

SO WHAT'S YOUR EXCUSE? AN ANALYSIS OF *FORCE MAJEURE* CLAIMS

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I. INTRODUCTION

It is well settled in the common law that if a party to a contract does not perform its obligations under the contract, the other party may seek damages or another appropriate remedy. However, there are exceptions to this rule, and it is possible that a party may be excused from performance under certain circumstances. Common law doctrines that may excuse performance include the doctrine of impossibility of performance and the more recent doctrine of commercial impracticability. In cases involving sales of goods, Section 2-615 (Section 2-615) of the Uniform Commercial Code (U.C.C.) provides an excuse under certain circumstances similar to the doctrine of commercial impracticability.

In addition to these common law and statutory excuses, and in large part due to their limitations, contracting parties often include a contractual provision, commonly referred to as a *force majeure* clause, which excuses a party from performance upon the occurrence of certain events or circumstances. However, a *force majeure* clause does not necessarily supplant the common law and statutory exceptions. In a number of jurisdictions, courts regard the case law addressing the common law and statutory exceptions as establishing the default rules, which may then be changed by a *force majeure* clause. Indeed, in many cases, a party may assert both a *force majeure* clause and one of these common law or statutory rules as a defense to performance. As a result, a court interpreting a *force majeure* clause may, in certain circumstances, impose requirements similar to those applicable to the common law and statutory excuses, even if a literal reading of the clause might lead to a different interpretation. For example, a court may require that the event was unforeseeable at the time of contracting and beyond the reasonable control of the party claiming excuse (herein, the “nonperforming party”).

These types of issues come up frequently in the energy sector, particularly when deliverability of supplies of oil and gas is interrupted. The parties must consider not only whether a particular event excuses performance under a particular contract, but also the impact of such nonperformance on other contractual obligations.

This paper is divided into three parts. In the first part, we will examine the common law and statutory doctrines of impossibility of performance,

commercial impracticability and Section 2-615.¹ Next, we will review case law addressing *force majeure* clauses.² Finally, we will review certain issues that a party may face when a *force majeure* event excuses performance under one contract in a series of related contracts, as well as a proposed form of *force majeure* clause.³

II. COMMON LAW AND STATUTORY DOCTRINES

Much of the jurisprudence surrounding the interpretation of *force majeure* clauses is rooted in the cases addressing the doctrines of impossibility and commercial impracticability (including Section 2-615 of the U.C.C.). More importantly, these doctrines often set the default rules around which the parties to a contract may bargain for more or less protection. Accordingly, in order to understand the limitations of a *force majeure* clause, we will first examine some of the limitations found in the law related to these common law and statutory excuses for performance.

A. Impossibility of Performance

The doctrine of impossibility of performance was first recognized as an excuse for a party's failure to perform in the late nineteenth century.⁴ Traditionally, courts have applied this doctrine narrowly due to a judicial recognition that the purpose of contract law is to allocate risks and that performance should only be excused in extreme cases.⁵ In the words of one court, "impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."⁶ Financial difficulty or economic hardship, even to the extent of insolvency, generally does not excuse performance.⁷

Over time, most courts have recognized that the defense of impossibility is too harsh in its requirement that performance be absolutely impossible and have instead moved toward a standard of commercial impracticability.⁸

1. See *infra* notes 4-45 and accompanying text.

2. See *infra* notes 46-142 and accompanying text.

3. See *infra* notes 143-155 and accompanying text.

4. See *Kel Kim Corp. v. Cent. Mkts, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987); JOHN D. CALAMARI & JOSSEPH M. PERILLO, *CONTRACTS* § 13-2, at 479 (2d ed. 1977) [hereinafter CALAMARI & PERILLO].

5. *Kel Kim*, 519 N.E.2d at 296.

6. *Id.*; see *United States v. Winstar Corp.*, 518 U.S. 839, 905-06 (1996); 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968).

7. 407 E. 61st Garage, 244 N.E.2d at 41.

8. CALAMARI & PERILLO, § 13-1, at 478.

B. Commercial Impracticability and U.C.C. § 2-615

Even though many courts continue to refer to the doctrine of impossibility, in most jurisdictions the test has evolved into one of commercial impracticability.⁹ This standard developed as courts balanced the concepts of certainty of contract against the commercial senselessness of requiring performance in certain circumstances.¹⁰ In *Transatlantic Fin. Corp. v. United States*, the court noted that performance is “impossible” in legal contemplation when it is not practicable, and performance is impracticable when it can only be done at an excessive and unreasonable cost.¹¹

A court will consider three factors in evaluating a defense of commercial impracticability:

1. Did an unexpected event occur? In determining whether an unexpected event has occurred, courts may consider what is usual and customary in the industry.¹² Where the event in question is foreseeable, the test for impracticability of performance should be applied in stricter terms.¹³
2. Was the risk of this unexpected event allocated, either by agreement or custom? Allocation of the risk to a party may be expressed in or implied from the agreement, as well as surrounding circumstances, customs, and usages of trade.¹⁴
3. Did the event make performance impracticable? This question focuses on cost, and, as noted above, the test used by the *Transatlantic* court was whether performance can only be done at an excessive and unreasonable cost.¹⁵

While the *Transatlantic* court treated foreseeability as a factor to be weighed, the fact that a particular contingency was foreseeable was not dispositive.¹⁶ In contrast, many courts impose an outright requirement that the event in question was unforeseeable at the time the parties entered into the contract.¹⁷ Where unforeseeability is a requirement, the relevant inquiry has been described by one court as whether the contingency in question was so unusual or unforeseen, and the consequences so

9. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

10. *Id.*

11. *Id.*

12. *Id.* at 316.

13. *See id.* at 319.

14. *Id.* at 317.

15. *Id.* at 315.

16. *See Transatlantic*, 363 F.2d at 318-19.

17. *See Waldinger Corp. v. CRS Group Eng'rs Inc.*, 775 F.2d 781, 786 (7th Cir. 1985); *Bende & Sons, Inc. v. Crown Recreation, Inc., Kiffe Prods. Div.*, 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983).

severe, that to require performance by the promisor would grant the promisee an advantage he did not bargain for.¹⁸

Sellers of goods can have their nonperformance excused under Section 2-615 of the U.C.C. provided they meet certain criteria.¹⁹ These criteria closely follow the common law doctrine of commercial impracticability. Section 2-615 provides that:

[D]elay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . .²⁰

In summary, this test has three elements: (1) a contingency has occurred, (2) the contingency has made performance impracticable, and (3) the non-occurrence of that contingency was a basic assumption upon which the contract was made.²¹ Note that this test is virtually identical to the test used by many courts for the common law doctrine of commercial impracticability.²²

Assuming a seller can meet the standard described above, availability of the Section 2-615 excuse is subject to the additional conditions that (a) the seller has not assumed a greater obligation, (b) where the relevant event affects only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers, and (c) the seller must notify the buyer that there will be delay or non-delivery and, when allocation is required, of the estimated allocation to the buyer.²³ Note that while Section 2-615 is limited to sellers, at least one court has applied the standards of Section 2-615 to a buyer.²⁴

18. See *Waldinger*, 775 F.2d at 786.

19. The full text of Section 2-615 is as follows:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer. U.C.C. § 2-615 (2005).

