.[82]

Generally, a force majeure clause should be drawn so as to throw the burden of both invocation of the catalysing events and proof of those events (should their existence be disputed) on to the party seeking to rely on the clause. Such a burden would, in the absence of express provision, probably be implied against the promisor in cases where the clause operates to exonerate it from *liability*. There are a number of cases establishing that the promisor relying on force majeure provision as an excuse for non-performance bears the burden of proof.[83] However, the burden of resisting the clause could, in the absence of specific provision to the contrary, be implied against the *promisee* in a case where the clause is, on its proper construction, one conditioning or qualifying the promise sought to be enforced. This would be unfair.

There is authority for the proposition that the promisor must establish a causal connection between the alleged force majeure and the failure to perform, that is, both that a qualifying event has occurred, and that it has prevented performance.[84] These conditions should be expressed in the contract. In other words the clause should expressly provide:

(a) that the promisor invoking the clause carries the burden of proof of catalysing events;

(b) that the promisor must establish a causal connection between the force majeure event and the failure to perform or the failure to perform on time;

(c) that performance is suspended only to the extent that it is prevented by the event;

(d) that the promisor is obliged to arrange substituted performance or otherwise take all reasonable endeavours to minimise the impact of the event.[85]

80. Yates, op. cit. at 202. A choice must be made, and expressly made, as to whether the giving of notice is to be a condition precedent to the right of the promisor to avail itself of a force majeure clause or merely an obligation the breach of which may sound in damages: McKillop, op cit at 383 and the cases there cited.
81. Kelly, op. cit. at 397.
82. Yates, op. cit. at 203.
83. *Reardon Smith* at 629; *Andre & Cie S.A. v. Tradax Export S.A.* [1983] 1 Lloyds Rep. 254; Yates, op. cit. at 198 (n. 72).
84. See e.g. *Brightman & Co v. Bunge y Born* [1924] 2 K.B. 619.
85. Kelly, op. cit. at 394.

A further circumstance catered for by a carefully drafted force majeure clause in a case where the relevant promisor is a producer, manufacturer, exporter or procurer with enduring obligations to supply a commodity to a number of purchasers from a precarious or limited source, is that arising where the promisor is able to procure enough supplies to satisfy some but not all obligations to its buyers. In the United States the *Uniform Commercial Code* imposes on the seller the duty to allocate his or her output among his or her purchasers in such manner as he or she may determine to be "fair and reasonable" and, if he or she does this, he or she is discharged from further liability. There is no similar provision in Australian legislation although in special circumstances the court may imply a right to allocate production between competing buyers. In a long-term contract under which a mine operator agrees to sell its ore to various buyers, the seller would be wise to include an express provision enabling the withholding, suspension or reduction of supply and thus an apportionment of output among purchasers. The apportionment may be pro rata or discretionary. If the seller wishes specifically to favour one customer over another in the event of a shortage of supplies, he or she may reserve the right to do so in the contract, either by specifying a right to pro-rate supplies or to maintain partial deliveries only. In such an event, the seller would be wise to include a priority clause not only in the contract with the customer to be favoured but also in all other contracts, so that less-favoured customers will have notice of their status.[86]

Finally, the clause may provide for termination of the contract and for the consequences of termination. This last aspect could well pose the greatest difficulty if the parties wish to share the burden of performance of the contract as carried out up to the time of the event which led to termination. In a case where a contract is terminated pursuant to an express power and other than for breach, the court will have no power to grant relief to a party which has, unrewarded, carried out part of its obligation unless the case can be fitted into one of the exceptional classes of case considered at p. 592 or unless the contract contains express provision enabling such relief. Even were the court to have such a power, the result may be unsatisfactory in the absence of a definite formula for apportionment of contractual outgoing. A drafting technique capable of providing a suitable formula, at least in the case of a contract containing a submission to arbitration, being a contract whose proper law includes a *Frustrated Contracts Act*, would be to deem the contract to have been frustrated and to arm the arbitrator with the power of the court under that legislation.

