CANADA LAW BOOK

Landlord's Rights and Remedies in a Commercial Lease

A PRACTICAL GUIDE

Second Edition

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Force Majeure: A Commercial Leasing Perspective for Landlords and Tenai

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"The future ain't what it used to be".
Yogi Berra

That's for sure. At this time in history our world is mired in turmoil. If it's not some extreme weather event, such as Hurricane Katrina, a North American-wide Ice Storm or massive floodwaters (usually the hallmark of the Mississippi States, but more recently migrated north to Alberta and Ontario), it's a medical health emergency in the form of an epidemic or pandemic. Last but not least, the famous American editorialist Charles Krauthammer has dubbed this the "Age of Terrorism". You cannot read or watch the news without learning of new terrorist attack or threat. The only thing that seems predictable these days is unpredictability itself. The old adage "hope for the best, plan for the worst" is appropriate in these circumstances. And so it is, that the often overlooked "force majeure" clause in commercial leases is slowly starting to get a fresh look by lawyers, landlords and tenants alike. In fact, one prominent Canadian leasing lawyer suggested that the force majeure clause was the number one clause on a top ten list of underrated commercial lease provisions.[1]

While today's commercial buildings are more costly, have more sophisticated operating systems and technology and are more valuable than ever before, so too are the businesses carried on by their Tenants, which cumulatively are generating revenues and business values that may be greater than the value of the building itself. In this global economy, some businesses can gain or lose very significant sums in seconds, minutes or days. The tolerance of today's tenants for any disruption, delay or outright closure of their ability to carry on business in this globalized competitive economy, is less and less.

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[1] Jerald M. Goodman, Sharon D. Brown, and Steven Messinger, "The Rodney Dangerfield Clauses: Ten Lease Provisions That Get No Respect", online: http://www.mindengross.-com/docs/publications/the-rodney-dangerfield-clauses-stephen-messinger-(july-10) > (published in (July-August 2010), 24:4 *Probate & Property* 11).

Cumulatively, this cauldron of unpredictability including potentially catastrophic weather, the emergence of disease-based epidemics or disaster-like health epidemics and terrorist based events, can cause significant economic damage and disruption to not only the commercial buildings and their owners but also the tenants and the businesses that are carried on. In this milieu, the force majeure clause in commercial leases deserves a closer look, a fresh perspective and considerable thought by all parties concerned. This especially includes legal counsel who draft leases and litigation counsel such as myself that enforce them.

"FORCE MAJEURE" MEANING

It is no secret that "force majeure" is a French term which means "supervening or superior force".[2][3] Without delving into its historical background, over the years it has become synonymous mostly with catastrophic weather events that have been seen to be "Acts of God". It's commonly known as the "Acts of God" clause. Having said that, the force majeure events that are typically enumerated in force majeure clauses often have much to do with human activities such as acts of war or terrorism, employment disputes including strikes and lockouts or acts of governments and their representatives, any or all of which may result in temporary or permanent delay, damage, destruction or closure of all or part of the leased premises.

PURPOSE OF THE FORCE MAJEURE CLAUSE IN COMMERCIAL LEASES

The purpose of the force majeure clause in commercial leases is to define and outline the circumstances where the parties to the lease exclude liability and/or suspend or release all or part of their contractual obligations under the lease. It specifically, or more broadly, lists circumstances where unforeseen events beyond a party's control prevent performance of its obligations pursuant to the lease. It contemplates situations outside the control of the parties in which performance of the contract becomes impossible. Such clauses attempt to anticipate and describe each party's obligations when the unthinkable or the unknowable occurs. Typically these clauses have covered off natural disasters or war-time situations, where commercial conditions have become so fundamentally altered that performance of the obligations under the agreement may be excused or suspended for the period of the delay

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2 *Merriam- Webster Online* (Springfield, Massachusetts: Merriam-Webster, Inc.). online. <http://www.merriam-webster.com/dictionary/force%20majeure>.

3 Douglas Hodgson, *The Law of Intervening Causation* (Burlington, Vermont: Ashgate Publishing, 2008).

caused by the force majeure event. Under the force majeure exception, a party that is properly claiming force majeure is relieved of the burden of performing its obligations pursuant to the lease because a supervening event has rendered performance impossible. In some cases, it may be even practical to terminate the lease completely under these conditions.

In legal terms, force majeure is defined as:

> [A] contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused form performance ... or is entitled to suspend performance ... upon the happening of a specified event or events beyond [his or her] control.[4]

The main hallmarks of a force majeure provision in a commercial lease include the following:

(i) A definition of what constitutes a force majeure event. This is more often than not a list of events;

(ii) A requirement that the force majeure event must be beyond the reasonable control of, and not the fault of, the non-performing party.

(iii) A description of what the parties' obligations are during the force majeure event. For example, often landlords' standard form commercial leases will require that the tenant continue to pay rent during the force majeure event;

(iv) The duration of the force majeure event. It will provide for temporary suspension of the lease obligations or, in more serious cases potential termination of the lease;

(v) A reference to the test of foreseeability. If the event was reasonably foreseeable, it may not qualify as a force majeure event;

(vi) A requirement that the non-performing party deliver notice of the force majeure event to the performing party;

(vii) It will include the duty to mitigate on behalf of both parties and that both parties act in good faith.

CONTEXT FOR INTERPRETATION OF FORCE MAJEURE PROVISIONS

Notwithstanding the above enumerated events are often referred to in commercial lease force majeure clauses, the fact is that the parties themselves are free to contract for any event to be a force majeure event. Each clause should be tailored to deal with the practical realities that exist in any given business and commercial leases are no exception in that

[4] H.G. Beale, ed., *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008).

regard. The different types of businesses and landlord tenant relationships that exist in each particular circumstance may form the basis for a different negotiation with respect to the terms of a force majeure clause.

Having said that, to date, force majeure clauses have often been glossed over as boiler plate and not closely reviewed or negotiated. To be candid, there may be some basis for this historical context given the fact that there have not been any Canadian reported cases of any substantive nature that provide any significant guidance or opinions with respect to force majeure events affecting commercial leases. The paucity of case law in this area perhaps speaks to the rationale for why these clauses have been overlooked and "underrated" in a commercial leasing context. It's a fair question to pose as to whether raising awareness and effectively sounding the alarm for a fresh look at force majeure clauses amounts to a "tempest in a teapot". One might suggest that if there are no Canadian cases on point then why take any time to review and negotiate what could be a very controversial lease provision. While that attitude may allow some to sleep soundly at night after having *not* informed the client of the importance of, or not negotiated the terms of a force majeure provision in a commercial lease, the present-day circumstances suggest it would *not* be a prudent approach. This approach may even form the basis for a substantial professional negligence claim should counsel not address the force majeure issues in a lease and not explain the risks and obligations to their respective clients whether they be tenants or landlords.

There is of course plenty of litigation in Canada already relating to construction and commercial supply contracts concerning force majeure issues. The leading Canadian Supreme Court of Canada case is a commercial supply case.[5] However, there is a very substantial body of cases dealing with force majeure clauses in the commercial leasing context in the United States. The litigation arising from the terrorist acts of 9/11 destroying the World Trade Center Towers is perhaps the starkest example in our time of this practical reality that now squarely faces us.[6] I suggest it's only a matter of time before our Canadian courts will have to deal with the interpretation of force majeure clauses in a commercial leasing context.

In order to understand the context for interpretation of force majeure provisions, it is perhaps wise to take a step back and understand some of the nuanced elements that relate to force majeure provisions in a lease and their heightened importance at this time. In particular,

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5 *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* (1975), [1976] 1 S.C.R. 580 (S.C.C.).

6 *One World Trade Center LLC v. Cantor Fitzgerald Securities*, 789 N.Y.S.2d 652 (N.Y. Sup. Ct., 2004) at p. 655.

notwithstanding the seminal decision in *Highway Properties*[7] and the remedies of the parties set out therein, the common law doctrine of frustration which on its face may seem very similar to force majeure, has not been applied to commercial leases in Canada. The doctrine of frustration has been defined as:

> ... the premature determination of an agreement between parties, lawfully entered into and in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. The effect of frustration is to release both parties from further performance of their obligations under the agreement and to terminate the agreement as of the date of the frustrating event.[8]

Frustration applies to the whole of the contract which is effectively discharged if frustrated whereas force majeure may apply to all or part of the contract or lease and for a specific period of time such that the contract or lease may be reinstated after the force majeure event has been completed. In any event, the important point to note is that the doctrine of frustration has not been applied to commercial leases in Canada given the age old position that since land is virtually indestructible, once title to the premises or in the case of a lease, the demise of the leased premises has occurred and the risk with respect to the property or the premises passes to the purchaser or the tenant as the case may be. The interest in land that the tenant has still remains in force notwithstanding the fact that the building on the land may have been destroyed.[9] A building can always be rebuilt. At that point the force majeure event will have ended. This is of course where the interconnection of a force majeure clause with other provisions in the lease becomes clear. In this case, the damage and destruction clauses that are in most commercial leases would take effect and the parties would have bargained for what would occur in those circumstances. Having said that, the fact that frustration does not apply to commercial leases in Canada only heightens the importance of the force majeure clauses to both the landlord and the tenant. There are numerous other types of situations where there may be an event which places either the landlord or the tenant in a position where it cannot meet its obligations under the lease, which might qualify as a "supervening or superior force".

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7 *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.).

8 *Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd.*, [1945] 1 All E.R. 252 (U.K. H.L.) at p. 255, Viscount Simon, L.C.

