

CONTENTS

<i>Foreword</i>	v
<i>Preface</i>	ix
<i>Contributors</i>	xi
<i>Table of Cases</i>	xxi
<i>Table of Legislation</i>	xxxvii

PART I—FORCE MAJEURE AND FRUSTRATION: INTRODUCTION AND INTERRELATIONSHIP

1. THE JUDICIAL CONSTRUCTION OF FORCE MAJEURE CLAUSES <i>William Swadling</i>	3
1. Introduction	3
2. What is <i>force majeure</i> ?	5
(a) <i>Force majeure</i> in French law	6
(b) <i>Force majeure</i> in English law	7
3. What is a <i>force majeure</i> clause?	9
4. Are <i>force majeure</i> clauses exclusion clauses?	10
(a) Canons of construction	14
(b) Burden of proof	17
5. Conclusion	18
2. FORCE MAJEURE IN FRENCH LAW <i>Barry Nicholas</i>	21
1. Introduction	21
2. Function of <i>force majeure</i>	21
3. Meaning of <i>force majeure</i>	23
(a) Irresistibility	24
(b) Unforeseeability	24
(c) Externality	24
(d) Impossibility	25
4. Can a strike constitute <i>force majeure</i> ?	25
5. Consequences of <i>force majeure</i>	26
6. Imprévision	28
7. Comparison with English law	29
3. FORCE MAJEURE AND FRUSTRATION—THEIR RELATIONSHIP AND A COMPARATIVE ASSESSMENT <i>Ewan McKendrick</i>	33
1. Introduction	33
2. The relationship between <i>force majeure</i> and frustration	34

CONTENTS

3. Express provision	34
4. Why draft a <i>force majeure</i> clause?	37
5. Frustration—a modern definition	37
(a) The basis of the doctrine of frustration	38
(b) Contexts and contortions—an excursus	39
(c) A doctrine with “very narrow limits”	42
(d) The consequences of frustration	44
(e) Self-induced frustration	46
(f) Frustration and fault	50
6. Conclusion	52

PART II—THE DRAFTING OF FORCE MAJEURE CLAUSES

4. DRAFTING OF FORCE MAJEURE CLAUSES—SOME GENERAL GUIDELINES <i>Michael Furmston</i>	57
1. Introduction	57
2. Definition of the event	59
3. Obligations to report	60
4. The effect of the event	61
5. Questions of adjudication	62
6. Hardship clauses	62
5. THE DETAILED DRAFTING OF A FORCE MAJEURE CLAUSE <i>Alan Berg</i>	63
1. Identifying the objectives	63
2. The requirement for clear words	65
(a) The demurrage cases	65
(b) Possible gaps in the ordinary <i>force majeure</i> clause	66
3. Main components of a <i>force majeure</i> clause	68
4. A statement of the <i>force majeure</i> events	68
(a) Burden of proof	68
(b) “Physical or legal impossibility”	71
(c) Negligence	72
(d) Defaults other than negligence	77
(e) Circumstances already existing at the date of the contract	77
(f) Foreseeability	79
(g) Anticipating a <i>force majeure</i> event	80
5. Detailed drafting points regarding the events in which the clause is capable of being brought into operation	81
(a) The specific events	81
Acts of authority	
(i) The relevant jurisdictions	82
(ii) International sanctions	85
(iii) Licences	85
(iv) Prerogative action, invalid action and public sector entities	86
(v) Action by a regime not considered a government	87
Strikes	
(i) What is a “strike”?	88

CONTENTS

(ii) The duty to take reasonable steps to settle	90
(iii) After-effects	90
(iv) Apprehension of a strike	91
(b) The general sweeper-up formula	91
(c) The <i>ejusdem generis</i> rule	92
6. Effect on a party's ability to perform the contract	94
7. The affected party's duties	97
8. Mechanism for bringing the clause into operation	99
(a) Mandatory or directory?	99
(b) Contents of <i>force majeure</i> notice	101
(c) Methods of serving a <i>force majeure</i> notice	102
(d) Time period for service of <i>force majeure</i> notice	102
9. The consequences of the clause applying	103
(a) Termination or suspension?	103
(b) Effect on liquidated damages	104
(c) Allocation of supplies	105
10. Adjustment of the contract	106
(a) Obligation to negotiate or obligation to use best endeavours to agree amendments	106
(b) Hardship clauses—the <i>Superior</i> case	110
(c) Adjustments to contract to be determined by an expert	113
11. Payment adjustments	114
(a) Unjust enrichment or adjustment of loss?	114
(b) Recovery of money paid	115
(c) Recovery for expenses incurred	115
(d) Accounting for benefits obtained	116
12. The mechanism for bringing the operation of the clause to an end	117
13. Excluding the doctrine of frustration	118