Choice of law

Most modern commercial agreements declare the proper law to which they are subject. That is to say, the parties make an express choice of law.

86. Cartoon, op. cit. at 236; Yates, op. cit. at 203; Chitty, op. cit., para. 1535; Kelly, op cit at 395-397. See also Cl. 12.4 of the agreement appended to J. G. Grace, "Comment on Deregulation: Crude Oil" [1988] *AMPLA Yearbook* 52 at 81.

A well-drawn agreement will also subject the parties to the jurisdiction of the courts of the chosen place. If the proper law of the contract includes a statutory modification of the common law doctrine of frustration, then any force majeure clause will have to be drawn with an eye to the legislation. If the parties will be content to have their rights and liabilities, in the event of frustration, resolved by an application of the relevant statute and nothing more, then a force majeure clause will be unnecessary except where the parties wish to be exonerated from their obligations in circumstances which, at common law, would not amount to frustration. If the parties would find the prospect of judicial intervention under the legislation unappealing, then there is further reason why every endeavour must be made so to temper all contractual obligations (except perhaps those requiring the payment of money) so as to make it impossible for the contract or a principal provision of it to be frustrated.

Severance

A further matter to be borne in mind is whether or not the contract contains a severance clause of general application. If it does, the parties need to decide whether a potentially frustrating event might leave part of the contract on foot whilst bringing other parts to an end. Such a selective discharge of the parties' obligations may be wholly unwelcome.

Summary of drafting desiderata

In summary, force majeure clauses should be based on the following structure:

(a) a list of catalysing events, closed or open, major or minor.

(b) the consequences of a catalysing event or of each class of catalysing event.

(c) provisions for the giving of notices and for the provision of information relevant to the catalysing event relied upon the promisor.

(d) an obligation on the parties to co-operate in the changed circumstances.

(e) an obligation on the promisor to take reasonable steps within good time to moderate the adverse effects of the impediment.

(f) limits on extensions of time for performance of obligations.

(g) a provision for termination at the end of the extension period where continuation of the contract would be futile.

(h) in the case of sales contracts, a right in the seller to withhold, reduce or suspend supply.[87]

87. Yates, op. cit. at 212, para. 5; Wright, op. cit. at 344-347.

INTERNATIONAL SALES OF GOODS

In the case of those contracts governed by the United Nations *Convention on Contracts for the International Sale of Goods* 1980 (the Vienna Convention),[88] there are special rules dealing with impediments to performance. Thus any force majeure clause in a contract falling inside the Convention must accommodate the effect of the Convention or expressly exclude its provisions. The Convention applies to contracts for the sale of goods between parties whose *places of business* are in different countries, where those countries are Contracting States or where the rules of private international law lead to the application to a contract of the law of a Contracting State: Art. 1(1).[89] The Convention became law in Australia on 1 April 1989. It does not apply to contracts then on foot: Art. 100.

The purpose of the Convention is to supply a code in relation to international sales of goods and, in particular, the topics of formation, contractual obligation and remedies, but not formal validity.[90] The Convention contains an expanded definition of "sale".[91] The parties may exclude or vary the effect of the Convention.[92]

The legislation giving the Convention municipal effect provides that the Convention provisions "prevail over every law in force in (the enacting jurisdiction) to the extent of any inconsistency". Clearly, the effect of this provision is that the provisions of the Convention, if not excluded by a particular contract, will override legislation such as the *Sale of Goods Act*. It would probably also prevail over the provisions of Pt V of the *Trade Practices Act* and the corresponding provisions in the State Fair Trading Acts. What is not clear is whether the legislation is intended to exclude the operation of the frustration of contracts legislation.[93]

88. Applied in South Australia by the *Sale of Goods (Vienna Convention) Act* 1986.
89. The Convention is comprehensively reviewed in Nicholas, "The Vienna Convention on International Sales Law" (1989) 105 L.Q.R. 201 and in M. Pryles, "An Assessment of the Vienna Sales Convention" [1989] *AMPLA Yearbook* 337.
90. Article 4 provides:
    "4. This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
    (a) the validity of the contract or of any of its provisions or of any usage;
    (b) the effect which the contract may have on the property in the goods sold."
91. Article 3 provides:
    "3. (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."
92. Article 6 provides:
    "6. The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."
93. Pryles, op. cit. at 367.