9 J.T. Robertson, "Frustrated Leases: No to Never – but rarely if ever" (1982), 60 Can. Bar Rev. 619, at p. 622.

> The cases where a tenant refused to pay the rent upon the happening of a supervening event and, as a defence to a suit for the rent, tried to argue that the doctrine of frustration applied to the lease illustrate the hardships experienced by a tenant in a lease where neither the doctrine of frustration nor any contractual provision saves the tenant from having to honour its obligation under the lease.[10]

There may, however, be an opening in Canadian law to suggest that the doctrine of frustration may be faintly alive with respect to commercial leases. The House of Lords in the United Kingdom considered the doctrine of frustration as it applies to commercial Leases in the case of *National Carriers Ltd. v. Panalpina (Northern) Ltd.*[11] In that case, the tenant leased a warehouse for a five-year term with the right of renewal for a further five years. However, governmental authorities closed the only road to the warehouse for a two-year period as a result of dangerous conditions relating to a building that was proximate to the warehouse. While the court held that the doctrine of frustration was applicable to commercial leases, it would only be applied in very rare circumstances. The doctrine of frustration was held not to apply because it would have discharged the whole of the lease contract when there was a three-year remaining portion of the five-year term, during which the warehouse was accessible and usable for the uses set out in the lease.

In this regard, it has been suggested that the British Columbia Court of Appeal's holding in *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*[12] that all contractual doctrines and remedies apply to leases means that the door is open to apply the doctrine of frustration to commercial leases in Canada.[13] In *Lehndorff*, the court held that a landlord's failure to consent to an assignment constituted a fundamental breach of the lease contract.

From a practical perspective, there appears to be nothing which restricts parties to a lease from drafting provisions that would effectively include the termination or discharge of the lease for certain events of force majeure. Most leases in Canada just provide for the temporary suspension of the obligations pursuant to the lease. Any termination right as a result of a force majeure event would have to be drafted in such a manner so to ensure that it is only utilized where a suspension of the rights and obligations under the Lease is not the appropriate solution to the risk allocation when a force majeure event occurs.

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10 L.J.D. (Dick) Batten, C.M. Gorsalitz, R.N. MacKay, P.A. Miquelon, J. Russell, and S.L. Tynan, Saskatchewan Bar, Bar Admission Program, Real Estate – Commercial Leases (Saskatoon, Saskatchewan Legal Education Society Inc., 1990, revised 2004).

11 (1980), [1981] 1 All E.R. 161 (U.K. H.L.).

12 [1989] 5 W.W.R. 481 (B.C. C.A.).

13 Batten, *et al.*, *supra*, footnote 10.

From a litigator's perspective, one should always plead not only the doctrine of force majeure but also, in the alternative, the doctrine of frustration in order to leave that argument open for consideration by the court.

It is to be remembered that force majeure is purely a common law principle subject to and interpreted in accordance with, the terms of the contract made between the parties. The parties are free to set any standard for events of force majeure, the triggering of the rights under the provision and the consequences that may occur as a result. Having said that, as will be noted, the courts at all material times interpret these clauses strictly given the fact that they are exculpatory in nature and they effectively relieve a non-performing party of all or part of its obligations under the contract or lease.

FORCE MAJEURE CASE LAW AND LEGAL TEST

The leading case with respect to the application and interpretation of force majeure clauses in Canada is *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*[14] In fact, the Supreme Court of Canada has not dealt with the issue of force majeure provisions in contracts since that time 40 years ago. The case related to Atlantic supplying a minimum amount of waste paper for a period of 10 years to St. Anne, an owner and operator of a pulp and paper mill. The contract provided as follows:

> St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tonnes a year and further warrants that in any one year, its requirements for secondary fibre shall not be less than 10,000 tonnes, unless as a result of an act of God, The Queen's or public enemies, war, the authority of the law, labour unrests or strikes, the destruction of or damage to production facilities or the non-availability of markets for pulp or corrugating medium.[15]

Unfortunately for Atlantic, St. Anne's ran into some problems in its business and approximately 14 months into the contract, it advised that it was no longer able to continue to purchase the waste paper because a downturn in the markets for its finished products made it economically unprofitable. The court interpreted the above-noted provision as a force majeure clause. In this regard, it stated:

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

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[14] *Supra*, footnote 5.

[15] *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*, *supra*, footnote 5, at para. 4.

The court upheld the lower court's finding that there was indeed a market for St. Anne's corrugated medium at the time but it was a declining market. While it wasn't economic anymore for St. Anne's to continue to buy the waste paper from Atlantic given the downturn in the market, the court effectively took the position that St. Anne's had brought the condition of non-availability of markets upon itself and suggested that St. Anne's would not be able to avoid liability if the non-availability of markets was a situation of its own making.

Given the fact that the "non-availability of markets" exclusion was contained in a force majeure clause, the court utilized the principle of ejusdem generis in order to interpret the force majeure provision. This interpretive principle is often utilized to narrow the construction of a provision. It provides as follows:

> In statutory construction, the "ejusdem generis rule" is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.[16]

In fact, St. Anne's had claimed that its inability to purchase waste paper was because it could not profitably sell its corrugated medium into the market profitably. The non-availability of markets exclusion was at the end of the list of triggering events. Dickson J. stated:

> Reading the clause ejusdem generis, it seems to me that the "non-availability of markets as a discharging condition must be limited to an event over which the respondent exercises no control ...
>
> The primary cause of the failure of St. Anne's corrugating medium facility was lack of an effective marketing plan for corrugating medium ...

I do not think St. Anne's can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude the whole St. Anne's project for manufacture of corrugating medium was misconceived.

In essence, the court held that St. Anne's had not contracted out of the non-availability of markets due to price fluctuations in the market for its finished products. If one was going to contract out of its obligation to purchase waste paper where the markets for its corrugated medium declined for any reason whatsoever, then it would have had to have been clear and more concise in the contract that was the intention of the parties. It wasn't "impossible" for St. Anne's to continue to purchase paper from Atlantic, it was just uneconomical. Perhaps a commercial leasing example similar to the *Atlantic* case might be where an oil

[16] *The Law Dictionary*, featuring Black's Law Dictionary Free (2nd ed.), online: <http://thelawdictionary.org/ejusdem-generis/>.

company leases industrial space from a landlord for the purpose of refining oil products but the lease costs become uneconomical because the market for the refined oil products declined substantially. The same non availability of market clause wouldn't apply based upon the court's ruling in *Atlantic* because there was still a market for the product, it was just less profitable than it was before. In a case like that, presumably the only way the tenant could protect itself for that eventuality would be to insert a provision to the effect that if the price that it sells its products for falls below a certain threshold, that would constitute a force majeure event. I suspect that would be a very unlikely provision for a landlord to agree to, however, perhaps it would depend upon the prevailing leasing markets at the time. The point is that the force majeure clause in a lease can be a very flexible way to deal with these types of concerns.

In *Atcor Ltd. v. Continental Energy Marketing Ltd.*[17] the Court of Appeal of Alberta considered the *Atlantic* case. Atcor supplied natural gas through a pipeline owned by a third-party Nova Corporation. The pipeline experienced a number of difficulties and, as a result, Continental did not receive all of the gas that it contracted for. The court had to determine whether a gas pipeline operator declaring force majeure as a result of pipeline damage was required to affect repairs as soon as possible, regardless of the cost. The Alberta Court of Appeal held that the supplier had to mitigate the force majeure event in a commercially reasonable manner.

> A supplier need not show that the event (of alleged force majeure) made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible.[18]

This holding of the Alberta Court of Appeal is at odds with the test of "impossibility" that was prescribed by the Supreme Court of Canada in *Atlantic*. While *Atcor* exists as a precedent, the doctrine of *stare decisis* would suggest that the S.C.C. impossibility test is paramount unless and until the Supreme Court of Canada rules differently. American common law has moved away from the harshness of the impossibility test and has adopted the test of commercial impracticability in dealing with force majeure cases.[19] Having said that, in any circumstance, a drafter of a force majeure provision will perhaps wish to deal with the tension between whether the event of force majeure requires that the performance of the contractual obligations be held to the impossibility standard or that of commercial impracticability or reasonableness.

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[17] (1996), 38 Alta. L.R. (3d) 229 (Alta. C.A.).

[18] *Atcor Ltd. v. Continental Energy Marketing Ltd.*, supra, footnote 17, para. 11.

[19] *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 D.C. Cir. 1996 (U.S. C.A. .D.C., 1966).

When litigating a commercial lease force majeure issue, depending upon the circumstances, one may wish to plead impossibility and commercial impracticability or reasonableness as the case may be, in order to make these arguments in the alternative if necessary.