20. UCC § 2-615(a) (2005).

21. *Waldinger*, 775 F.2d at 786.

22. See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

23. *Id.*

24. *Nora Springs Coop. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976).

1. Impracticability and Foreseeability

There is no guidance in the U.C.C. itself as to what constitutes “impracticability” or how a court should determine whether the non-occurrence of a contingency was a “basic assumption” of the contract. Thus, parties are forced to look to sources beyond the statute for guidance, such as the Official Comments to the U.C.C. and the common law.²⁵ In general, the test for impracticability under Section 2-615 is virtually the same as the one used for the common law doctrine of commercial impracticability.²⁶

The foreseeability element is used to probe the “basic assumption” requirement, and the reasoning courts employ is essentially an “assumption of risk” argument.²⁷ For example, consider the *Bende* case, in which a seller of combat boots destroyed in a train derailment sought relief under Section 2-615.²⁸ In *Bende*, the district court stated that the defendant must demonstrate either that “the contingency that made performance impracticable was not foreseeable at the time of contracting or the contract contains specific, exculpatory language excusing non-performance under certain circumstances.”²⁹ The court further stated:

[The] foreseeability requirement does not entail contemplation of a specific contingency; rather, it is sufficient that the contingency that eventually occurred could have been foreseen as a real possibility that would affect performance. (citation omitted) Although it does not appear that Bende and Kiffe ever contemplated a train derailment . . . common sense dictates that they could easily have foreseen such an occurrence. . . . Inasmuch as I find that the derailment was not unforeseeable, there is no excuse for non-performance . . .³⁰

Likewise, the *Cliffstar* court phrased its interpretation of the basic assumption doctrine in the following words:

The question . . . hinges on whether the [contingency] was foreseeable at the time the contract was made. [citation omitted] “If a contingency is foreseeable, it and its consequences are taken outside the scope of U.C.C. § 2-615, because the party disadvantaged by fruition

25. See, e.g., *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 990 (5th Cir. 1976) (discussing U.C.C. § 2-615 cmt. 8 (2005)); *Bende & Sons, Inc. v. Crown Recreation, Inc., Kiffe Prods. Div.*, 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983) (“[Section 2-615] reflects the common law standard”); U.C.C. § 2-615 cmt. 4 (2005) (clarifying that increased cost alone does not constitute an excuse except where it has been caused by an unforeseen contingency that alters the nature of performance).

26. See *E. Air Lines*, 532 F.2d at 991; *Transatlantic*, 363 F.2d at 315; *Mishara Constr. Co., Inc. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367 (Mass. 1974); *Cliffstar Corp. v. Riverbend Prods., Inc.*, 750 F. Supp. 81, 84 (W.D.N.Y. 1990).

27. See *Waldinger Corp. v. CRS Group Eng'rs Inc.*, 775 F.2d 781, 786 (7th Cir. 1985).

28. *Bende*, 548 F. Supp. at 1018.

29. *Id.* at 1022.

30. *Id.*

of the contingency might have protected himself in his contract.” [citation omitted] However, non-foreseeability is not an absolute requirement. ‘After all, as Williston has said, practically any occurrence can be foreseen but whether the foreseeability is sufficient to render unacceptable the defense of impossibility is ‘one of degree.’”³¹

These passages from *Bende* and *Cliffstar* demonstrate that courts have considerable flexibility in applying the foreseeability test. Based on the reasoning of *Bende*, almost any contingency is foreseeable and, absent an express provision, no excuse is available for the occurrence of a foreseeable contingency. In contrast, following the reasoning of *Cliffstar*, a court could conclude that a contingency was foreseeable yet still allow an excuse under Section 2-615, either because the degree of foreseeability was not sufficient to render the defense unacceptable or because the occurrence of the contingency has made the performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.

In determining whether the seller has assumed a greater obligation, a court may review the express terms of the contract, as well as usage of trade or the like, discussed further in Section III-B. Usages of Trade. The comments to Section 2-615 go on to say that the exemptions of Section 2-615 do not apply when the contingency in question is “sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances.”³² Some have argued that Section 2-615 sets a minimum beyond which the parties are not allowed to contract.³³ This approach has been rejected in the Fifth Circuit.³⁴

2. Allocation of Available Supplies

As noted above, in order to avail itself of Section 2-615, the seller must notify the buyer that there will be delay or non-delivery and, when allocation is required, of the estimated allocation to the buyer.³⁵ There are no bright lines as to the method of allocating production among customers, and the seller is allowed to allocate in any manner which is “fair and rea-

31. *Cliffstar*, 750 F. Supp. at 84.

32. See U.C.C. § 2-615, cmt. 8 (2005).

33. See *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 19 (5th Cir. 1990) (quoting from *Hawland, THE ENERGY CRISIS AND § 2.615 OF THE UNIFORM COMMERCIAL CODE*, 79 Com. L.J. 75, 79 (1974)).

34. *PPG*, 919 F.2d at 19; *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976).

35. U.C.C. § 2-615(c) (2005).

sonable.”³⁶ The seller may include regular customers not then under contract as well as his own requirements for further manufacture.³⁷ The comments indicate that the section provides the seller with “every reasonable business leeway” with one exception.³⁸ The exception pertains to the allocation of supplies to spot contract customers where prices have risen.³⁹ In this case, the seller must take extra care in making allocations and, in case of doubt, contract customers should be favored.⁴⁰

A strict, pro-rata allocation among customers is not necessarily required, though a seller’s position is strongest if it uses an objective standard such as a ratable distribution among customers, perhaps based upon prior purchasing practices.⁴¹ In *Terry v. Atl. Richfield Co.*, a gasoline seller’s allocation method was considered fair and reasonable when each of its customers received an allocation based on a fixed percentage of their orders from the corresponding months in the preceding year.⁴² The *Terry* court indicated that “fair and reasonable” was to be judged as among the customers as a whole, and not as to whether an allocation scheme was fair and reasonable as to any particular customer.⁴³ At the other extreme, another court stated that an allocation method that fulfilled one-third of the needs of a third party customer but fulfilled 100 percent of the needs of an entity affiliated with the seller was clearly not fair and reasonable.⁴⁴

III. FORCE MAJEURE CLAUSES

The relief available under a *force majeure* clause depends in large part upon the precise wording of the clause in question.⁴⁵ While there is by no means a standard definition of *force majeure*, a typical definition will list specific events that constitute *force majeure*, usually followed by a generic or “catch-all” phrase such as “other events beyond the reasonable control of the parties.” The amount of detail included in the specific list of events constituting *force majeure* is one of the most important considerations in drafting a *force majeure* clause because reliance on a catch-all phrase is generally more difficult and in some cases impossible. As noted by one court, “ordinarily, only if the *force majeure* clause specifically includes the

36. U.C.C. § 2-615(b) (2005).

37. *Id.*

38. U.C.C. § 2-615, cmt. 11 (2005).

39. *Id.*

40. *Id.*

41. U.C.C. § 2-615, cmt. 11 (2005).

42. *Terry v. Atl. Richfield Co.*, 140 Cal. Rptr. 510, 514 (Cal. Ct. App. 1977).