PART III—FRUSTRATION, FORCE MAJEURE AND SHIPPING LAW

6. FRUSTRATION AND SHIPPING LAW—OLD PROBLEMS, NEW CONTEXTS <i>M. N. Howard Q.C.</i>	123
1. Introduction	123
2. Frustration and freight	123
3. The Law Reform (Frustrated Contracts) Act 1943	127
4. Frustration by delay	129
7. FORCE MAJEURE PROVISIONS IN A SHIPBUILDING CONTEXT <i>Simon Curtis</i>	139
1. Introduction	139
2. The definition of <i>force majeure</i>	141
(a) “Acts of God”	141
(b) “Strikes, lockouts or other labour disturbances”	142
(c) “Labour shortage”	143
(d) “Explosions”	144
(e) “Shortage of materials, machinery or equipment . . . delays in delivery”	144

CONTENTS

(f) “Defects in materials, machinery or equipment which could not have been detected by the Builder using reasonable care”	145
(g) “Delays in the Builder’s other commitments which in turn delay construction of the Vessel”	145
(h) “Other causes or accidents beyond the control of the Builder, its subcontractors or suppliers whether or not indicated by the foregoing words”	146
3. The effect of <i>force majeure</i> events	148
4. The requirement of notice	149
5. Excessive delay	150
8. WAR CLAUSES IN TIME CHARTERPARTIES <i>Brian Davenport Q.C.</i>	153
1. The public international law view of “war”	154
2. The construction of time charterparty war cancellation clauses	155
3. When does a war start?	157
4. Is an invasion always a war?	158
5. Is there a touchstone?	159
6. Evidence of war	159
7. When is a state “involved” in a war?	160
8. When must notice of termination be given?	160
9. “Warlike operations”	160

PART IV—APPLYING THE PRINCIPLES: INDUSTRIAL ACTION AND BUILDING CONTRACTS

9. THE PRIVATE LAW EFFECTS OF INDUSTRIAL ACTION <i>Norman Palmer</i>	165
1. Introduction	165
2. Exculpatory terms	168
3. When performance is disrupted by external industrial action (that is, by action not among the contractor’s own personnel)	178
(a) Frustration	178
(b) Limitation or qualification of the obligation	179
4. When performance is disrupted by internal industrial action (that is, by action among the contractor’s own personnel)	182
(a) Qualified obligation	183
(b) Frustration	185
5. Vicarious liability for industrial action	189
6. Discretionary remedies	194
10. FRUSTRATION AND FORCE MAJEURE IN BUILDING CONTRACTS <i>J.A. McInnis</i>	195
1. Introduction	195
2. The textbook view	196
3. Into the age of excuse	196
(a) Destruction of the subject matter of the contract	198
(b) Delay	199
(c) Subsequent legal changes and supervening illegality	200
(d) Ground conditions	202

CONTENTS

(e) Strikes	202
(f) Weather	203
(g) Inflation, price and cost increases	205
4. The role of foreseeability	206
5. A re-evaluation	210
(a) A comparative perspective	210
(b) The United States	211
(c) English law—time for judicial adjustment of contracts	213
6. <i>Force majeure</i>	214
7. Standard form building contracts— <i>force majeure</i> and frustration	216
8. Conclusion	217

PART V—FRUSTRATION, REMEDIES AND RE-APPRAISAL

11. THE CONSEQUENCES OF FRUSTRATION—THE LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943 <i>Ewan McKendrick</i>	223
1. Introduction	223
2. The common law prior to the 1943 Act	224
3. The scope of the 1943 Act	226
4. The purpose behind the 1943 Act	228
5. The recovery of money: section 1(2)	229
(a) Sums paid or payable “before the time of discharge”	229
(b) The proviso	230
(c) Does the payee have a cause of action?	233
6. Recovery in respect of non-monetary benefits: section 1(3)	234
(a) Identification of the benefit	235
(b) Valuing the benefit	237
(c) The just sum	237
(d) No discharge of obligations prior to date of discharge	238
(e) Obligations performed after the date of discharge	239
7. Severability: section 2(4)	240
8. Contrary intention: section 2(3)	240
9. Prior breach by the plaintiff	242
10. Excepted cases	242
11. The future	243
12. FRUSTRATION AND ESTOPPEL <i>The Hon. Andrew Rogers Q.C.</i>	245