As indicated earlier, these Canadian force majeure legal precedents do not deal with commercial leasing situations. At best, there is one Canadian case involving a commercial lease which deals with a force majeure situation, but in a very perfunctory manner. In *No. 163 Sail View Ventures Ltd. v. Century 21 Prudential Estates Ltd.*,[20] the plaintiff 163 agreed to lease to the defendant the upper floor of a two story building which premises were to be constructed in accordance with certain specifications. The premises were to be delivered on a fixed date. The plaintiff failed to provide the premises to the defendant tenant on time for various reasons which included negligent work and incompetent design by the plaintiff's agents involved in the design and construction of the premises. When the tenant finally did take possession of the premises, there were still a series of deficiencies that the tenant's architect confirmed were outstanding. 163 as landlord made a demand for a sum that the tenant believed was greater than the amount payable pursuant to the terms of the lease. The tenant's response was to vacate the premises without prior notice. The landlord attempted to argue that a problem arose concerning "seismic standards" requiring major structural work be done on the building and that this constituted a force majeure event which prevented it from delivering the leased premises on time. There was contradictory evidence as to whether a "stop work order" had been served by the City of Vancouver building department. On the facts of the case, the court ended up finding that the delay was caused by the negligent or incompetent design work performed by the landlord's agents. There is no real examination of the force majeure provision nor any discussion of the force majeure case law including the leading case *Atlantic. 163* is therefore of little assistance to the Canadian bar in dealing with force majeure issues concerning commercial leasing matters, except to suggest that there should be a concern on the part of landlords who actually build out the new space for tenants as to what will happen if the contractors do not meet the date for occupancy whether through their own negligence or their own supply chain issues. In order to cover off this type of situation involving third-party contractors or subcontractors the force majeure clause may be drafted to include a provision to the effect that:

[20] (1994), 40 R.P.R. (2d) 302, [1994] B.C.J. No. 1870 (B.C. S.C.).

> Any force majeure event affecting a party's subcontractors or third party contractors constitutes a force majeure event affecting that party.[21]

Having said that, there are some American cases which are noteworthy and of some assistance. In particular, as mentioned earlier, there is a case dealing with the tragic events of September 11, 2001. In the case of *One World Trade Center LLC v. Cantor Fitzgerald SEC*,[22] the plaintiff One World Trade Center LLC had leased the World Trade Centre from the Port Authority of New York pursuant to a Net Lease Agreement dated July 16, 2001. Cantor Fitzgerald was a securities firm and a tenant in the building that occupied a number of floors in the building. Cantor Fitzgerald suffered a devastating loss of numerous employees and all of its securities trading documentation on 9/11.

Pursuant to a lease supplement dated November 30, 2000, Cantor Fitzgerald had agreed to a number of lease concessions and benefits that included the payment of an increased "front-loaded" rent, restricted termination rights in exchange for future benefits, a fixed rental rate, a dedicated screening station in the lobby of the building together with the installation of a tenant identification sign in the building's lobby. The plaintiff landlord sought to recover from Cantor Fitzgerald rent and additional rent for the period from August 1, 2001, through September 10, 2001, which remained unpaid. They were not claiming rent for the period after September 11, 2001. In defence of the claim, the defendants Cantor Fitzgerald argued that because of the 9/11 tragedy, they were entitled to the remedies of rescission and unjust enrichment because the landlord was not able to provide them with the future benefits that they had bargained for in consideration of the front-loaded rent that they had agreed to earlier together with the other benefits. The lease contained a force majeure provision that included many of the usual events of force majeure including "war" and "acts of third parties for which the Port Authority was not responsible". It further included the usual catch-all provision that many force majeure provisions contain which included "any other condition or circumstances beyond the control of the landlord" which could not be prevented or remedied by reasonable effort and reasonable expense.

The issue of force majeure came before the court by way of a motion for summary judgment by the plaintiff for the arrears of rent. The defendant Cantor Fitzgerald opposed the motion but the landlord's claim prevailed. The court held:

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21 Tina L. Stark, *Negotiating and Drafting Contract Boilerplate* (New York, New York: ALM Publishing, 2003), p. 339.

22 789 N.Y.S.2d 652 (N.Y. Sup. Ct., 2004), at p. 655.

> In this case, the *force majeure* specifically shields the lessor from liability for any non-performance that results from the acts of third parties, and therefore bars defendant's counterclaim for a refund of rent.

The defendant Cantor Fitzgerald had brought a cross-motion for recoupment of the front loaded rent that it had paid earlier. The court held that there was no provision in the lease for recoupment of such payments where the lessor's future performance was rendered impossible due to the destruction of the building without any fault of the plaintiff.

The court further noted that:

> [Cantor Fitzgerald were] sophisticated commercial tenants and there is no reason to excuse them from the operation of the *force majeure* clause which they freely negotiated. [The] Defendants bargained away their right to hold the lessor liable for non-performance in the face of the tragic, unanticipated events which destroyed the Building.[23]

A further commercial lease force majeure case of interest is where a New York court held that a temporary restraining order against the landlord was a "government prohibition" described in the lease force majeure provision.[24]

The Louisiana Court of Appeals dealt with issues surrounding Hurricane Katrina and its aftermath in 2005. A tenant attempted to argue that notwithstanding its business premises had not been physically damaged, the business climate remained depressed for a significant period of time after the Hurricane and this constituted a continuing force majeure event under the lease. The court held that the only period for which the tenant could claim any force majeure was for a two-month period following the hurricane given that the premises were inaccessible. The force majeure clause in the case was narrowly interpreted such that it could not include the subsequent economic market conditions for the business after the hurricane.[25]

Two things have become clear from the Canadian common law jurisprudence in respect of force majeure clauses:

(i) the alleged force majeure event must not be an event, or related to an event, of a party's own making; and
(ii) the event generally must render performance of the contractual obligations impossible. Mere inconvenience or commercial hardship will not suffice.[26]

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23 *One World Trade Center LLC v. Cantor Fitzgerald SEC*, *supra*, footnote 22, at pp. 654-655.

24 *Reade v. Stoneybrook Realty LLC*, 882 N.Y.S.2d 8 (N.Y.A.D. 1st Dept., 2009).

25 *Meadowcrest Prof'l Building P-Ship v. Toursakassian*, 1 So.3d 555 (1st Cir., 2008), at p. 556; Goodman, *et al.*, *supra*, footnote 1.

26 Lorne Neudorf, "Force majeure clauses in comparative perspective: The Canadian common law approach in light of recent developments in the courts of Singapore and the United Kingdom" (2014), 65 U.N.B. L.J. 312, p. 313.

FORCE MAJEURE FACTORS TO CONSIDER

There are a number of factors that one has to consider in the drafting, construction, interpretation and enforcement of a force majeure clause aside from the practical business issues that flow from any of these factors. At the end of the day, the force majeure clause in a lease is really all about the allocation of risk as between the landlord and the tenant. From the landlord's perspective, it has the risk of building and/or purchasing the property in the first instance, maintaining it, keeping its operations up-to-date and ongoing, and of course, paying the mortgage financing. It has the risk of fluctuations in real estate market prices together with the responsibilities of ownership, management and operations. Insofar as the leases in the building are concerned, the landlord's position is that it has net carefree leases with the tenants. It is providing the tenants with the leased space in exchange for rent which it needs to utilize not only for the purpose of operating the building but of course paying its mortgage. If the rental stream is somehow interrupted or ceases, the landlord's ownership of the building will be in jeopardy. From the landlord's perspective, it in no way should be saddled with the obligation of effectively guaranteeing all or part of the tenant's business operations in the event of a force majeure event.

From the tenant's perspective, it is paying rent so that it will have a venue from which to carry on its business without interruption or delay. The tenant must have core services which include power, HVAC, access, security, cleaning and waste disposal among others in order to maintain its operations. In a force majeure event, any or all of these services may be partially or completely compromised. In those circumstances, the tenant's interest is to be in a position to continue to carry on business notwithstanding a force majeure event to the extent that may be possible, or if there is a delay, for it to be as short as possible. The tenant will of course not wish to continue to pay rent in the event of a force majeure event, because it is essentially not receiving the benefit of the leased premises during any delay and will most certainly be suffering damages as a result of its inability to continue to carry on business during that period. There are clearly a number of moving parts to this balancing act and it's a very tricky area to navigate. Practically speaking, landlords and tenants will have to take into account their respective bargaining power and market conditions. In most circumstances, smaller tenants will not have much sway in attempting to negotiate a landlord's standard form force majeure provision no matter how onerous, whereas larger tenants will be more likely to make some headway in negotiations with the landlord with respect to this issue. Having said that, it's really in both parties' best interests to act reasonably in relation to the force majeure events as the

ability to trigger the clause is often mutual. Courts of competent jurisdiction interpret these clauses strictly against the non-performing party and the party that drafted the clause also. The fact that that clause may be negotiated may not oust the general principle of contra proferentum in all circumstances, which works to construe any ambiguity in the clause against the drafter.

(i) Wide or Specific Language?

The first question the parties have to ask themselves is as to whether they believe the clause that will best protect their interests be very general in its language and worded as broadly as possible with minimum specificity. The hallmark of this type of drafting includes phrases such as "howsoever caused", "without limitation", "including", or my favourite, "or otherwise".[27] On the other hand, the other extreme is to try to construct a laundry list that will include specifically any and all possible types of supervening events that may trigger a force majeure provision from the perspective of either the landlord or the tenant. The fact that these specific events are examined under a microscope by the courts to determine whether in fact that enumerated event actually covers off the specific event that actually occurs, has caused parties to start to include lists that are so nuanced that they become linguistic competitions as to who can think of more examples to include. For instance, in the United States, since 2001, parties have begun to use phrases such as "enemies of the state", "public enemies", and to include language listing biological warfare agents and "dirty bombs" when attempting to deal with more specific types of circumstances that might otherwise be encompassed in acts of war or terrorism.[28] While it may on the face of it seem like overkill (no pun intended), there is some basis for counsel to embark on these expeditions when drafting these clauses based upon some of the case law that has been generated interpreting what wording and events may trigger a force majeure situation in a contract or lease. The ramifications of this litany list of force majeure events is that if the even that actually occurs that effects a party's performance is not specifically enumerated in the list, it is unlikely that a court will excuse performance.