43. *Id.*

44. *Chemtron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 257 (N.D. Ill. 1974).

45. *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App. Amarillo 1998, pet. denied); see also *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003); *R&B Falcon Drilling Co. v. Am. Exploration Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2000).

event that actually prevents a party's performance will that party be excused."⁴⁶ Texas courts have taken the approach that, in interpreting *force majeure* clauses, the actual terms of the clause are controlling, and only when those terms are vague will the courts turn to common law to fill in the gaps.⁴⁷

In interpreting a *force majeure* clause, courts may consider various rules of construction, such as usage of trade and *ejusdem generis*, discussed below, which may result in the imposition of requirements not found in the express wording of the *force majeure* clause. For example, the court may require that the event was unforeseeable at the time the contract was made, and that the event was beyond the reasonable control of the parties.

A. *Ejusdem Generis*

As previously noted, the precise wording of *force majeure* clauses often varies in important dimensions from contract to contract. One subtle distinction, however, involves the effect of a list of specific events of *force majeure* on the generic definition. By using the words "including, without limitation" rather than merely "including," the parties can limit the application of a doctrine known as *ejusdem generis*, under which a court, when reading a generic clause and a specific clause together, would exclude events dissimilar to those explicitly listed from the scope of the generic clause.⁴⁸

To illustrate how this doctrine might apply to different wording, consider the following example of a *force majeure* definition:

"*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 the Party claiming *force majeure*, that prevents or delays in whole or in part such Party's performance of any one or more of its obligations under this Contract, including, **(but not limited to,)** any fire, flood, storm, hurricane, tornado, earthquake or other natural disaster; acts of war (whether declared or undeclared), invasion, sabotage, terrorism or threat thereof, riot, civil war, blockade, insurrection, acts of public enemies, or civil disturbances; strike,

46. *Kel Kim Corp. v. Cent. Mkts, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987); see *Bende & Sons, Inc. v. Crown Recreation, Inc., Kiffe Prods. Div.*, 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983); see also *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 747 (Iowa 1976); *United States v. Panhandle E. Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988) (buyer's obligation to purchase liquefied natural gas was not excused by economic hardship when this was not listed as an event of *force majeure*).

47. See *Sun Operating*, 984 S.W.2d at 283; see also *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ); *Tex. City Ref. v. Conoco, Inc.*, 767 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

48. *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988-89 (5th Cir. 1976); see *Kel Kim*, 519 N.E.2d at 296.

lockout, or other industrial disturbances.

Applying the doctrine of *ejusdem generis*, the general or “catch-all” definition at the beginning would be limited to the specifically listed events if the words “but not limited to,” were removed from the definition.

Another example of the application of this doctrine is found in the *Maralex* case.⁴⁹ At issue in this case was whether a *force majeure* clause contained in an oil and gas lease excused the lessee’s failure to produce, which would otherwise result in termination of the lease.⁵⁰ The lessee asserted that the failure to produce was the result of excess pressure in the gas purchaser’s pipeline. The *force majeure* clause in question provided that the lease would not terminate if production was “prevented by an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the reasonable control of the parties.”⁵¹ The lessee sought to rely on the catch-all clause as a basis for excuse.⁵² The court noted that the specifically listed events were all external factors and therefore the catch-all clause could only be relied upon if the event that prevented production was also an external event.⁵³ The court based this on the premise that where general words follow a list of specific items the general words will be construed as applying only to items of the same kind or class as those specifically mentioned.⁵⁴ The court went on to state that while excess pressure in the gas purchaser’s pipeline would be considered an external event beyond the lessee’s control, insufficient pressure within the well would not be considered external.⁵⁵ As the lessee had presented no evidence of the excess pipeline pressure, and had conceded elsewhere that it takes time for well pressure to build, the lower court had properly granted summary judgment.⁵⁶

B. Usage of Trade

In interpreting the terms of a contract, a court may consider usage of trade and the related concepts of course of dealing and course of performance.⁵⁷ For transactions involving a sale of goods, these concepts are

49. *Maralex*, 76 P.3d at 636.

50. *Id.* at 629.

51. *Id.* at 636.

52. *Id.*

53. *Id.*

54. *Id.*; see also *R&B Falcon Drilling Co. v. Am. Exploration Co.*, 154 F. Supp. 2d 969, 974 (S.D. Texas 2001) (seabed anomaly was dissimilar to specifically listed events and therefore was not captured by the phrase “any act or cause . . . reasonably beyond the control” of the party claiming *force majeure*).

55. *Maralex*, 76 P.3d at 637.

56. *Id.*

57. See *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988-89 (5th Cir. 1976); *Chronister Oil Co. v. Elleron Chem. Corp.*, 1986 WL 13445, at *2-4 (S.D. Tex. Nov. 21, 1986)

defined in Section 1-303 of the U.C.C. Usage of trade is any practice or method that is regularly observed in particular business to the point that there is a justified expectation that it will be observed for a particular transaction.⁵⁸ The existence of a usage of trade is a question of fact, unless it is established in a trade code or similar record, in which case it is a question of law.⁵⁹ Course of dealing focuses on the conduct of the parties in prior transactions that establishes a common basis of understanding for interpreting conduct in subsequent transactions.⁶⁰ Course of performance arises when a contract involves repeated occasions for performance and a party accepts a particular performance without objection.⁶¹

Where reasonable, the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed as consistent with each other.⁶² However, failure to object to a particular claim of *force majeure* not supported by the express terms of a contract may create a course of performance that precludes a subsequent objection to a similar *force majeure* claim.⁶³ Where the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade are inconsistent with each other, construction is based on the following priority: first, express terms; second, course of performance; third, course of dealing; and fourth, usage of trade.⁶⁴

C. Foreseeability

The requirement that an event be unforeseeable at the time the contract was made is a remnant of the common law doctrines of impossibility of performance and commercial impracticability.⁶⁵ As a general rule, this requirement only applies when events are not specifically listed in the clause, and the nonperforming party is relying on a catch-all clause (e.g., other events beyond a party's reasonable control).⁶⁶

(mem.); Tex. City Ref., Inc. v. Conoco, Inc., 767 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 316 (D.C. Cir. 1966).