The Convention does not embody a concept of frustration. Nor does it use the concept of force majeure. However, it does make specific provision in relation to "impediments" beyond the control of a party. Art. 79 provides that:

"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

. . .

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

In one sense, the reference to impediments "beyond the control" of a party gives the appearance of encapsulating the effect of the doctrine of frustration in conventional (now statutory) form or of making the Continental doctrine of force majeure applicable in Australia. The phrase "due to an impediment" is not defined in the Convention. It may be interpreted as extending beyond circumstances which would normally fall within the concept of force majeure. No doubt, it will be interpreted differently in different forums. One writer has commented that the use of such a broad undefined concept is undesirable in an area of the law where national systems differ considerably in the scope which they allow to doctrines such as force majeure.[94]

Article 79 prescribes effects which differ in a number of ways from the operation of the doctrine of frustration. First, an impediment does not automatically bring the contract to an end. Rather, it provides a defence to a non-performing party in an action for damages. It does not affect the other rights and remedies of the promisee in relation to non-performance, such as the right to rescind the contract: Art. 79(5) leaves unaffected every remedy except damages. Thus, in a case of continuing substantial breach or fundamental breach flowing from an impediment, the promisee may be entitled to avoid the contract. Secondly, the exemption extends to "any" obligation of the performing party. It may, therefore, provide a defence to an action for damages for partial non-performance and not only of performance of an entire contractual obligation or of the contract as a whole. Thirdly, Art. 79(3) provides that exemption from liability for the non-performing party exists only for the

94. Nicholas, op. cit. at 235. "Impediment", it is there suggested, implies an event both subsequent to formation of the contract and external to the parties.

period of the impediment: the obligation to perform is not permanently suspended, even if performance (once the impediment has been removed) is radically different from that originally intended. Fourthly, specific performance may remain available, in theory, to the promisee; however, it must be remembered that specific performance is rarely decreed in favour of a buyer of goods.[95] Fifthly, Art. 79(2) extends the non-performing party's exemption from liability to situations where non-performance is due to failure on the part of a third party (that is, a sub-contractor) engaged by the non-performing party to perform the whole or that part of the contract delegated to the third party. It is quite likely, therefore, that Art. 79 does not impliedly exclude the doctrine of frustration.

Contracts for the sale of goods governed by the Vienna Convention should still incorporate express force majeure or hardship clauses, where appropriate.[96] Unlike the well-drafted force majeure clause, Art. 79 does not allow for the express suspension or termination of contractual obligations by notice. Consideration should, at the same time, be given by the drafter to expressly excluding Art. 79 under the provisions of Art. 6.[97]

CONCLUSION

The doctrine of frustration evolved by the common law is uncertain in operation. Its effect—the discharge of a contract—is quite undesirable in the case of contracts for continuing supply of goods or for the provision of infrastructure. It is, therefore, often appropriate to seek to exclude the operation of the doctrine. This can be done by making specific provision against events otherwise capable of frustrating the contract. Force majeure clauses are one example of such provision. Even for those jurisdictions where Frustrated Contracts Acts are in force, consideration should be given to inserting some provision calculated to preclude the possibility of the contract being frustrated or becoming impossible to perform. Force majeure clauses must be drawn having regard to their specific objectives and to the nature of the contract, the precise relation, present and future, of the parties and the legislative background against which the contract is to operate. Precedents should be used merely as guides and should not slavishly be transposed from one setting to another.