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[27] Let me say from the outset that I do not draft leases or negotiate them on a regular basis but I do either enforce them on behalf of landlord clients or defend them on behalf of tenant clients on a regular basis so I do have some sense as to how the language issues can affect the interpretation or enforceability of the provisions in question.

[28] Jessica S. Hoppe and William S. Wright, "Force Majeure Clauses in Leases" (March/April 2007), 21 Probate & Prop. 8, at p. 10. I would recommend this article to any counsel that are drafting and enforcing force majeure clauses as it provides a good overview of these issues in a commercial leasing context.

For instance, in or about March of 2003 Toronto, Ontario suffered a SARS outbreak which occurred in two waves: March to April and April to July, 2003. In total, 44 people in Canada died from SARS, approximately 25,000 Toronto residents were placed in quarantine. Approximately 85% of all Canadian SARS cases occurred in Ontario.[29] The media and the public generally described the outbreak of SARS as an epidemic or something akin to a pandemic. The WHO classified SARS as a "communicable disease outbreak" but did not use the term epidemic. In Ontario, the government classified SARS as a "communicable and virulent disease" as defined in s. 1 of the *Health Protection and Promotion Act*.[30] While many more recent commercial leases may refer to "epidemic" in their force majeure event provisions, there is a real issue as to whether SARS would have been a triggering event of force majeure where only the use of the term "epidemic" was included in the lease, with respect to what otherwise would certainly seem to be a health emergency. There's a very interesting discussion in this regard in an article that was written on topic "Is SARS an "Event" that Triggers a Force Majeure Clause". The authors debate whether SARS would have triggered force majeure clauses that used terminology like "epidemic" or similar language whether statutory based or otherwise. They go on to deal with the fact that in Ontario, the government declared an emergency under the *Emergency Management Act*,[31] and postulated that if the force majeure clause had referred to an "emergency" as a triggering event then that might have been sufficient to trigger the force majeure provision. Drafters of force majeure clauses certainly may wish to include the more general term of "emergency" in with their definitions.

On the other hand, in the WTC case mentioned earlier, the court relied on broad language in s. 36(b) of the lease which provided that:

> Causes or conditions beyond the control of the Port Authority shall mean and include acts of God ... war ... acts of third parties for which the Port Authority is not responsible ... or any other condition or circumstance whether similar to or different from the foregoing (it being agreed that the foregoing enumeration shall not limit or be characteristic of such conditions or circumstances) which is beyond the control of the Port Authority or which could not be prevented or remedies by reasonable effort and at reasonable expense.

This very broad language was utilized to trigger the force majeure event of what was clearly a terrorist attack on the United States.

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29 "SARS Outbreak in Canada", *Canadian Environmental Health Atlas*, online: < www.e-hatlas.ca/sars-severe-acute-respiratory-syndrome/case-study/sars-outbreak-canada >.

30 R.S.O. 1990, c. H.7. M. Nigro and M. Smith, "Is SARS an 'Event' that Triggers a Force Majeure Clause?" (2003), 27 Adv. Q. 199.

31 R.S.O. 1990, c. E.9.

It's a difficult call to know which way to proceed, although most counsel will err on the side of caution and the prevailing practice seems to include a balancing of both broad and specific language in definitions of force majeure-triggering events. In most all clauses, you will find the "catch-all" provision that is at the end of the above noted provision. Given these "catch-all" provisions are often interpreted to only include like or similar events of these which are listed in the clause, if counsel wants to ensure that the provision is wider in scope then wording must be included to achieve that objective. Unfortunately, this "catch-all" drafting cure including language such as "or other similar causes beyond the reasonable control of the parties" has spawned its own litigation focusing on what is or is not a "similar cause".[32]

In order to deal with the issues that arise with the litany list, one prominent text dealing with the construction of force majeure clauses suggests that the parties may wish to conclude the force majeure definition with the following statement:

> This list of Force Majeure Events is not exhaustive, and the principle of *Ejusdem Generis* is not to be applied in determining whether a particular act or event qualifies as Force Majeure Event under the definition set forth in this Section. . . .[33]

FORESEEABILITY AS A FACTOR

In virtually all of the jurisprudence relating to force majeure, the issue of foreseeability of the potential event is a factor that is directly or indirectly dealt with by the courts. This is because the courts have held that if an event was foreseeable, the non-performing party should have protected itself during the contract negotiations against the effects of the event and if they did not do so, the risk of the foreseeable event occurring must be borne by the non-performing party. Therefore, only events that were unforeseeable could be used as a defence for non-performance.[34] In particular, the courts have generally held that a force majeure event must be an event beyond the control of the parties and beyond their reasonability foreseeability. Thus, only events that were unforeseeable could be used as a defence for non-performance.[35] Perhaps the most extreme example of the foreseeability issue was determined by the Judicial Committee of the Privy Council in Singapore sitting as an appellate court of last resort for Mauritius. They were considering the doctrine of force

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[32] See *Kel Kim Corp. v. Central Markets Inc.*, 70 N.Y.2d 900 (N.Y. Ct. App., 1987); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F.Supp. 850 (N.D. Ill., 1990).

[33] Stark, *supra*, footnote 21, p. 333.

[34] *Ibid.*, p. 333.

[35] *Ibid.*, p. 330.

majeure under the *Civil Code Mauricien*. In this case, Cyclone Hollanda struck the island of Mauritis, situated just east of Madagascar. In 1994, Hollanda caused parts of a crane owned by General Construction Co. to fall from a multi-story building in Port Louis, on to a neighbouring building. The crane caused damage to a building and the property and business of a commercial tenant in that building. The tenant in the building sued General Construction for the damage and General Construction was held liable for the damage both to the owner of the building and the tenant by the Mauritius Supreme Court. The Judicial Committee of the Privy Council dismissed General Construction's appeal and held it liable for damage caused by the crane. The court observed that cyclones were a common occurrence in the Indian Ocean and that 19 cyclones had hit Mauritius between the years of 1960 to 1994. Many of the cyclones had wind gusts in excess of 200 km/h. The court therefore held that cyclones of 200 km/h winds were foreseeable. The court held that General Construction had failed to take reasonable and practical steps to ensure that the crane could be operated safely in the event of a cyclone with a wind speed exceeding 200 km/h. It could therefore not rely on the legal doctrine of Force Majeure to escape liability for the damage caused by the crane.[36]

Counsel for the landlord may wish to include the phrase "whether foreseen or unforeseen", which may eliminate the foreseeability test from the definition of a force majeure event. Of course, if the parties agree to that, then they will be likely contracting out of the common law benefits of the common law requirement that the force majeure event be unforeseeable.

FORCE MAJEURE TRIGGERING EVENTS AND ONUS

The importance of the balancing of the language is underscored for litigators that might be dealing with this issue as to whether there's been a triggering event under a force majeure clause. Note that the onus of proving that a triggering event has occurred is on the non-performing party that is claiming force majeure pursuant to the terms of the lease.

Sometimes, the triggering event may be a difficult point in time or actual date to ascertain. If there is a hurricane or a tornado, then it's easy to specify a date when the force majeure event is triggered. With respect to other types of triggering events, it may not be so easy. Using the SARS example noted above, a brief chronology of the outbreak illustrates the difficulty in assessing what may constitute the actual timing for a triggering event.

[36] Neudorf, *supra*, footnote 26, p. 318.

- On March 13, 2003, the first reported death attributed to SARS occurred in Toronto.
- Health Canada issued its first SARS advisory on March 16, 2003. At the time there were seven cases in Canada, six of which were in the Toronto area.
- Also on March 16, 2003, the WHO declared Canada an "affected area."
- On March 25, 2003, the Ontario Health Minister declared SARS a "reportable, communicable and virulent disease."
- On March 26, 2003, Ontario declared a "public health emergency" and ordered thousands of people to quarantine themselves in their homes.
- On April 23, 2003, the WHO issued a SARS-related travel advisory for Toronto.
- On April 30, 2003, the WHO lifted the SARS travel advisory for Toronto.
- On May 14, 2003, the WHO removed Toronto from the list of areas with recent local transmission.
- On May 26, 2003, the WHO added Toronto to the list of areas with recent local transmission of SARS. The change in status follows information, communicated by Health Canada, about new clusters of 26 suspect and eight probable cases of SARS linked to four Toronto hospitals.[37]

The same might be said in circumstances where there is a labour dispute as to whether certain steps taken by unionized workers may constitute a strike or even amount to labour unrest. For instance, in *Fishery Products International Ltd. v. Midland Transport Ltd.*,[38] Midland was transporting fish to locations in Ontario and Quebec. A trucker protest on route blocked the truck from making it to its destination in a timely manner. The fish that were being transported became unfit for consumption. As a result, the transport company Midland attempted to rely on the "strike" clause as an event of force majeure. That argument was unsuccessful given the fact that the court held that the term "strike" has a precise legal meaning and the trucker protest did not qualify as a triggering event.

It is incumbent upon counsel to attempt to draft force majeure clauses in a manner that will ensure that the triggering events are clear and unambiguous. And, as indicated earlier, out of an abundance of caution, they should be both broad and specific. The conundrum that counsel is in in this regard is well described as a "double edged" sword[39].

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[37] Nigro and Smith, *supra*, footnote 30.
[38] (1994), 113 D.L.R. (4th) 651 (Nfld. C.A.).