58. U.C.C. § 1-303(c) (2005).

59. *Id.*

60. U.C.C. § 1-303(b) (2005).

61. U.C.C. § 1-303(a) (2005).

62. U.C.C. § 1-303(e) (2005).

63. *See* U.C.C. § 1-303(f) (2005).

64. U.C.C. § 1-303(e) (2005).

65. *See supra* notes 6-35 and accompanying text.

66. *See E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 990 (5th Cir. 1976); *see also* PPG Indus., Inc. v. Shell Oil Co., 919 F.2d 17, 19 (5th Cir. 1990); Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (unforeseeability requirement did not apply to acts of governmental bodies or agencies when the *force majeure* clause specifically listed this type of event); Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 720-721 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); Valero Transmission Co. v. Mitchell Energy Corp., 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no writ) (unforeseeability re-

The Third Circuit adopted a different rule in *Gulf Oil Corp. v. FERC*, where the court stated that Gulf (the nonperforming party) had to prove that the alleged *force majeure* event was unforeseeable even though the event was specifically listed in the *force majeure* clause.⁶⁷ In that case, the Third Circuit stated that “[i]t is not enough for Gulf to allege that because the mechanical repairs were listed in the contract, they were *force majeure* events.”⁶⁸ The court required that Gulf also prove that the mechanical repairs were unforeseeable and infrequent.⁶⁹ The rule cited in *Gulf Oil* seems unduly restrictive, since a specifically listed item is by definition foreseeable. However, it is worth noting that the mechanical repairs that formed the basis of the claim of *force majeure* occurred on a regular basis, and the fact that Gulf Oil could have anticipated these problems and taken steps to prevent them was a significant factor in the court’s decision.⁷⁰ The Fifth Circuit, in *Eastern Air Lines v. McDonnell Douglas Corp.*, disagreed with the Third Circuit and stated that when the parties have specified certain *force majeure* events in the contract, the non-performing party does not also have to prove that the event was unforeseeable.⁷¹

Texas courts have followed the rule that unforeseeability is not a requirement for specifically listed events.⁷² In *Kodiak Drilling P’Ship v. Delhi Gas Pipeline Corp.*, a gas purchaser ceased taking delivery of gas after a loss of its resale market.⁷³ The gas contract contained a *force majeure* clause that included a “partial or entire failure to gas supply or market” as an event of *force majeure*.⁷⁴ The *Kodiak* court rejected the rule of the *Gulf Oil* case and, citing to *Eastern Air Lines*, held that an unforeseeability requirement did not apply to this specifically listed event of *force majeure*.⁷⁵ In contrast, in *Valero Transmission Co. v. Mitchell Energy Corp.*, the court held that an unforeseeability requirement applied when *force majeure* was defined as “causes beyond [a party’s] reasonable control.”⁷⁶ Interestingly, the *Valero* court cited to the *Gulf Oil* case in sup-

quirement applied to *force majeure* clause providing excuse for failure of performance due to causes *beyond a party’s reasonable control*).

67. *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 454 (3d. Cir. 1983).

68. *Id.*

69. *Id.*

70. *Id.*

71. *E. Air Lines*, 532 F.2d at 992.

72. *Kodiak 1981 Drilling P’ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 721 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.); see *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 288 (Tex. App. Amarillo 1998, pet. denied) (citing to *Kodiak* for the proposition that an unforeseeability requirement does not apply to a specifically listed *force majeure* event).

73. See *Kodiak*, 736 S.W.2d at 716.

74. *Id.*

75. *Id.* at 721.

76. *Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no pet).

port of its holding.⁷⁷ While at first blush this might create the appearance of conflicting Texas authorities, the facts of each case are consistent with the rule that unforeseeability is not a requirement for specifically listed events, but is a requirement for events that may otherwise be covered by a catch-all clause.

To the extent that an unforeseeability requirement is imposed on events not specifically listed as *force majeure* events, reliance on a catch-all *force majeure* definition (e.g., “other events beyond the reasonable control of” the party) is virtually the same as reliance on Section 2-615 or the doctrines of impossibility or commercial impracticability.⁷⁸

Eastern Air Lines is instructive because it clearly addresses the interaction among impossibility, Section 2-615, and *force majeure* clauses. Eastern had ordered one hundred jet airplanes from McDonnell, ninety of which were delivered significantly late. Eastern sued for breach of contract and received a judgment for substantial damages at trial. McDonnell had defended unsuccessfully on the theory that the escalation of the war in Vietnam in the late 1960s brought pressure by the U.S. government to give military contracts priority over civilian orders, thus causing McDonnell's suppliers to delay their parts deliveries to McDonnell.⁷⁹ McDonnell sought relief under the contract's *force majeure* clause, which reads in relevant part:

EXCUSABLE DELAY. Seller shall not be responsible nor deemed to be in default on account of delays in performance of this Agreement due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to civil war, insurrections, strikes. . .any act of government, governmental priorities. . .

As one of its arguments, McDonnell objected to the application by the trial court of a foreseeability requirement to the list of enumerated events in the excusable delay clause set forth above.⁸⁰ After acknowledging that foreseeability was a key element of a Section 2-615 claim, the *Eastern Air Lines* court reasoned that the trial court had merely applied the U.C.C.'s commercial impracticability standard to any claim of *force majeure* under the excusable delay clause, including for specifically enumerated events such as an act of government.⁸¹

77. *Id.*

78. See *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 990 (5th Cir. 1976); *Bende & Sons, Inc. v. Crown Recreation, Inc., Kiffe Prods. Div.*, 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983); *Valero*, 743 S.W.2d at 663-64; see also P.J.M. Declerq, MODERN ANALYSIS OF THE LEGAL EFFECT OF FORCE MAJEURE CLAUSES IN SITUATIONS OF COMMERCIAL IMPRACTICABILITY, 15 J.L. & Com. 213, 225 (1995).

79. *E. Air Lines*, 532 F.2d at 964-65.

80. *Id.* at 989-90.

81. *Id.* at 990.

