

FORCE MAJEURE, FRUSTRATION AND EXCEPTIONS CLAUSES

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Charter parties, whether time or voyage and whether for dry-bulk or liquid cargoes often contain exceptions clauses covering a variety of evils such as Act of God, strike, or explosions. These clauses are sometimes referred to as “force majeure” clauses although the name is in itself confusing as the clauses do not refer to force majeure and force majeure is not included as an excepted risk. The necessity of even including “force majeure” clauses, as well as their drafting and interpretation, give rise to common misconceptions of those preparing and entering into charter parties.

Although English common law does not use the term force majeure, it would be inaccurate to state that that term is unknown in English law. In fact, English maritime law is a combination of European civil law as adopted and developed by the Court of Admiralty and of English common law as developed by the common law courts. As the latter courts gradually took over the adjudication of maritime law disputes, the portion of maritime law dependent on the common law became greater and greater. However, civil law concepts remain as part of the *lex maritima*. It is for this reason that terms such as force majeure are used in maritime law today, although often in a mistaken way.

We should first consider a few definitions.

“Force majeure” is a term of civil law and is sometimes referred to in its Latin form as “vis major”. In the *Civil Code of Quebec* the English equivalent “superior force” is used although that term does not appear to be common in the English-speaking world. Force majeure is defined as an event that is unforeseeable and irresistible and that renders the fulfillment of the obligation absolutely impossible. Note that Act of God is not a term of civil law. However, an Act of God will be a force majeure if it meets the other criteria of that concept.

The common law equivalent of force majeure is usually said to be the doctrine of frustration of contract. A contract is said to be frustrated where a supervening event renders its performance impossible or at least so different from that contemplated that it would not be reasonable to hold the parties bound by the contract. Again, an Act of God may lead to frustration but only if performance is affected as aforesaid.

It should be noted that the terms “force majeure” and “frustration” are not interchangeable and indeed flow from different legal concepts. However, they also have some things in common. Both concepts concern the effect of supervening events on existing contracts. Both the civil law and the common law have rules concerning the effect of antecedent events on the formation of contracts. Such events, the existence of which is unknown to the parties at the

time of entering into the contract, are referred to as mistakes and the resulting contract is usually said to be null *ab initio* as the conditions upon which it is based were not in fact in place at the time of entering into the contract even though the parties thought, erroneously, that they were.

Both force majeure and frustration require that the supervening event not be attributable to either party. If either party is at fault in causing the event, then the event is a breach of contract and, unless excused by the terms of the contract, is actionable by the innocent party. The event in this sense must be an exterior one and must be caused by nature, such as an Act of God, or by someone not connected with either party. For example, the act of an agent or employee would be neither force majeure nor frustration if a party is liable for such acts.

Both concepts are triggered where the supervening event renders the fulfillment of the contract impossible. Thus, where an opera house was rented for a series of concerts, the fact that it was destroyed by fire prior to the concerts being held frustrated the contract. That was the case in *Taylor v. Caldwell* (1863) 3 B.& S. 826 where the court found that from the very nature of the contract it must be inferred that the parties knew that it could not be fulfilled unless some particular specified thing [*i.e.* the music hall in Surrey Gardens] continued to exist. That case is said to be the source of the doctrine of frustration of contract in English law. In civil law the concept of force majeure is much older but the supervening event must prevent the fulfillment of the obligation in an absolute and permanent manner.

The effect of both doctrines is the discharge of the contract. Thus both parties are freed of their obligations and neither need pay damages to the other. Note that at common law, damages is the usual method of compensation for non performance whereas in civil law specific performance is equally available. Frustration and force majeure avoid both remedies as the contract, or the remaining portion of the contract is discharged as are the obligations contained therein.

However, the concepts are not identical. Frustration is available if the performance of the obligation is possible although totally unrelated to the obligation the party had intended to undertake. A good example of this is the series of cases surrounding the coronation of King Edward VII in 1901. Due to his illness, the event was postponed at the last minute. Several contracts had been agreed for the renting of rooms and balconies along the route of the intended procession. The rooms were still available and could have been used on the intended date for any other purpose. It is unclear whether the civil law would have allowed the contracts to be discharged by force majeure. However, in *Krell v. Henry* [1903] 2 K.B. 740, it was held that the postponement discharged the obligations of the parties by virtue of the doctrine of frustration.

Another example resulted from the closing of the Suez Canal in 1956 and again in 1967. There, contracts of sale on CIF terms and voyage charters were affected because while it remained possible to circumvent Africa to reach

Europe, the cost of such a voyage would represent an exponential increase over that originally contemplated. The civil law would have found that the execution of the obligation was not rendered impossible. The common law agreed and in *Tsakiroglou v. Noblee* [1962] A.C. 93 and in *The Eugenia* [1964] 2 Q.B. 226, the courts refused to declare CIF sales contracts and voyage charters frustrated by the closure.