The irony is that if the wording of the provision is too broad, the Court may hold that the provision was vague and uncertain, whereas if the clause is very specific with a litany of specific events, the Court might hold that the enumerated event is not specific enough (as we saw with the "epidemic" and SARS).

When drafting force majeure clauses, one will have to take into account whether the triggering event was something that was foreseeable or not. For example, in December, 2013, the North American Ice Storm caused substantial damage to many business and residences in Central Canada and Central United States. Given the severity of the Ice Storm, cryoseisms (frost quakes) formed and were heard by a large number of people. Hydro One in Ontario reported over 600,000 power outages at the height of the storm.[40] By December 24, 69,800 customers throughout Toronto had no electricity. Over 1.5 million people and business were estimated to be effected by power outages. The same story was repeated throughout the regions affected by the storm. As a result, various utilities have subsequently issued warnings and outlined plans to deal with power outages.[41]

If you're dealing with a force majeure clause in Canada, the inclusion of common events such as snow storms or ice storms or the results thereof, may not protect your force majeure event if the scope and magnitude of the event is something that is arguably foreseeable. This may prompt counsel to attempt to draft their force majeure clauses so that they take into account the foreseeability issue by, in fact, contracting out of foreseeability altogether. The question as to whether that will be upheld by the courts as a matter of contract between private parties is an open one. I would suggest that counsel consider the foreseeability issue in the context of the circumstances.

The same type of issue may perhaps arise in other non-weather related circumstances. For example, let's assume for the moment that you have an embassy or a consulate in your building. It may well be that access to the building will be limited by ongoing protests and/or picketing. If it was foreseeable based upon past experience, it may not qualify as an event of force majeure that the courts will enforce.

One well-known U.S. author of a text on contract drafting has contracted out of the foreseeability issue in his force majeure precedent provision as follows:

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[39] "Weathering the Storm: The Force Majeure Clause", Daoust Vukovich LLP News Release, September 20, 2011.

[40] "December 2013 North American storm complex", *Wikipedia*, online: < https://en.wikipedia.org/wiki/December_2013_North_American_storm_complex#Canada >.

[41] Toronto Hydro Electric System, "About Outages", online: < http://www.torontohydro.com/sites/electricsystem/poweroutages/Pages/AboutOutages.aspx >.

> "Force Majeure" event means, with respect to a party, any event or circumstance, *regardless of whether it was foreseeable*, that was not caused by that party and prevents that party from complying with any of its obligations under this agreement . . . [in an effort to contract out of the foreseeability issue]. [emphasis added][42]

Contracting parties are free to agree to whatever circumstances they see fit over which a force majeure cause should operate: but to the extent they desire such circumstances to be something other than events beyond the reasonable control of either party that make the performance impossible, they must expressly and clearly reflect that desire in the contract.[43]

One has to be extremely careful in dealing with the issue as to whether a triggering event has occurred or not. In the case of *Wheeling Pittsburgh Steel Corp. v. Central West Va. Energy Co.*,[44] the court held that a party asserting force majeure "without a legal, factual basis" was ordered to pay punitive damages.

DURATION, MITIGATION AND GOOD FAITH

A well-drafted force majeure provision will include the definition of the duration of a force majeure event. According to the case law interpreting force majeure provisions, a non-performing party is not liable for damages resulting from its non-performance due to a force majeure event for so long as the force majeure event continues.[45] Of course, this may be a difficult endeavour in any circumstances given the fact that not only is it hard to define when a force majeure event begins, as earlier discussed, it is sometimes equally difficult to define when it has ended. Most force majeure clauses will define the duration of the force majeure event to continue for a period equivalent to the period of the resulting delay caused by the force majeure event. Some clauses will include provisions to the effect that after some reasonable time, the party that is not relying on a force majeure event, may be entitled to terminate. From a tenant's perspective, that would be an extremely important issue to deal with given the fact that it may well need to move its business to another premises from which to operate.

The issue relating to duration of a force majeure event is inextricably linked with the duty to mitigate a force majeure event. All force majeure clauses should include an express duty to mitigate on behalf of the party that is claiming a force majeure. In fact, even where the duty is not

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[42] Ken Adams, "My take on force majeure provisions" (February 10, 2011), online: < www.adamsdrafting.com/my-take-on-force-majeure-provisions/ > .

[43] Neudorf, *supra*, footnote 26, p. 340.

[44] 2007 WL 4959806 (W.Va. Cir. Ct. Brooke County).

[45] Stark, *supra*, footnote 21, p. 344.

express, the courts will likely imply such a duty to exist. This is especially so in light of the relatively recent ruling of the Supreme Court of Canada that establishes a general duty of the good faith in the performance of all contracts which will arguably and most assuredly include lease contracts and the duty to mitigate.[46] In this context, the duty of any party trying to rely on the declaration of a force majeure event in order to avoid performance under the lease, must ensure that its conduct will survive scrutiny based upon the overarching duty of good faith to perform contractual obligations honestly.

FORCE MAJEURE AND OTHER LEASE PROVISIONS

A force majeure event may arguably have a direct or indirect impact on numerous other lease provisions. For example, in the event that the landlord is tasked with building out the tenant's premises, the parties may well be affected if the landlord's contractors go on strike or suffer a supply chain shortage of materials which results in the tenant not being able to take occupancy of the premises as of the commencement date. In such a case, the landlord might tie the force majeure provision directly to the build out provisions in the lease. Similarly, a tenant who does not wish to commence paying rent if the premises aren't ready in time may attempt to negotiate a provision to the effect that the Commencement Date will not commence unless and until the premises that are being built out are substantially ready for occupancy. The damage and destruction clause in the lease should have direct ties to a force majeure event and should be drafted accordingly. Even the arbitration provisions in the lease may be linked to a force majeure event. For example, it was noted earlier in the paper that the parties may dispute the occurrence of a force majeure event or at the very least when it commences. The parties may fashion an arbitration provision which effectively allows for a "baseball" arbitration type provision to be incorporated such that the issue as to whether a force majeure event has occurred be dealt with by a single arbitrator who provides a final determination within 24 or 48 hours. Issues that arise relating to force majeure events may need a quick resolution or decision in order for the parties to move forward. The parties agree to be bound by that decision and if they wish to appeal they can abide by the Order under protest without prejudice to any Appeal. An example of a provision that might deal with this issue is as follows:

> The parties shall negotiate in good faith and attempt to resolve any dispute between the parties as to whether a Force Majeure Event has occurred, or as to whether a Force Majeure Event has prevented the non-performing party, in whole or in part, from performing any obligation or satisfying any

[46] *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 (S.C.C.).

> condition under this Agreement. If the parties are unable to resolve the dispute, they shall submit the dispute to arbitration, in which event the non-performing party has the burden of proof as to whether a force majeure event has occurred or as to whether the force majeure event has prevented performance.[47]

NOTICE PROVISION

It is of imperative in any force majeure provision to include concise language as to how and when the parties are to provide notice of a force majeure event that is being relied upon to trigger the clause. Often in force majeure situations, the parties may not be able to provide notice easily to one another given the fact that regular methods of communication may not be in operation and the parties may not be in the same premises as provided for in the general notice provisions in the lease. Alternative notice provisions should be addressed and in some cases it may be necessary to suggest that constructive notice be implied when a force majeure type event has occurred and is widely known or a state of emergency has been declared by some governmental authority. An example of a provision dealing with constructive notice might be as follows:

> In case of interruption of all methods of giving notice set forth in this Section, notice shall be deemed given on the second day of reasonably prominent news coverage of the force majeure event reasonably able to recognized as effecting the leased premises.[48]

A force majeure clause should include the requirement that the party relying on the force majeure event provide full particulars of the alleged force majeure in writing to the other party within a reasonable or short fixed time from the date the force majeure event is alleged to have occurred. The U.S. courts have held that the failure to give proper notice will be fatal to a defence based upon a force majeure.[49] The requirement to give notice provides the opposite party the ability to consider its alternatives for self-help or relocation and to monitor the efforts of the non-performing party to mitigate the efforts to resolve the force majeure event and its effects.

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47 Stark, *supra*, footnote 21, p. 354.

48 Hoppe and Wright, *supra*, footnote 28, p. 14.

49 *International Minerals and Chemical Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir., 1989) at p. 855; *Resources Investment Corp. v. Enron Corp.*, 669 F.Supp. 1038 (D. Colo., 1987), at pp. 1043-1044.

A NOVEL APPROACH TO FORCE MAJEURE EVENTS

One approach for landlords to take in drafting their force majeure clauses is to attempt to take control of the issue as to when a force majeure event has occurred and what flows from that is for the article to include a procedure whereby the landlord determines in good faith when the force majeure event occurs based upon advice from a professional. In particular, this approach is outlined in a draft "health emergency article" annexed as appendix "A" to a paper entitled *Pandemic Preparedness for Building Owners and Managers* prepared by the writer. The relevant portion states as follows:

> *Health Emergency:*
>
> [A] situation in which the landlord determines, based on advice from a medical professional, or a directive, bulletin, notice or other form of communication from a public health official, that Landlord Persons or tenant Persons are or may be exposed in or at the building to imminent danger from any diseases, viruses or biological or physical agents that may in any way be detrimental to human health . . .[50]

In this manner, the parties themselves can take charge of the determination of the commencement of a force majeure event and the procedures that will flow from it. The health emergency article at appendix "A" is made subject to the landlord acting reasonably and in good faith.