The Fifth Circuit rejected this approach based upon its reading of Section 2-615, especially Comment 8, and its review of impossibility doctrine. Where Comment 8 to Section 2-615 states that “express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in light of mercantile sense and reason,” the court interpreted this comment to mean that parties could enlarge upon the protections of Section 2-615.⁸² Thus, while Section 2-615 traditionally only protects against unforeseeable contingencies, parties to a contract can bargain for more seller-friendly provisions where unforeseeability need not be required. Furthermore, the court supported its conclusions based upon its reading of traditional impossibility doctrine: If an event is foreseeable, parties should protect themselves through explicit provisions. If a party does so protect itself, it should not then have to bear the burden of proving that the event was unforeseeable.⁸³

D. Beyond the Reasonable Control

Many *force majeure* clauses will impose an express requirement that the event of *force majeure* be beyond the reasonable control of the nonperforming party. However, in many cases it may not be clear whether or not the nonperforming party will have to carry this burden, and very subtle differences in language may lead to different results.⁸⁴ For example, in *Sun Operating Ltd. P’ship v. Holt*, the contract contained a list of specific *force majeure* events and then concluded with the following catch-all *force majeure* definition: “any cause whatsoever beyond the control of the Lessee.”⁸⁵ Applying the doctrine of *ejusdem generis* discussed above, the court held that “before any event can be successfully invoked as *force majeure* by the Sun parties, it must be outside of their reasonable control.”⁸⁶ The *Sun Operating* court based its decision on the fact that this catch-all definition and its “beyond the reasonable control” requirement came after the list of specified events.⁸⁷ The court went on to state that the result would have been different if the catch-all definition had preceded the list of specific events.⁸⁸ An example of just such a case is the *PPG* case.

In *PPG*, the Fifth Circuit affirmed the judgment of the district court interpreting Texas law where the district court had held that the non-

82. *Id.*

83. *Id.* at 992.

84. See *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 277 (Tex. App. Amarillo 1998, no pet.); *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 18 (5th Cir. 1990); *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003).

85. *Sun Operating*, 984 S.W.2d at 280; see also *Maralex*, 76 P.3d at 636.

86. *Sun Operating*, 984 S.W.2d at 288; see *supra* notes 49-57 and accompanying text.

87. *Sun Operating*, 984 S.W.2d at 280.

88. *Id.*

performing party did not have to prove that the *force majeure* event was beyond its reasonable control.⁸⁹ Because the *force majeure* clause at issue stated that the party would be excused if there was an event beyond its reasonable control or if any one of a list of specific *force majeure* events occurred,⁹⁰ the court determined that the non-performing party did not have to prove that the event was beyond its reasonable control.⁹¹ In sum, in interpreting whether a party must prove that the *force majeure* event was beyond its reasonable control, the exact wording of the *force majeure* clause makes a difference in what the non-performing party must prove to be excused from performing under the *force majeure* clause.

In contrast, California and Pennsylvania law require that the court determine whether the alleged *force majeure* event was outside of the reasonable control of the non-performing party, notwithstanding the specific wording of the *force majeure* clause.⁹² In *Watson Labs. v. Rhone-Poulenc, Inc.*, the court stated that “the California law of *force majeure* requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest.”⁹³ The court also noted that this conclusion was equally supported by the express language of the contract, which was similar to the language discussed in *Sun Operating*.⁹⁴

E. Notice and Mitigation

Many *force majeure* clauses include requirements that the nonperforming party give notice of *force majeure* events and use reasonable efforts to overcome the event. Where notice is required, courts are split over whether timely notice is a precondition to relief under a *force majeure* clause. For example, in *Toyomenka Pac. Petroleum v. Hess Oil V.I. Corp.* the court held that failure to give notice of *force majeure* within forty-eight hours did not preclude a party from claiming *force majeure*.⁹⁵ In contrast, in the *Martin* case the court indicated that timely notice of *force majeure* was a requirement for the *force majeure* claim.⁹⁶

89. *PPG*, 919 F.2d at 18.

90. An example of this style of *force majeure* definition is as follows: “*Force majeure*” shall mean any event or circumstance not reasonably within the control of the party claiming *force majeure*; or any fire, flood, storm, hurricane, tornado, earthquake or other natural disaster; acts of war (whether declared or undeclared), invasion, sabotage, terrorism or threat thereof, riot, civil war, blockade, insurrection, acts of public enemies, or civil disturbances; strike, lockout, or other industrial disturbances; that prevents or delays in whole or in part such party’s performance of any one or more of its obligations under this contract.

91. *PPG*, 919 F.2d at 18.

92. See *Watson Labs. v. Rhone-Poulenc, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001); *Martin v. Commonwealth*, 548 A.2d 675, 678 (Pa. Commw. Ct. 1988).

93. *Watson Labs.*, 178 F. Supp. 2d at 1110.

94. *Id.*

95. *Toyomenka Pac. Petroleum v. Hess Oil V.I. Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991).

96. *Martin*, 548 A.2d at 679; see also *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1168

Courts have also taken different positions as to whether, in the absence of an express provision, there exists an implied covenant to use reasonable efforts to overcome the *force majeure* event. For example, in *Sun Operating* the court rejected the argument that the nonperforming party had to use “due diligence” to overcome the effects of *force majeure* even if the contract terms did not impose such an obligation.⁹⁷ Compare this to the Third Circuit’s opinion in *Gulf Oil*, in which it stated that to “invoke *force majeure* . . . the nonperforming party’s duty extends to showing what action it took to perform the contract . . .”.⁹⁸ This is consistent with *Chemetron Corp. v. McLouth Steel Co.*, in which the court indicated that an explosion, even if it otherwise constituted a *force majeure* event, would not perpetually release the nonperforming party and it must seek alternative means of performing the contract.⁹⁹

F. Specific Types of Force Majeure Events

Set forth below is a discussion of certain events that are often raised as potential *force majeure* events. As noted in the discussion above, it is easier for a nonperforming party to successfully assert a *force majeure* event that is specifically listed. However, in some situations there are additional provisions that may be necessary or desirable in order for certain types of events to give rise to a *force majeure* excuse.

1. Source of Supply

In contracts involving sales, a seller may assert that a *force majeure* affecting its source of supply constitutes an excuse. The seller will have its best case if the contract includes a specific event of *force majeure* with respect to source of supply that specifically identifies the source of supply.¹⁰⁰ However, the failure to list a specific source of supply in the contract may not be fatal if the source is described generally or if shown to be the contemplated source by other evidence.¹⁰¹ In *Capital City Gas Co. v. Phillips Petroleum Co.*, the *force majeure* clause excused the seller from performance if it was the result of exhaustion, reduction or unavailability of liquefied petroleum gas at the “source of supply from which deliveries are normally made.”¹⁰² Though the contract did not specify the source of

(W.D. Okla. 1989).

97. *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 284 (Tex. App.—Amarillo 1998, pet. denied).

98. *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 452 (3d Cir. 1983).

99. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 256 (N.C. Ill. 1974).

100. See *Gulf Oil*, 706 F.2d at 452-53; see also *Bende & Sons, Inc. v. Crown Recreation, Inc., Kiffe Prods. Div.*, 548 F. Supp. 1018, 1021 (E.D.N.Y. 1982), *aff’d mem.*, 722 F.2d 727 (2d Cir. 1983).