APPENDIX A: EXAMPLE OF FORCE MAJEURE CLAUSE IN JOINT OPERATING AGREEMENT

No party shall be liable to any other party hereto and no party hereto shall be judged or deemed in default hereunder for any breach of this

95. Ibid. at 236.
96. Yates, op. cit. at 206.
97. Ibid. at 212.

agreement (other than failure to pay money due hereunder) caused by or arising out of any act or omission or cause not within the control of such party and which by the exercise of due diligence such party is unable to prevent or overcome, including, but not limited to, acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, delays in obtaining import licences, custom clearances and exonerations, and exchange control approvals, civil disturbances, revolutions, explosions, breakage or accident to machinery or lines of pipe, necessity for making repairs to or alterations of machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells or sources of supply of petroleum, the filing or pendency of any lawsuit or administrative proceedings attacking or putting in issue the validity of this agreement or any rights granted or raising hereunder (including the authority of the parties to enter into same), and any act or omission by any party not controlled by such party hereto. The settlement of strikes or lockouts shall be entirely within the discretion of the party hereto directly affected thereby, and nothing herein shall require the settlement of strikes or lockouts affecting the operations hereunder by acceding to the demands of the opposing party when such course is inadvisable in the judgment of such party hereto.

When pursuant to any provisions of this agreement a party hereto is obliged within a specified period or by a certain or ascertainable date to do any act or to complete performance of any work, and such party is prevented for the time being or delayed in carrying out or completing its obligation through the operation of any of the forces referred to or enumerated in Section 1, then the date of performance or of completion of performance shall be extended by a period equivalent to the duration of the force operating to prevent or delay performance, together with such further reasonable period (if any) which in the circumstances may be necessary in order to repair any damage arising or otherwise to re-establish any normal operations after the cessation of the force operating to prevent or delay performance.

APPENDIX B: CLAUSE 16 OF THE COOPER BASIN INDENTURE

(1) The time for performance of obligations under or arising out of this indenture (other than the payment of money) which performance is delayed by circumstances beyond the reasonable control of the party responsible for the performance including delays caused by or arising from act of God act of war (declared or undeclared) earthquake explosions act of public enemies floods washaways strikes lockouts stoppages bans or other industrial disturbances interruption of supplies breakdowns restraint of labour partial or entire failure of petroleum reserves or other similar circumstances may be extended by the period of the delay and no party shall be liable in damages or otherwise to any other party by reason of such delay.

(2) The party subject to the delay shall do all such things as may be necessary in order to overcome the delay as soon as possible (except for the settlement of disputes on terms which are not acceptable to such party or of the drilling of wells or the installation of facilities which are uneconomic) and such party shall as soon as reasonably practicable notify the other parties when the delay has been overcome.

APPENDIX C: EXTRACTED FROM A LONG-TERM SALES CONTRACT

(a) Any delay or failure by the sellers (which for the purposes of this clause 13 shall include sellers' representative) or any of them or by the buyer to carry out any of their or its obligations under this agreement except in relation to obligations to make payment under this agreement and except as herein expressly provided to the contrary shall not be nor be deemed a breach of this agreement or default if such failure is caused by an event of force majeure. In particular, but without limitation, time will not count for the purpose of calculation of laytime if the sellers are prevented or hindered from loading a vessel presented by buyer hereunder as a result of an event of force majeure.

(b) Without limiting the operation of subclause (a) of this clause, any delay or failure by the sellers or any of them to carry out any of their or its obligations under this agreement except in relation to obligations to make payments under this agreement shall not be or be deemed a breach of this agreement or default if such failure or default could only have been prevented or remedied by the drilling of wells or the installation or operation of facilities which in the opinion of the sellers supported by the report of an independent expert are uneconomic.