ALLOCATION OF RISK AND INSURANCE

As suggested above, force majeure clauses in leases are all about the allocation of risk between the landlord and the tenant. The landlord and tenant determine which party will bear the risk of a party's inability to perform because of a force majeure event. Both the landlord and the tenant must be alive to the insurance issues that flow form a force majeure event and it is critical that they contact their own insurers. Their own insurance coverage must cover off any possible force majeure event that may have a substantial effect on their ability to carry on business. Having said that, the balancing act between whose insurance should cover off which force majeure event is a tricky negotiable issue. A sensible approach should be to determine who is in the best position to manage the risk. For instance, the landlord is likely in the best position to purchase a terrorism insurance policy that would act as an umbrella policy over all the other buildings' coverages. The tenant would then be well-placed to suggest that since it is paying the landlord's insurance premiums as part of its operating costs, the tenant should also have the

[50] Harvey M. Haber, *Shopping Centre Leases*, 2nd ed. (Toronto: Carswell, 2008), at p. 109.

benefit of the terrorism policy. Without question, these insurance issues are complicated and best left to the landlord's and tenant's respective representatives to discuss with their respective insurance brokers who specialize in dealing with these issues. Landlords may find it prudent in these circumstances to ensure that tenants not only carry all risk liability policies but also have the appropriate business interruption insurance that will cover off the tenant's ability to pay rent during the force majeure event. It may be advisable for landlords to request that they be named insureds on any such business interruption policies as this will lessen the likelihood that other creditors who may be secured might attempt to scoop the proceeds of any insurance to pay the tenant's indebtedness to its creditors, including institutional creditors.

CONCLUSION

While the likelihood that force majeure events may occur is increasing, so too are the potential damages that may flow from any delay or suspension of tenants business operations that result therefrom. Both landlords and tenants must focus on the force majeure provision in their commercial lease and tailor it to the nature of business carried on with the tenant coupled with the nature and scope of force majeure events which are foreseeable relating to that business or the region in which the building is located. There is a balancing act in negotiating the provision in an attempt to ensure that the reasonable business risks and practical realities are addressed by the provision. The allocation of risk between the parties must also be tied into the insurability of the risks that can be managed by both the tenant and the landlord.

SCHEDULE A – SAMPLE FORCE MAJEURE CLAUSES*

An Interesting Baseball Stadium Lease Clause, But with No Notice and Diligence Concepts

"Force Majeure" means the occurrence of any of the following for the period of time, if any, that the performance of a Party's material obligations under this Lease is actually, materially, and reasonably delayed or prevented thereby: acts of God, lock-outs, acts of the public enemy, the confiscation or seizure by any government or public authority (excluding the stadium owner authority), insurrections, wars or war-like action (whether actual and pending or expected), arrests or other restraints of government (civil or military), blockades, embargoes, strikes, labour unrest or disputes, unavailability of labour or materials,

* These are from the articles cited in this paper.

epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, wash-outs, explosions, any delays occasioned by arbitration actions and proceedings under the Arbitration Procedures specified in this Lease, civil disturbance or disobedience, riot, sabotage, terrorism, threats of sabotage or terrorism or any other cause, whether of the kind herein enumerated or otherwise, that is not within the reasonable anticipation or control of the Party claiming the right to delay performance on account of such occurrence and which, in any event, is not a result of the intentional act, negligence or wilful misconduct of the Party claiming the right to delay performance on account of such occurrence. As to Landlord, actions of the Landlord shall not be considered actions of a Governmental Authority for purposes of Force Majeure. Notwithstanding the foregoing, "Force Majeure" shall not include: (i) any strikes or lock-outs or other labour disputes related to Tenant's trade organizations; or (ii) economic hardship.

A Modest Clause

This Lease and the obligation of Tenant to pay rent hereunder, and the obligation of each party to perform and comply with all of the other covenants and agreements hereunder on its part to be performed or complied with, shall not be affected or excused because of the other party's delay or failure to perform any of the covenants and agreements hereunder on the part of the other to be performed for reasons beyond the reasonable control of such other party which reasons are generally being encountered at the time in Comparable Buildings [defined somewhere in the Lease, may or may not be appropriate here], including, without limiting the generality of the foregoing, strikes, lockouts or labour problems, governmental pre-emption, laws, conditions of supply and demand which have been or shall be affected by war or other emergency or general market conditions or otherwise; provided, however, that this Section shall not apply to, and nothing contained in this Section shall affect or impair either party's rights and remedies pursuant to, Articles [fire, condemnation, cure, abatement] hereof, or any offset rights or rights to credit expressly given to Tenant in this Lease, and further, in no event shall any delay or failure of payment of rent or other money, whatever the cause, be either considered as a reason beyond a party's reasonable control or to any extent excused by operation of this Section.

A Broad Shopping Centre Clause without Notice[51]

Despite anything contained in the Lease, if either the Landlord or the Tenant is *bona fide* (that is, in good faith) delayed or hindered in or prevented from the performance of any term of the Lease by reason of any one or more of the following: strikes; walkouts; labour troubles; industrial disturbances; inability to procure materials or services; failures, fluctuations or non-availability of electric power, heat, light, ventilation or air-conditioning; governmental laws, regulations or controls; riots; civil commotions; insurrections; anarchy; acts of a foreign enemy; revolution; acts of sabotage; acts of terrorism, bio-terrorism, or cyber-terrorism; invasion; rebellions; military or usurped power; war or warlike operations; blockades; epidemics; washouts; nuclear and radiation activity or fallout; explosions; acts of God (including without limitation, earthquakes, blizzards, floods, hurricanes, lightning, storms and other natural disasters); damage caused by any aircraft; or any other reason whether of a similar nature or not which is not the fault of the party delayed in performing the work or doing the acts required under the terms of the Lease ("Force Majeure"), then performance of the obligation is excused for the period of the delay and the party so delayed is entitled to perform that obligation within the appropriate time period after the end of the period of delay. However, the Tenant should note that the provisions of this section do not operate to excuse the Tenant from the payment of Rent when due nor do they apply so as to extend the period of time for the Tenant to complete the Tenant's Work or to extend the Fixturing Period, if any.

A Clause with Diligence and Notice

Except as otherwise expressly set forth herein, in the event either party hereto shall be delayed or hindered in, or prevented from, the performance of any act or rendering any service required under this Lease, by reason of strikes, inability to procure materials, failure of power, restrictive governmental laws or regulations, riot, insurrection, war or other reasons of a similar or dissimilar nature which are beyond the reasonable control of the party (collectively referred to herein as "Event"), then the performance of any such act or rendering of any such service shall be excused for the period of the resulting delay and the period of the performance or rendering shall be extended for a period equivalent to the period of such delay. Notwithstanding the foregoing, this paragraph shall not be applied

[51] Excerpt taken from article 17 of Harvey Haber, *The Commercial Lease: A Practical Guide*, 5th ed. (Toronto: Canada Law Book, 2013), at pp. 405-406, reproduced by permission of Canada Law Book, a division of Thomson Reuters Canada Limited.

so as to excuse or delay payment of any monies by one party to the other, including rent.

Except in the instance described in a provision of this Lease expressly referring to this Section, nothing contained in this Section shall be applied so as to: (i) permit any delay or time extension due to shortage of funds; or (ii) excuse any nonpayment or delay in payment of rent; or (iii) limit either party's rights under right-to-cure-other's-default as if this Section were not contained in this Lease. It shall be a condition to either party's claim of the benefit of this Section that such party ("Claiming Party") notify the other in writing within 48 hours after the occurrence of the Event, and within 24 hours after request shall advise the other party in writing of its good faith estimate of the time which will be required until the delay is ended. Claiming Party shall have no liability to the other if the good faith estimated time of cure of the delay is not met but Claiming Party shall advise the other in writing whenever Claiming Party learns that any material additional time shall be required (and promptly upon request shall advise the other party of any latest estimated time of cure of the delay and the actions being taken to cure the delay).[52]

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1. Long-Form Provision

Section X.01 ***Force Majeure Event***

(a) *Definition.* As used in this Agreement, a "Force Majeure Event" means any act or event, whether foreseen or unforeseen, that meets all three of the following tests:

i. The act or event prevents a party (the "Nonperforming Party"), in whole or in part, from

(a) performing its obligations under this Agreement; or

(b) satisfying any conditions to the Performing Party's obligations under this Agreement.

ii. The act or event is beyond the reasonable control of and not the fault of the Nonperforming Party.

iii. The Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence.

(b) *Acts and Events Included in the Definition of Force Majeure Event.*

i. *Included Acts and Events.* In furtherance of the definition of Force Majeure Event and not in limitation of that definition, each of the following acts and events is deemed to meet the requirements of Section X.01(a) and to be a Force Majeure

[52] Hoppe and Wright, *supra*, footnote 28, p. 13.

Event: war, flood, lightning, drought, earthquake, fire, volcanic eruption, landslide, hurricane, cyclone, typhoon, tornado, explosion, civil disturbance, act of God or the public enemy, terrorist act, military action, epidemic, famine or plague, shipwreck, action of a court or public authority, or strike, work-to-rule action, go-slow or similar labor difficulty, each on an industry-wide, region-wide or nation-wide basis.

ii. *Other Included Acts and Events.* The list of Force Majeure Events set forth in subsection (i) is not exhaustive, and the principle of ejusdem generis is not to be applied in determining whether a particular act or event qualifies as a Force Majeure Event under Section X.01(a).