101. *Capital City Gas Co. v. Phillips Petroleum Co.*, 373 F.2d 128 (2d Cir. 1967).

102. See generally *id.* at 130.

supply, the court indicated that the seller might be able to produce evidence based on the history of performance.¹⁰³ It is also helpful if the *force majeure* clause expressly negates the obligation to obtain alternative supplies in the case of sales of a commodity that could be obtained in the open market, albeit at a higher price.

It is also possible that a court may determine that failure of a specified supply is not excused even if the source of supply is specified in the *force majeure* clause. In *Sunflower Elec. Coop., Inc. v. Tomlinson Oil Co., Inc.*, a Kansas court was asked to consider whether a seller's inability to produce natural gas from a specified natural gas field constituted an excuse under U.C.C.2-615.¹⁰⁴ First, the court noted that the evidence and the trial court's own findings are to the effect that gas reserves are inherently unknown, but the seller of gas, as a party in the business of estimating oil and gas reserves, must be held to have had superior knowledge as to the possibility reserves would be insufficient. The court also recognized that the contract provided that availability of gas to buyer was the essence of the agreement.¹⁰⁵ Based on this, the court found that the risk that reserves would be inadequate was foreseeable to the seller and therefore the seller assumed this risk.¹⁰⁶ The court explained that this was an exception to the general rule that destruction of a specific thing, such as a crop to be grown on a specified tract, without fault of the seller, will excuse seller from performance under the contract.¹⁰⁷

2. Strikes

It is fairly common to see labor strikes listed as a specific *force majeure* event. When strikes are specifically listed as *force majeure* events, distinctions are sometimes made between industry-wide strikes as opposed to strikes aimed at specific employers. It is also not unusual for a *force majeure* provision to include a clause to the effect that settlement of strikes is within the discretion of the party experiencing such situations. In the absence of a "no settlement" clause, the other party may argue that the nonperforming party can settle the strike and therefore the event is not "beyond its reasonable control."

As discussed above, a court may impose an unforeseeability requirement if the nonperforming party is relying on a catch-all *force majeure*

103. *Id.* at 132.

104. *Sunflower Elec. Coop., Inc. v. Tomlinson Oil Co., Inc.*, 638 P.2d 963 (Kan. Ct. App. 1981).

105. *Id.* at 972.

106. *Id.*; see also *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 452 (3d Cir. 1983) (the seller of natural gas was not excused for *force majeure* based on a specifically listed event of mechanical repairs, where there was a history of frequently required repairs and their effect on volumes available for delivery could have been anticipated).

107. *Sunflower*, 638 P.2d at 973.

definition and in some cases even if it is specifically listed. Where unforeseeability is an issue with respect to a strike, courts may review the record of labor unrest in the particular industry.¹⁰⁸ As the court stated in *Mishara Constr. Co., Inc. v. Transit-Mixed Concrete Corp.*:

In general, labor disputes cannot be considered extraordinary in the courts of modern commerce. [However,] [m]uch must depend upon the facts known to the parties at the time of contracting with respect to the history of and prospects for labor difficulties during the period of performance of the contract, as well as the likely severity of the effect of such disputes on the ability to perform. From these facts it is possible to draw an inference as to whether or not the parties intended performance to be carried out even in the face of the labor difficulty.¹⁰⁹

3. Weather

Weather-related events are almost always listed as *force majeure* events, often with great specificity. While the case law on adverse weather varies across the country, if the parties specifically identify adverse weather as a *force majeure* event and bad weather prevents a party from performing, many courts will excuse the party from performing.¹¹⁰ For example, in *Jon-T Chems, Inc. v. Freeport Chem. Co.*, the Fifth Circuit in interpreting Texas law held that because the parties had included an express provision in the *force majeure* clause for adverse weather conditions, snowstorms in Chicago excused the defendant from performing.¹¹¹ The court explained that because the *force majeure* clause specified that adverse weather constituted a *force majeure* event, the party was excused from performing because of these bad snowstorms.¹¹² Also, in the *Toyomenka* case, the Southern District court of New York held that because the parties included in their *force majeure* clause a provision dealing with adverse weather, the party was excused from performing because the delays in delivering the crude oil were caused by Hurricane Hugo.¹¹³

108. See *Mishara Constr. Co., Inc. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367-68 (Mass. 1974).

109. *Id.* at 368.

110. See *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1415 (5th Cir. 1983); *Toyomenka Pac. Petroleum, Inc. v. Hess Oil V.I. Corp.*, 771 F. Supp. 63, 67 (S.D. N.Y. 1991); *Tex. City Ref., Inc. v. Conoco, Inc.*, 767 F.2d 183, 195-86 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (stating that strong winds in the Gulf of Mexico excused performance where the *force majeure* clause specifically listed “floods, hurricanes or other actions of the elements”).

111. *Jon-T*, 704 F.2d at 1414-15.

112. *Id.* at 1415.

113. *Toyomenka*, 771 F. Supp. at 68; see also *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 453 (3d Cir. 1983) (specifying that a hurricane is a *force majeure* event).

One issue that is often discussed is the severity of the weather event and the extent to which it was foreseeable.¹¹⁴ In *Chronister Oil Co. v. Elleron Chems., Corp.*, the plaintiff sued the defendant for breaching a contract that required the defendant to deliver a quantity of oil by a certain date. The defendant delivered the oil late and claimed that the *force majeure* event of adverse weather (icy conditions on the Illinois River) prevented it from delivering the oil on time.¹¹⁵ The court found that the defendant should have known from its years of shipping experience that there would be icy conditions in December on the Illinois River and for the defendant to prevail, it “would have to show that unanticipated weather conditions were severe enough to make the waterways unnavigable.”¹¹⁶

In *Tejas Power Corp. v. Amerada Hess Corp.*, an unpublished Texas case, the court found that adverse weather constituted an “act of God” and excused a party from performing based on freezing weather conditions.¹¹⁷ The court said that “the contract define[d] ‘*force majeure*’ in pertinent part, as an act of God ‘or any other cause of like kind not reasonably within the [seller’s] control . . . and which, by the exercise of due diligence of such party, could not have been prevented or is unable to be overcome.’”¹¹⁸ The court concluded that “[i]t is undisputed that the freezing weather was an act of God.”¹¹⁹ The Texas equivalent of Section 2-615 of the U.C.C. and the doctrines of impossibility and impracticability helped the court come to its conclusion that the bad weather constituted an act of God and a *force majeure* event under the terms of the contract.¹²⁰

Similarly, the Southern District of New York implied that adverse weather could be covered by a catch-all *force majeure* definition.¹²¹ In that case, one party was required to deliver petroleum to the other party, but the shipment was delayed because of adverse weather conditions at sea.¹²² The contract between the two parties contained a *force majeure* clause stating that in the event a cause beyond a party’s control prevents it from performing, its performance will be suspended without penalty for as long as the disability continues.¹²³ The court determined that the ad-

114. See *Chronister Oil Co. v. Elleron Chems. Corp.*, No. H-86-949, 1986 WL 13445 at *4 (S.D. Tex. Nov. 21, 1986); see also *Logan v. Blaxton*, 71 So. 2d 675, 677 (La. Ct. App. 1954) (seasonable rains should have been anticipated).

