

Force Majeure

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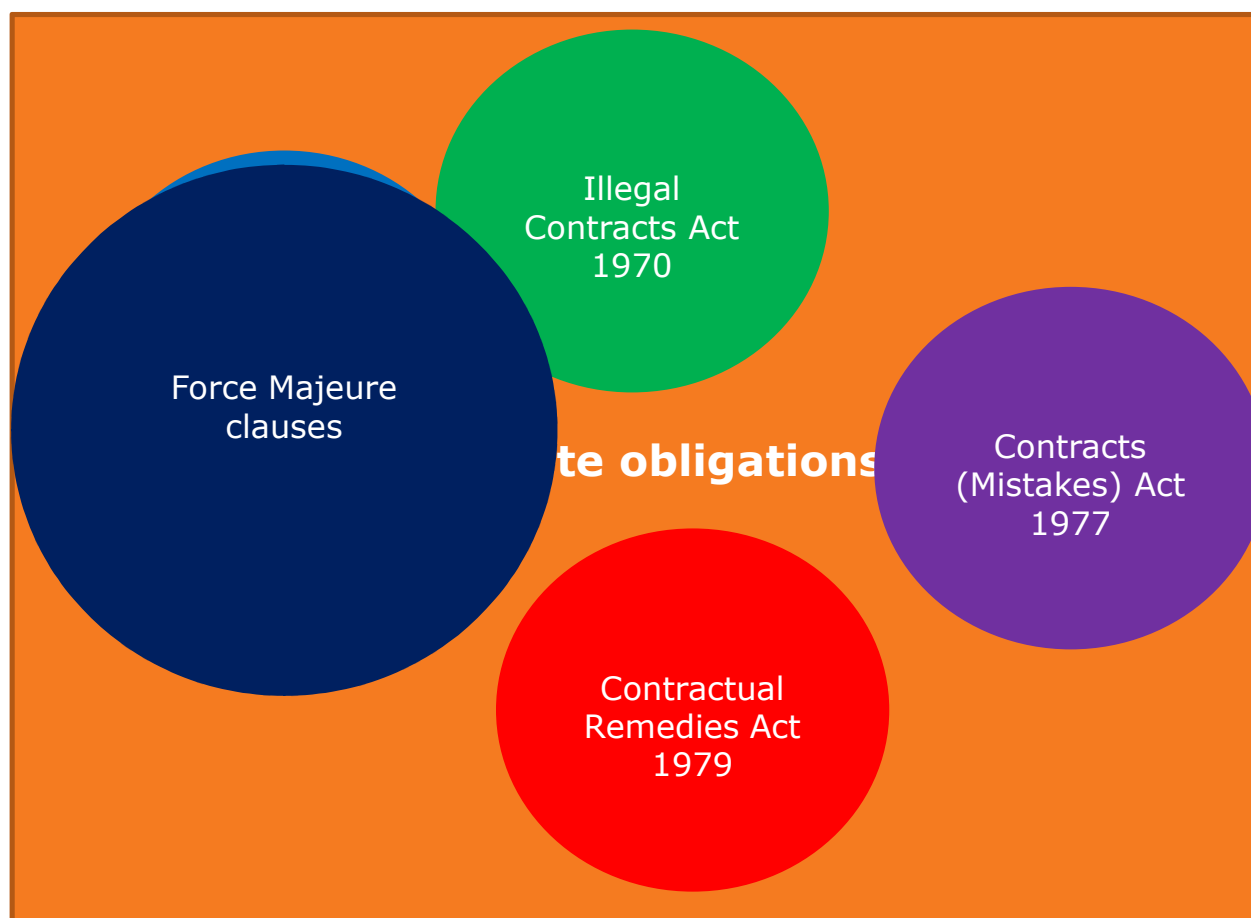
PRESENTATION TO 2011 GAS NZ INDUSTRY FORUM – 20 OCTOBER 2011



Introduction to force majeure clauses

- Force majeure describes a type of contractual clause, **not** a general legal principle.
- Force majeure provisions allow a party to excuse its non-performance of the contract where that non-performance is caused by extraordinary events beyond the party's reasonable control.
- Force majeure clauses are essentially about the allocation of risk between the parties in unforeseen circumstances.

Relationship of force majeure clauses to law of contract



Case study: *Hawke's Bay Electric-Power Board v Thomas Borthwick And Sons (Australasia) Ltd* [1933] NZLR 873

- The Napier earthquake extensively damaged a meatworks (£33,000 to reinstate).
- Meatworks' electricity supply contract included a take or pay clause of £1,000 per annum.
- No force majeure clause.
- Result:
 - Meatworks liable under contract, which is held not to be "frustrated";
 - in New Zealand, earthquakes (even of significant intensity) are not uncommon and business interruption insurance could be obtained.