(c) *Exclusions.* Despite the provisions of Section X.01 (a) and (b), a Force Majeure Event does not include economic hardship, changes in market conditions, insufficiency of funds, unavailability of equipment or supplies or, except as specifically set forth in subsection (b), strikes, work-to-rule actions, go-slows or similar labour difficulties

ection X.02 Suspension of Performance. Subject to the provisions of ections X.03 and X.04, if a Force Majeure Event occurs, the Non-erforming Party is excused from

(a) whatever performance is prevented by the Force Majeure Event to the extent so prevented (a "Suspension of Performance"); and

(b) satisfying whatever conditions precedent to the Performing Party's obligations that cannot be satisfied, to the extent that they cannot be satisfied (a "Suspension of Performance")

Despite the previous sentence, no obligation by either the Performing Party or the Nonperforming Party to make any payment required under this Agreement is excused as a result of a Force Majeure Event.

Section X.03 Obligations of the Nonperforming Party

(a) *Written Reports*

i. *Upon Occurrence of a Force Majeure Event.* No later than two working days after becoming aware of the occurrence of a Force Majeure Event, the Nonperforming Party shall furnish the Performing Party with a written report describing

the particulars of the occurrence, including an estimate of its expected duration and probable impact on the performance of the Nonperforming Party's obligations under this Agreement.

ii. *During the Continuation of a Force Majeure Event.* During the continuation of the Force Majeure Event, the Nonperforming Party shall furnish timely, regular written reports, updating the information required by Section X.03(a)(i) and providing any other information that the Performing Party reasonably requests

(b) *Other Obligations.* During the continuation of the *Force Majeure Event*, the Nonperforming Party shall

i. exercise commercially reasonable efforts to mitigate or limit damages to the Performing Party;

ii. exercise commercially reasonable due diligence to overcome the *Force Majeure Event*;

iii. to the extent it is able, continue to perform its obligations under this Agreement; and

iv. cause the Suspension of Performance to be of no greater scope and no longer duration than the *Force Majeure Event* requires.

Section X.04 Conditions Precedent

(a) *Section X.03(a)(i) Covenant.* The Nonperforming Party's performance of the covenant set forth in Section X.03(a)(i) is a condition precedent to its initial Suspension of Performance. If the covenant is performed, the Suspension of Performance is deemed to have commenced on the date the Force Majeure Event occurred

(b) *Section X.03(a)(ii) and Section X.03(b) Covenants.* During the continuation of the Force Majeure Event, the Nonperforming Party's performance of the covenants set forth in Section X.03(a)(ii) and Section X.03(b) are conditions precedent to its continued Suspension of Performance.

Section X.05. Resumption of Performance. When the Nonperforming Party is able to

(a) resume performance of its obligations under this Agreement, or

(b) satisfy the conditions precedent to the Performing Party's obligations,

it shall immediately give the Performing Party written notice to that effect and shall resume performance under this Agreement no later than two working days after the notice is delivered.

Section X.06. Disputes. The parties shall negotiate in good faith and attempt to resolve any dispute between the parties as to whether a *Force Majeure* Event has occurred, or as to whether a *Force Majeure* Event has prevented the Nonperforming Party, in whole or in part, from performing any obligation or satisfying any condition under this Agreement. If the parties are unable to resolve the dispute, they shall submit the dispute to arbitration, in which event the burden of proof as to whether a *Force Majeure* Event has occurred or as to whether the *Force Majeure* Event has prevented performance is upon the Nonperforming Party.

Section X.07. Termination. If the Suspension of Performance continues for a period of more than twelve consecutive months as a result of a *Force Majeure* Event, either party is entitled to terminate this Agreement by giving a notice to the other party pursuant to the notice provisions of this Agreement.

Section X.08. Exclusive Remedy. The relief offered by this force majeure provision is the exclusive remedy available to the Nonperforming Party with respect to a Force Majeure Event, and the parties waive the protections of U.C.C. § 2-615 and the common law defenses of impossibility and impracticability with respect to the Force Majeure Events and any event or act that might be deemed a force majeure event under the common law.

1. Short-Form Provision

[Insert the following definitions into the definitions article.]

"Force Majeure Event" means any act or event, whether foreseen or unforeseen, that meets all three of the following tests:

(a) The act or event prevents a party (the "Nonperforming Party"), in whole or in part, from

i. performing its obligations under this Agreement; or

ii. satisfying any conditions to the Performing Party's obligations under this Agreement.

(b) The act or event is beyond the reasonable control of and not the fault of the Nonperforming Party.

(c) The Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence.

Despite the preceding definition of a Force Majeure Event, a Force Majeure Event excludes economic hardship, changes in market conditions or insufficiency of funds.

"Nonperforming Party" has the meaning assigned in the definition of *Force Majeure Event.*

"Performing Party" has the meaning assigned in the definition of *Force Majeure Event.*

The following are the subsections of the Force Majeure Event Section:

(a) *Suspension of Performance.* If a force Majeure Event occurs, the Nonperforming Party is excused from:

i. whatever performance is prevented by the *Force Majeure* Event to the extent prevented; and

ii. satisfying whatever conditions precedent to the Performing Party's obligations that cannot be satisfied, to the extent they cannot be satisfied.

Despite the preceding sentence, a *Force Majeure* Event does not excuse any obligation by either the Performing Party or the Nonperforming Party to make any payment required under this Agreement

(b) *Resumption of Performance.* When the Nonperforming party is able to

i. resume performance of its obligations under this Agreement, or

ii. satisfy the conditions precedent to the Performing Party's obligations,

it shall immediately give the Performing Party written notice to that effect and shall resume performance under this Agreement no later than two working days after the notice is delivered.

(c) Exclusive Remedy. The relief offered by this *Force Majeure* provision is the exclusive remedy available to the Non-performing Party with respect to a *Force Majeure* Event.

Health Emergency Article

1. In this article, the following definitions apply:

Landlord Person:

a human being that is an officer, director, employee or agent of the Landlord, of a management business employed by the Landlord, of

a contractor that does work, in connection with the Building or of supplier of services in connection with the Building.

Tenant Person:

a human being that is an officer, director, employee of any tenant or occupant of the Building, of a contractor that does work for any tenant or occupant of the Building, or of a supplier of services in connection with any areas or space suitable for use or occupation in the Building.

Health Emergency:

a situation in which the Landlord determines, based on advice from a medical professional, or a directive, bulletin, notice or other form of communication from a public health official, that Landlord Persons or Tenant Persons are or may be exposed in or at the Building to imminent danger from any diseases, viruses or other biological or physical agents that may in any way be detrimental to human health which include by way of example, SARS and Avian Flu (H5Nl).

2. If the Landlord, acting in good faith, determines that a Health Emergency

   (a) The Landlord may amend, supplement or otherwise enforce any existing health emergency rules or regulations in existence; may pass additional rules and regulations and may impose restrictions, to mitigate or minimize the effects of the Health Emergency by controlling access, to parts of the Building, imposing sanitization requirements, and implementing health precautions consistent with advice from medical experts or public health officials.

   (b) The Landlord will not be in default by reason of:

      i. anything it does pursuant to Section 2(a) above

      ii. by reason any decision it makes in good faith in response to the Health Emergency and will not be liable in contract, tort, or on any other basis of liability statutory or otherwise, by reason of any actions, omissions or failure to act in connection with or as the result of a Medical Emergency.

   (c) If the Landlord, due to a Health Emergency acting in good faith, determines that it needs stop suspend, reduce or restrict Building Services, in whole or in part including but not limited to janitorial

services, it will not be considered to be in default under this Lease.[53]

1.1 Events of Force Majeure

(a) Neither Seller nor Buyer shall be liable for any delay or failure in performance hereunder if and to the extent such delay or failure in performance is a result of Force Majeure, except for the performance of any payment obligation that has accrued prior to the Force Majeure event. The Party so excused shall be called the "Excused Party".

(b) "Force Majeure" shall mean any act, event or circumstance, whether of the kind described herein or otherwise, that is not reasonably within the control of, does not result from the negligence of, and would not have been avoided or overcome by the exercise of reasonable diligence by, the Party claiming Force Majeure, such Party having observed a standard of conduct that is consistent with the usual and customary standard of the relevant industry, and that prevents or delays in whole or in part such Party's performance of any one or more of its obligations under this Contract, and may include, without limitation, the following:

(i) fire, flood, atmospheric disturbance, lightning, storm, hurricane, cyclone, typhoon, tidal wave, tornado, earthquake, volcanic eruption, landslide, soil erosion, subsidence, washout, epidemic or other natural disaster;

(ii) acts of war (whether declared or undeclared), invasion, armed conflict, embargo, revolution, sabotage, terrorism or threat thereof, riot, civil war, blockade, insurrection, acts of public enemies or civil disturbances;

(iii) ionizing radiation or contamination, radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear waste from the combustion of nuclear, radioactive, toxic, explosive or other hazardous properties of any explosive assembly or nuclear component;

(iv) pressure waves caused by aircraft or other aerial devices traveling at sonic or supersonic speeds;

(v) strike, lockout or other industrial disturbances;

(vi) acts after the date hereof of a governmental entity, agency, nation, port or other authority having jurisdiction,

[53] Haber, *supra*, footnote 50, pp. 109-110.

including the issuance or promulgation of any court order, law, statute, ordinance, rule, regulation or directive, the effect of which would prevent, delay, or make unlawful a Party's performance hereunder, or would require such Party, in order to comply with said act, to take measures which are unreasonable in the circumstances;

(vii) expropriation, requisition, confiscation or nationalization, embargoes, export or import restrictions, or restrictions of production, rationing or allocation of same, whether imposed by law, decree or regulation by insistence, request or instructions of any governmental authority or organization owned or controlled by any government, or by any Person purporting to represent a governmental authority, to whose jurisdiction any of the Parties is subject, whether civil or military, legal or de facto, or that purports to act under any constitution, decree or act;

(viii) inability to obtain, or suspension, termination, adverse modification, interruption, or inability to renew, any servitude, right of way, easement, permit, license, consent, authorization, or approval of any governmental entity, agency, national, port or other local authority having or asserting jurisdiction;

(ix) breakdown or destruction of facilities or equipment, subject to Section 1.1(d)(i); or

(x) in the case of Buyer, events of the type described in clauses (i) through (ix) above affecting:

(A) the ability of [Specified Receiving Terminal] to receive, offload and store LNG, including governmental actions such as necessity for compliance with any court order, law, status, ordinance, regulation or policy having the effect of law promulgated by a governmental authority having jurisdiction, but only to the extent of the affected cargo;

(B) any pipeline facilities downstream of a [Specified Receiving Terminal] necessary to deliver LNG to commercial markets, including, [specified portion of pipeline system]; or

(C) the ability of a [Specified Tanker] to receive and transport LNG.