115. *Chronister*, 1986 WL 13445 at *1.

116. *Id.* at *4.

117. *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, 1999 WL 605550, at *3 (Tex. App.—Houston [14th Dist.] Aug. 12, 1999, no writ) (not designated for publication).

118. *Id.*

119. *Id.*

120. *Id.* at *2.

121. See *Stinnes Interoil, Inc. v. Apex Oil Co.*, 604 F. Supp. 978, 982 (S.D.N.Y. 1985).

122. *Id.* at 980.

123. *Id.* at 982.

verse weather could possibly be covered by the *force majeure* clause and, inasmuch as this presented a question of fact, denied the motion to dismiss.¹²⁴

4. Economic Events

Economic events, such as failures of markets, are very difficult to assert as events of *force majeure*, particularly in the absence of a specific clause.¹²⁵ In *Kel Kim Corp. v. Cent. Mkts., Inc.*, the nonperforming party was unable to obtain insurance required by the contract, which it attributed to a “liability insurance crisis” in early 1986.¹²⁶ The contract contained a *force majeure* clause that did not specifically provide for this type of event.¹²⁷ The court indicated that this type of problem could have been foreseen and guarded against in the contract.¹²⁸ Based on this reasoning, the court denied the defendant’s claim for an excuse based on both the *force majeure* clause and the doctrine of impossibility.¹²⁹

Similarly, in *Langham–Hill Petroleum, Inc. v. S. Fuels Co.*, the buyer sought to avoid its obligations to purchase fuel oil in the wake of a significant drop in prices caused by Saudi Arabia’s attempts to regain its share of the world oil market.¹³⁰ The court rejected this argument, which was based on a general catch-all clause, on the basis that to allow a fixed-price contract to be voided when prices fluctuate would defeat the whole purpose of having a fixed price.¹³¹

In contrast, the *force majeure* clause in *Kodiak* specifically listed “partial or entire failure to gas supply or markets” as an event of *force majeure*.¹³² On the basis of this clause the court upheld the gas buyer’s *force majeure* claim when its resale market failed.¹³³

5. Governmental Actions

Governmental actions are sometimes relied upon as a *force majeure* event. In *Eastern Air Lines*, the *force majeure* clause specifically listed acts of government.¹³⁴ In this case the aircraft manufacturer claimed that informal government policies in effect during the Vietnam War caused its

124. *Id.* at 983.

125. *United States v. Panhandle E. Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988); see *Hanover Petroleum Corp. v. Tenneco, Inc.*, 521 So. 2d 1232 (La. Ct. App. 1988).

126. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987).

127. *Id.*

128. *Id.*

129. *Id.*; cf. *Hanover Petroleum*, 521 So. 2d at 1238.

130. *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1329 (4th Cir. 1987).

131. *Id.* at 1330.

132. *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 716 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

133. *Id.* at 721.

134. *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 963 (5th Cir. 1976).

suppliers to favor military contracts over commercial contracts.¹³⁵ The court agreed that these policies, though informal, were sufficient to constitute an “act of government” mentioned in the *force majeure* clause.¹³⁶

Governmental actions typically will not be recognized as *force majeure* events if the government's action is in response to the nonperforming party's violation of a law.¹³⁷ For example, in *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, a well was shut-in by the Texas Railroad Commission after the operator repeatedly exceeded its allowable production.¹³⁸ The court stated that since the shut-in resulted from the operator's violations of the production allowables set for the well, the governmental action was not beyond the operator's reasonable control.¹³⁹

While a bankruptcy in and of itself is rarely a *force majeure*, it is possible that a bankruptcy court action may be considered a governmental action. In *Gilbert v. Smedley*, the contract operator of an oil and gas property filed for bankruptcy and the court ordered a receiver to take control of the operations of the oil and gas property.¹⁴⁰ As a result, the lessees were unable to conduct operations necessary to maintain the lease in effect.¹⁴¹ The court held that this interference constituted a governmental action and, as this was a specifically listed *force majeure* event, nonperformance was excused and the lease was extended.¹⁴²

IV. COMMON CONTRACTS AND ISSUES

Commercial contracts never exist in a vacuum and should not be considered in isolation, but within the broad context of an overall business. For example, a commercial purchaser of natural gas may intend to either consume the natural gas as part of a manufacturing process or resell the natural gas. In fact, many marketers of natural gas are likely to be both buyers and sellers of natural gas under a number of contracts at any one time, and may also be engaged in various financial transactions to hedge the price risk. When a hurricane causes a shutdown of natural gas production and transportation service, a natural gas marketer may find that contracted supplies of natural gas are not available as expected and their suppliers are excused by a bona fide *force majeure* and, if replacement natural gas is available, the price is considerably higher. These businesses

135. *Id.* at 964.

136. *Id.* at 994-96.

137. See *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1113 (C.D. Cal. 2001); *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ).

138. *Hydrocarbon Mgmt., Inc.*, 861 S.W.2d at 431.

139. *Id.* at 436.

140. *Gilbert v. Smedley*, 612 S.W.2d 270, 274 (Tex. Civ. App.—Fort Worth, 1981, writ ref'd n.r.e.).

141. *Id.* at 273.

142. *Id.* at 274.

then face the prospect of either being unable to perform under contracts that were dependent upon receipt of natural gas or, if able to secure alternative suppliers, finding that the higher price renders performance under other contracts uneconomic. The plight of these parties with respect to their obligations to their customers would turn on the terms of their contracts with those customers.

A. Types of Contracts

There are three general types of contracts that are common among buyers and sellers of natural gas. These contracts are the Base Contract for Sale and Purchase of Natural Gas, published by the North American Energy Standards Board, Inc. (NAESB Contract),¹⁴³ customized gas purchase and sale contracts, and the ISDA Master Agreement, published by the International Swaps and Derivatives Association, Inc. (ISDA Master Agreement).¹⁴⁴

The NAESB Contract is very common in the North American natural gas market. This type of contract typically does not contemplate a specific purchase and sale of natural gas, but rather that one or more individual purchase and sale transactions will be agreed to and documented by a separate confirmation.¹⁴⁵ The NAESB Contract contains a standard *force majeure* clause that is often modified by the parties, but typically does not specify a source of supply for the seller.¹⁴⁶

In the writer's experience, customized gas purchase and sale contracts are less common than the NAESB Contract in the North American natural gas market. They are typically used for contracts that are either long term in nature (e.g., more than a year) or provide for sales close to the source of supply (e.g., a purchase of liquefied natural gas). The *force majeure* clauses in these customized contracts are usually quite detailed. An example of such a clause is discussed below.