(c) Events of force majeure shall include, but not be limited to, war (whether declared or undeclared), revolution, riot, sabotage, insurrection, civil disturbance, arrest or restraint of lawful authority, confiscation, blockade, barricade, embargo, boycott, trade restrictions, strike, lockout, "go-slow", ban and any other labour conflict or industrial dispute or disturbance, epidemic, earthquake, landslide, act of God or the public enemy, fire, lightning, flood, washout, storm, tempest, explosion, order of any Court of competent jurisdiction, order or direction or action or failure to take action of any government de jure or de facto or any instrumentality, agency or subdivision thereof or any civil authority (excluding the adoption of import restrictions or import quotas by any government as aforesaid or the revocation of buyer's authorisation or registration as an importer of LPG in any country or place, any of which occurrences will not constitute force majeure), unforeseen blockage of access to the loading port or the berth and any cause (whether or not of the kind hereinabove described) over which the sellers or the

buyer (whichever is claiming under subclause (f) of this clause) have not reasonable control and which is of such a nature as to delay, curtail or prevent due and proper performance by the sellers or the buyer (whichever is claiming as aforesaid) of their respective obligations under this agreement, and shall include weather conditions preventing loading or operation of a buyer's vessel at the loading port, and in the case of sellers shall also include accident or break-down of facilities or machinery at the sellers' source of supply of propane and butane or of the hydrocarbons from which they are derived or at the loading port or between the source of supply and the loading port and partial or entire failure of reserves, well blowout and temporary or permanent failure of the supply, purchase or transportation of gas and in the case of the buyer shall include but only in relation to the buyer's obligations to take delivery of propane and butane hereunder, accident or breakdown of machinery or equipment requisite to continued loading of a buyer's vessel, explosion or destruction of a buyer's vessel at or about the loading port.

(d) The buyer will be unable to rely upon an event of force majeure for the late arrival of a vessel at the loading port to accept a delivery unless the event of force majeure causing the delay has occurred after the notification of EDA of the vessel given to the seller's representative pursuant to clause 11(e) hereof.

(e) If the sellers after making due application are unable to obtain or maintain in force necessary permits or licences to export propane and butane to the buyer then the sellers are not liable to the buyer for failure to deliver.

(f) If the buyer or the sellers or any of them has reason to believe its performance under this agreement might be affected by force majeure, or if it is so affected, it shall promptly give notice thereof, with appropriate supporting information, to the other parties. A party affected by force majeure shall take all reasonable steps to make good and resume with the least possible delay compliance with the obligation which is hindered or prevented, provided however that a party shall not be obliged to settle any labour difficulty or dispute on terms unacceptable to that party.

(g) A party claiming suspension of its obligations hereunder because of an event of force majeure will only be excused from performance of those obligations during the period of the disability resulting from force majeure.

(h) If both parties mutually agree to deliver and purchase any undelivered tonnages of propane and butane resulting from an event of force majeure such quantity shall be delivered at such time during the first five contract years as may be mutually agreed between the buyer and sellers' representative on behalf of the sellers.

(i) (i) Notwithstanding anything elsewhere in this clause 13 contained or implied if there is a strike or any labour conflict delaying or preventing the loading of a buyer's vessel on or after the vessel's arrival at loading port, the buyer may divert the vessel to another

port. However, if the sellers' representative requests the buyer to wait at the loading port, the buyer will use its best endeavours to comply with such request and shall immediately notify the sellers' representative by telex, telegram or cable of its decision. If the buyer has so complied the buyer shall cause the vessel to wait at the loading port for seven days or such period as the buyer and the sellers' representative may agree from time to time. The sellers shall pay demurrage for the whole period from the vessel's arrival or in the case of the strike or any labour conflict delaying or preventing the loading of the buyer's vessel occurring after the vessel's arrival, from the time of the occurrence.

(ii) If the sellers' representative becomes aware of a strike or any labour conflict likely to delay or prevent the loading of the buyer's vessel upon its arrival at any time after the giving of the notice by the buyer pursuant to clause 11(e) hereof the sellers' representative shall notify the buyer of such event . . .