(c) Where an act, event or circumstance which primarily affects a third party or third parties prevents or delays a Party's performance hereunder, such act, event or circumstance shall constitute Force Majeure hereunder as to such Party only if it is of a kind or character that, if it had happened to a Party, would have come within the definition of Force Majeure under this Section 1.1.

(d) Notwithstanding the foregoing provisions of this Section 1.1, Force Majeure shall not include:

(i) the breakdown or failure of equipment or machinery operated by a Person to the extent caused by (A) normal wear and tear which should have been avoided by the exercise of reasonable care and diligence, (B) the failure to comply with the manufacturer's recommended maintenance and operating procedure, or (C) the non-availability at appropriate locations of standby equipment or spare parts in circumstances where reasonable prudence and foresight would have required that such equipment or spare parts be made available;

(ii) the non-availability or lack of funds or failure to pay money when due, except for failure to pay money caused by Force Majeure affecting all reasonable means of payment, in which event, on the cessation of such Force Majeure, the affected Party shall pay, in addition to the amounts due hereunder, interest on such amounts due at the Base Rate calculated from the due date to the date of payment;

(iii) the withdrawal, denial or expiration of or failure to obtain any approval or consent of any national or local governmental authority, agency or entity acting for or on behalf thereof, to the extent (A) the affected Person can apply for and obtain, maintain or extend or could have reasonably applied for and obtained, maintained or extended, any such approval or consent, or (B) caused by the affected Person's failure to observe the terms and conditions of any existing approval or consent or other requirement of law;

(iv) economic hardship, to include, without limitation, Seller's ability to sell LNG at a higher or more advantageous price than the price for LNG purchased under this Contract, or Buyer's ability to purchase LNG at a lower or more

advantageous price than the price for LNG purchased under this Contract; or

(v) loss or failure of natural gas reservoirs in the [specified area] and the deliverability associated therewith due to natural depletion or the absence of economically recoverable gas.

(e) Buyer shall have no obligation to seek alternative means of transportation, and Seller shall have no obligation to seek alternative supplies of LNG, in the event of Force Majeure.

1.2 Notice; Resumption of Normal Performance

(a) Immediately upon the occurrence of an event of Force Majeure that may delay or prevent the performance by the Excused Party of any of its obligations hereunder, the Excused Party shall give notice thereof (promptly confirmed in writing if originally given orally) to the other Party describing such event and stating the obligations the performance of which are, or are expected to be, delayed or prevented, and (either in the original or in supplemental notices) stating:

(i) its good faith estimate of the likely duration of the Force Majeure event and of the period during which performance may be suspended or reduced, including to the extent known or ascertainable, the estimated extent of such reduction in performance; and

(ii) the particulars of the program to be implemented and any corrective measures already undertaken to ensure full resumption of normal performance hereunder.

(b) In order to ensure resumption of normal performance of this Contract within the shortest practicable time, the Excused Party shall take all measures to this end which are reasonable in the circumstances, taking into account the consequences resulting from such event of Force Majeure. Prior to resumption of normal performance, the Parties shall continue to perform their obligations under this Contract to the extent not excused or prevented by such event of Force Majeure. Subject to Section 1.1(e) and Section 1.3, to the extent that the Party claiming Force Majeure fails to use commercially reasonable efforts to overcome or mitigate the effects of such events of Force Majeure, it shall not be excused for any delay or failure in performance that would have been avoided by using such commercially reasonable efforts.

(c) Upon request of the non-Excused Party given no sooner than the second Business Day after the Excused Party's notice of Force Majeure, the Excused Party shall forthwith use all reasonable efforts to give or procure access for representatives of the non-excused Party to examine the scene of the event which gave rise to the claim of Force Majeure, and such access shall be at the expense of the non-Excused Party.

1.3 Settlement of Industrial Disturbances

Settlement of strikes, lockouts or other industrial disturbances shall be entirely within the discretion of the Person experiencing such situation and nothing herein shall require such Person to settle industrial dispute by yielding to demands made on it when it considers such action inadvisable.

1.4 Seller's Rights Upon Buyer's Force Majeure

If Buyer has in effect a claim of Force Majeure and is rendered wholly or partially unable to accept deliveries of LNG under this Contract, Seller may enter into sales contracts with third persons for the quantity of LNG Buyer would have had the right, or been obligated, to take hereunder except for the relevant Force Majeure events. Upon resumption of Buyer's ability to perform under this Contract, Seller shall continue to be excused for failure to deliver LNG to Buyer to the extent resulting from Seller's obligations under such third-party contracts until such third-party contracts are required to be terminated in accordance with the following: If the estimated duration of Force Majeure, as stated in the notice provided by Buyer pursuant to Section 1.2(a)(i), is less than 180 days, Seller shall use reasonable efforts, but shall not be required, to terminate such sales prior to the end of the period stated in the notice if the actual period of Force Majeure ends prior to such date. In the event that the estimated duration of Force Majeure, as stated in the notice provided by Buyer pursuant to Section 1.2(a)(i), is greater than 180 days, Seller shall terminate such sales on no less than 90 days' notice from Buyer of the end of the period of Force Majeure, and shall use reasonable efforts, but shall not be required, to terminate such sales on such lesser notice as Buyer may provide. In the event that the actual period of Force Majeure exceeds one year, Seller shall use reasonable efforts, but shall not be required, to terminate such sales prior to the end of the period stated in the notice provided by Buyer pursuant to Section 1.2(a)(i) if the actual period of Force Majeure ends prior to the date specified in the latest notice given in the first year of Force Majeure.

1.5 Apportionment of Available Product

If an event of Force Majeure under this Contract affects the ability of the Manufacturing Facilities to produce or load LNG, any quantity of LNG that the Manufacturing Facilities are able to produce and load shall be allocated among Buyer and all other off-takers as follows: [*specify allocation method*].

1.6 Buyer's Rights upon Seller's Force Majeure

If Seller is rendered wholly or partially unable to make deliveries of LNG under this Contract as a result of an event of Force Majeure affecting Seller, Buyer may utilize its transportation and receiving facilities, wholly or partially, as the case may be, to receive LNG from other suppliers during such period of time that Seller's ability to make deliveries of LNG is affected by an event of Force Majeure. Upon resumption of Seller's ability to perform under this Contract, Buyer shall continue to be excused for failure to take delivery of LNG to the extent resulting from Buyer's obligations under third-party contracts until such third-party contracts are required to be terminated in accordance with the following: If the estimated duration of Force Majeure, as stated in the notice provided by Seller pursuant to Section 1.2(a)(i), is less than 180 days, Buyer shall use reasonable efforts, but shall not be required, to terminate such third-party contracts prior to the end of the period stated in the notice if the actual period of Force Majeure ends prior to such date. In the event that the estimated duration of Force Majeure, as stated in the notice provided by Seller pursuant to Section 1.2(a)(i), is greater than 180 days, Buyer shall terminate such third-party contracts on no less than 90 days' notice from Seller of the end of the period of Force Majeure, and shall use reasonable efforts, but shall not be required, to terminate such third-party contracts on such lesser notice as Seller may provide. In the event that the actual period of Force Majeure exceeds one year, Buyer shall use reasonable efforts, but shall not be required, to terminate such third-party contracts prior to the end of the period stated in the notice provided by Seller pursuant to Section 1.2(a)(i) if the actual period of Force Majeure ends prior to the date specified in the latest notice given in the first year of Force Majeure.

1.7 Termination for Extended Force Majeure

(a) If an event of Force Majeure lasts for more than [120] days, the non-Excused Party shall have the right to terminate this Contract upon 30 days notice; provided, however, if the Excused Party has used and continues to use all commercially reasonable efforts to

remedy, cure or mitigate the event of Force Majeure, subject to Section 1.7(b), the non-Excused Party's right to terminate this Contract shall be suspended for so long as the Excused Party continues to use commercially reasonable efforts to remedy, cure or mitigate the event of Force Majeure.

(b) If an event of Force Majeure lasts for more than [365] days, either Party shall have the right to terminate this Contract upon 30 days' notice so long as, in the case of a termination by the Excused Party, it has performed its obligation under Section 1.2(b).[54]

[54] Jay D. Kelley, "So What's Your Excuse? An Analysis of Force Majeure Claims" (2007), 2 Tex. J. Oil Gas & Energy L. 91, pp. 118-124.