Contents of a force majeure clause

- The precise terms of a force majeure will depend on the contract.
- Generally included terms are:
 - **Definition:** what constitutes a force majeure event;
 - **Notice:** the method of reporting a force majeure event;
 - **Consequences:** the consequences that flow from a force majeure event:
 - suspension of obligations during force majeure event;
 - duty to mitigate;
 - **Dispute mechanism:** a mechanism for solving disputes under a force majeure clause.

Example: Maui Gas Contract

13.1 If either party to this Contract shall fail to perform any obligation hereby imposed upon it, and such failure is caused by acts of God, strikes, lockouts or other industrial disturbances, acts of the Queen's enemies, sabotage, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, floods, storms, fires, washouts, arrests and restraints of rulers and peoples, civil disturbances, explosions, breakage of or accident to machinery or lines of pipe, freezing of wells or delivery facilities, well blowouts, craterings, the order of any court or governmental authority, the necessity for making repairs to or reconditioning wells, machinery, equipment or pipelines (not resulting from the fault or negligence of such party), or any other act or omission occasioned by any cause beyond the control of the party invoking this Article, and being such that by the exercise of due diligence such party could not have prevented such failure, that failure shall not give rise to any cause of action based on breach of the obligation of such party hereunder, but such party shall use reasonable diligence to put itself again in a position to carry out its obligations hereunder. Nothing contained herein shall be construed to require either party to settle a strike or lockout or other industrial disturbance by acceding against its judgment to the demands of opposing parties.

13.2 No such circumstance or occurrence affecting the performance of this Agreement by any party shall continue to relieve the party affected thereby from liability or to hold in abeyance a cause of action, after the expiration of a reasonable period of time within which by the use of due diligence such party could have remedied the situation preventing its performance, nor shall any such circumstance or occurrence relieve any party from its obligation to make payment of amounts then due hereunder nor shall any such circumstance or occurrence affect the party from liability or hold in abeyance a cause of action unless such party shall give notice of such circumstance or occurrence in writing with reasonable promptness; and like notice shall be given upon termination of such circumstance or occurrence.

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What events are covered by force majeure?

- This will depend on the contract, but a well-drafted clause will include:
 - a list of included events;
 - a general definition to include any event beyond the reasonable control of the party claiming the benefit which prevents that party from performing its obligations under the contract;
 - a list of excluded events.

What events are covered: Acts of God

- Violent storm at sea Yes
- Death Yes
- Fog No
- Fire caused by lightning Yes
- Gnawing by rats of a hold in a pipe of a ship, through which sea water enters and damages cargo No
- An extraordinary snowfall Yes
- Earthquake Yes



Reliance on force majeure clauses

- The burden of proof is on the party relying on the force majeure clause to prove the facts bringing the case within the clause by showing:
 - that one of the specified events occurred;
 - that because of the event he or she was prevented, hindered or delayed from performing the contract;
 - the non-performance was due to circumstances beyond his or her control; and
 - there were no reasonable steps he or she could have taken to avoid or mitigate the event.

Effect of force majeure clauses

- Generally when a force majeure clause is triggered:
 - contractual obligations may be suspended;
 - a party may be given a longer period of time to fulfil its obligations; or
 - the contract may be cancellable either immediately or after the completion of the suspension period.
- The consequences arising from a party claiming force majeure will affect how strictly the clause is interpreted:
 - if the clause exempts liability for non-performance, as opposed to extend the time for performance, or permit substituted performance, it will be more strictly construed;
 - if only one party can claim force majeure, any ambiguity will generally be construed against it.

Duty to mitigate and scarcity of supply

- A duty to take reasonable steps to avoid the event affecting performance of the contract, or to limit its impact, will generally be expressed or implied in a force majeure clause.
- Where a force majeure event causes a scarcity of the good to be supplied (i.e., the supplier cannot supply to all its customers), the supplier must act reasonably in dividing the goods available between its customers:
 - there is a strong presumption of pro rata supply;
 - but, there may be a departure where the allocation of goods is reasonable (e.g., reflecting different circumstances of the customer).

Other liability (apart from contract)

- As a contractual mechanism, force majeure clauses affect only contractual liability.
- Other liability may include:
 - Fair Trading Act 1986;
 - Consumer Guarantees Act 1993 (see *Contact Energy Ltd v Jones* [2009] 2 NZLR 831);
 - Negligence.

Key points

- Force majeure clauses are about the allocation of risk between the parties in unforeseen circumstances.
- When force majeure can be claimed and what the consequences will be are a matter of interpretation of the particular contract.
- Generally, a party claiming force majeure:
 - will have the onus of establishing that it was entitled to claim force majeure;
 - Will have an obligation to mitigate the effects of the force majeure event on the other party.
- While often dismissed as boiler plate, when the extraordinary occurs such clauses will have an immediate and often critical relevance. Attention to detail at the contracting stage is therefore worthwhile.

Contact details

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