However, both the civil law and the common law have struggled with the concept of a strike. Where strikes have rendered ports temporarily unavailable it could be argued that frustration or force majeure resulted only if time was truly of the essence in the agreement. In *The Nema* [1982] A.C. 724, the House of Lords considered a strike at Sorel on the St. Lawrence. The case turned more on the power of the courts to overrule an arbitrator than on frustration but, nevertheless, the finding of the arbitrator that the contract had been frustrated was allowed to stand. Several Quebec decisions are of the same effect, even though the concept of force majeure is not supposed to be available for cases which only delay and do not render permanently impossible the obligations of the parties.

There will be discharge by frustration or force majeure where a vessel is damaged beyond reasonably rapid repair, or detained in time of war, thereby forcing the shippers to tranship the cargo. However, where a party is at fault for an error of navigation or for having ordered the vessel to proceed to a port where war was impending, discharge will not result. Such discharge flows only from the fault-free and unforeseeable characterization of the event. The civil law requires the event to be reasonably unforeseeable. The common law only requires that the parties did not in fact foresee the consequences of the event, even if the event, such as the sickness of a sovereign in his sixties, could in fact be foreseen had the parties thought of it. Further, presumably, where the contract of carriage relieves the shipowner of liability such as, for example, for errors of navigation, frustration will follow, as the fault cannot be set up any more than it would have been in a case of general average.

Finally, both systems allow a party to undertake to produce a result. Civil law calls this an obligation of result as opposed to an obligation of due diligence. But the civil law off-sets obligations of result by reasoning that there can be no obligation to do something which is impossible to do. Although Equity states that the law will not compel a person to do the impossible, the common law has no such doctrine and a contract to do something which is impossible cannot be discharged through frustration where the obligation cannot be fulfilled. Rather, damages will be allowed instead of specific performance.

Where does this leave a charterer? The doctrines of frustration and force majeure are available at law in common law and civil law jurisdictions respectively without any clause being necessary in the contract. Indeed, if the parties have contemplated the consequences of the destruction of the object of the contract, the courts will apply the logic of the parties and will not consider the contract frustrated. This is not to say that liability may not be discharged if the

parties have so stated, but the contract is not frustrated where the parties contemplated the situation.

In fact, the parties almost invariably include language in their charters concerning situations which would otherwise fall to be determined by the courts to be or not to be events of frustration or, in civil law contexts, force majeure. Such clauses are often called force majeure clauses even in Canada and in the U.K. As aforesaid, this is a misnomer. In Canada, charter disputes are considered to fall under Canadian maritime law, which is defined as English maritime law as adopted and adapted in this country. This includes the notions of the common law of contracts and thus the notion of frustration, although, arguably, not that of force majeure. Thus the adjective force majeure is as much a misnomer in Canada as in the U.K. when applied to exceptions clauses of charters.

If an exceptions clause in a charter does incorporate the term force majeure, presumably it incorporates the civil law meaning as explained above. However, these precise words are rarely found in charter party forms. And even if they are, we have seen that the civil law concept is narrower than that of frustration given that the civil law is supposed to require the impossibility to be permanent, whereas frustration only requires that it be totally different from the obligation the parties intended, and considering the requisite unforeseeable nature of the force majeure.

For the rest, frustration will be available unless the contract determines otherwise. Exception clauses can do just that. Where a strike clause allows for the time lost to be allocated or postponed, it will not be possible to argue the contract is frustrated. The same result would arise where Act of God is dealt with, even though in absence of the clause the contract may have been discharged.

But this is not to say that the parties should shy away from such clauses. Rather, they should make sure the consequences they wish to result are drafted in the clause.

Unfortunately, many standard form charters contain force majeure clauses which are not standard and which may not cover the points the parties think they do. For example, the NYPE form, both in its 1946 and more recent versions, "mutually excludes" a short list of events. Does this mean that the obligations of both parties are thereby discharged, or simply that both parties can rely on the list if their obligation is prevented by such an event? Other forms state that the obligations of both parties are discharged by listed events. This is the case in the ExxonMobil VOY2000 form. However, the GENCON form is strangely silent with regard to many events the others consider worthy of note.

The parties may not always need an exceptions clause but in any charter it is likely that there will be a certain number of events that would greatly affect one of the parties. If so, it would be wise to make a provision for such an event. A clause avoids the need to argue whether the contract is frustrated and, perhaps

more important still, avoids the termination of the entire contract which is not always desired. For example, many modern force majeure clauses in consecutive voyage or long time charters provide for the time so lost to be added at the end of the term. If this is the desire, a clause is necessary.

In conclusion, there are misconceptions in the meaning and effect of so-called force majeure clauses in charter parties. Such clauses are not always necessary. However, when drafted, they should be carefully designed to give the parties the protection they desire without taking away the protection the law otherwise affords.