PART VI—FRUSTRATION AND FORCE MAJEURE—INTERNATIONAL AND COMPARATIVE ASPECTS

13. FORCE MAJEURE AND FRUSTRATION UNDER INTERNATIONAL SALES CONTRACTS <i>Aubrey Diamond</i>	257
1. Frustration	257
2. Sale of goods	257
3. Specific goods	258

CONTENTS

4. The goods perish	259
5. Avoidance	261
6. Effect of frustration	261
7. Problems with frustration	262
8. Force majeure	262
9. Unfair terms?	264
10. Vienna Convention	265
11. Conclusion	265
14. EXEMPTIONS AND IMPOSSIBILITY UNDER THE VIENNA CONVENTION	
<i>A.H. Hudson</i>	267
1. Exclusion and modification of Article 79	268
2. Freedom from formalities	269
3. Contracts not within the Convention	269
4. General principles of interpretation	269
5. Usage and custom	272
6. Passing of risk	273
7. Preparatory questions	274
8. Article 79	274
9. Impediment v. Circumstances	275
10. Impossibility v. Frustration	276
11. Operation of the impediment	278
12. Failure of a third party	279
13. Temporary interruption	280
14. Notice	281
15. Remedies	282
(a) Remedies for buyer	283
(b) Remedies for seller	283
16. Default in co-operation	285
17. Conclusions	285
15. THE 1973 MISSISSIPPI FLOODS: "FORCE MAJEURE" AND EXPORT	
PROHIBITION <i>Michael Bridge</i>	287
1. Introduction	287
2. The events of 1973	290
3. <i>Force majeure</i>	291
4. Prohibition of export	297
5. Conclusion	302
16. THE APPLICATION OF COMMERCIAL IMPRACTICABILITY UNDER ARTICLE	
2-615 OF THE UNIFORM COMMERCIAL CODE <i>Sukhnam Digwa-Singh</i>	305
1. Introduction	305
2. The conditions of article 2-615 of the Uniform Commercial Code	306
The role and function of article 2-615	308
3. Article 2-615 and related principles of legal excuse	310
Frustration of purpose	312
4. The scope of commercial impracticability	312
(a) Commercial impracticability and commercial hardship	313

CONTENTS

(b) Article 2–615 and increased costs in performance	314
(c) What constitutes excessive cost and excessive hardship?	315
5. A comparison between US doctrine of impracticability and the English doctrine of frustration	324
A comparative case analysis	325
6. Article 2–615: the method of performance and failure or unavailability of the source of supply	327
7. Conclusions	329
17. FORCE MAJEURE IN EU LAW <i>Michael Parker</i>	333
1. The domestic position in the UK	333
2. The importance of <i>force majeure</i> in EU law	334
3. The differing perspectives of exporters, bankers and the insurance industry	335
(a) The exporter	335
(b) The banker	336
(c) The insurer/insurance broker	336
4. Definition	336
5. European Commission Notice C.(88) 1696	340
6. Case examples	341
(a) <i>Union Française des Céréales v. Hauptzollamt Hamburg-Jonas</i>	341
(b) <i>Butter-und-Eier-Zentrale Nordmark v. Hauptzollamt Hamburg-Jonas</i>	341
(c) <i>De Jong Verenigde v. VIB</i>	343
(d) <i>E.D. & F. Man (Sugar) Limited v. Intervention Board for Agricultural Produce</i>	343
(e) <i>Anthony McNicholl v. Minister for Agriculture</i>	343
(f) <i>Greece v. Inter-Kom</i>	344
(g) <i>Belgium v. Nationaale Instituut voor Landbouwkrediet</i>	344
(h) <i>Buitoni v. Forma</i>	344
(i) <i>Denkavit France v. Fonds d'Orientation</i>	344
(j) <i>Molkerei Zentrale v. BALM</i>	345
(k) <i>Ministerio delle Finanze v. Esercizio Magazzini Generali S.p.A.</i>	345
(l) <i>Erpelding v. Secrétaire d'État à l'Agriculture et à la Viticulture</i>	345
(m) <i>Bayer AG v. EC Commission</i>	345
(n) <i>R. v. IBAP ex parte Tara Meat Packers Limited</i>	346
(o) <i>Organisationen Danske Slagterier pro Jydske Andelsslægteriers Konservesfabrik A.m.b.A. (JAKA) ("ODS") v. Landbrugsministeriet (Ministry of Agriculture)</i>	347
7. Application of <i>force majeure</i> by analogy or implication	347
8. Two-way process	348
9. <i>Force majeure</i> —a shield and not a sword	350
10. Excusable error	351
11. Ways in which differing interests can protect themselves	352
<i>Index</i>	355