The last type of contract to consider is the ISDA Master Agreement. These contracts are primarily used to hedge price risk involved in the purchase and sale of natural gas and other commodities in that they are financial in nature and involve an exchange of payments based on a com-

143. The North American Energy Standards Board, Inc., also known as NAESB, serves as an industry forum for the development of standards for natural gas and electricity markets, including standard contracts such as the NAESB Contract. Copies of the NAESB Contract are available through NAESB's website, www.naesb.org.

144. The International Swaps and Derivatives Association, Inc., also known as ISDA, represents participants in the privately negotiated derivatives industry. ISDA cites the development of the ISDA Master Agreement and related documentation as one of its most notable accomplishments. See www.isda.org. Copies of these agreements are available through ISDA's website at www.isda.org.

145. See NAESB, BASE CONTRACT FOR SALE AND PURCHASE OF NATURAL GAS § 1.2 (2002).

146. See *id.* at § 11.

parison of a fixed price to a floating price tied to a quoted price index for natural gas.¹⁴⁷ Examples of transactions that may be implemented under an ISDA are swaps, collars, price floors or puts, and price caps or calls.¹⁴⁸ While these transactions do not involve physical delivery of the underlying commodity, they allow parties to hedge price risk associated with transactions involving physical delivery of the commodity. For example, consider the natural gas producer who sells its natural gas production at a price tied to an index price that changes on a monthly or daily basis. The proceeds received by the producer will fluctuate upward or downward with changes in the index price, and in times of volatile prices it may be very difficult for the producer to forecast revenues with any certainty. This price risk can be mitigated by entering into a commodity hedge, such as a commodity price swap, so that an unfavorable movement in prices for the physical purchase and sale of the commodity is offset by a payment under the commodity hedge. The combined effect of the physical and financial transactions is to shift the risk of price volatility away from the producer. However, these financial transactions are independent of the related physical transaction and are not affected or excused if performance of the physical transactions are excused by a *force majeure* event.

B. Common Force Majeure Problems

1. Mismatch in Force Majeure Regimes

Where a party is engaged in multiple gas purchase and sale transactions, it should try to harmonize *force majeure* clauses among these transactions as much as possible. For example, consider the case of a gas marketer that obtains a material portion of its supply under a long-term, customized gas purchase contract. While a loss of seller's natural gas supply caused by a depletion of natural gas reserves would not typically constitute a *force majeure* event, it is quite possible that events that affect the deliverability of those reserves through a particular transportation facility will constitute a *force majeure* event. If the gas marketer resells this natural gas through a portfolio of standardized NAESB Contracts, differences between the *force majeure* regimes of its supply contracts and sales contract could result in a situation where delivery of supplies based on *force majeure* is excused due to *force majeure* without necessarily excusing its sales obligations.

147. See ISDA, USER'S GUIDE TO THE ISDA 2002 MASTER AGREEMENT (2005); ISDA, 2005 ISDA COMMODITY DERIVATIVES DEFINITIONS (2005).

148. See *USER'S GUIDE TO THE ISDA 2002 MASTER AGREEMENT* at § I.A.3 (for a discussion of various types of derivatives and sources of specialized definitions, terms, and forms to be utilized for such derivatives).

2. The Physical Versus Financial Dilemma

As discussed above, a seller of natural gas may hedge its exposure to price volatility by entering into a commodity price swap. In this type of hedge, if the index price used to price a physical sale falls, the payments under the swap will offset the drop in revenues. However, consider the situation in which a hurricane curtails delivery by sellers in a particular geographic area, and a particular seller is unable to make any deliveries. The reduction in deliverability in that geographic area is likely to drive prices higher, which may result in the seller of natural gas owing money under the natural gas hedge (e.g., in a commodity price swap, to protect against the downside of a drop in prices the seller gives away the upside of a rise in prices). Normally this hedge payment would be funded from sales of natural gas at a higher price, which are not then possible. However, this hedge payment is still due and owing even though a *force majeure* event interrupts the seller's physical sales and revenues.

C. Model Clause

As discussed above, the analysis of a *force majeure* defense begins with the language of the parties' contract. If the parties have drafted their contract to provide that specific events will—or will not—excuse performance, that contractual language will in large part govern the outcome. Appendix A contains a suggested form of *force majeure* clause that might be used in a contract for the purchase and sale of liquefied natural gas (LNG), although many of the components could be applied to any type of commodity contract. A brief description of certain components of this clause is set forth below.

1. Events of Force Majeure

The general effect of *force majeure* as an excuse is described in Section 1.1(a). The definition of *force majeure* is found in Section 1.1(b). It begins with a catch-all definition that includes requirements that the event is not within the control of the nonperforming party, was not caused by the negligence of the nonperforming party, and would not have been avoided by the exercise of reasonable diligence. In order to limit the effects of *ejusdem generis*, the catch-all definition includes the phrase “whether of the kind described herein or otherwise” and the list of specific events is prefaced with the phrase “including, without limitation . . .”¹⁴⁹ The list of specific events contains a number of common items (see clauses (i) through (ix) of Section 1.1(b)), but should be modified to fit the specific transaction. For example, clause (x) of Section 1.1(b) con-

149. See *supra* notes 49-57 and accompanying text.

tains a specific reference that a buyer of LNG might require to protect against *force majeure* events affecting its delivery chain.

Section 1.1(c) addresses the situation in which a party's ability to perform is indirectly affected by events directly affecting a third party. The effect of the clause is to make clear that an event affecting a third party can be a *force majeure* event only if it satisfies the *force majeure* requirements of the contract. This clause would appear to negate any argument that a bankruptcy of a third party or an act within a third party's reasonable control could form the basis for a *force majeure* claim under this clause.¹⁵⁰

Note that this clause does not specifically address the issue of foreseeability. As discussed above, usually this will not be an issue for specifically listed events. In some cases the parties may want to expressly negate the foreseeability element for specifically listed events, particularly if a dispute concerning the contract may be heard in a jurisdiction, such as the Third Circuit, that imposes a foreseeability requirement on all *force majeure* events, whether or not specifically listed.¹⁵¹ However, in the writer's view it is generally not advisable to negate the foreseeability requirement with respect to the catch-all definition inasmuch as this may result in an overly broad definition of *force majeure*.

Section 1.1(d) contains a list of events that do not constitute *force majeure*. Clauses (i) and (iii) are intended to help clarify that *force majeure* will not arise in certain circumstances relating to the breakdown of equipment and failure to obtain certain governmental approvals. These clauses address situations that arguably would be excluded from *force majeure* by the "beyond the reasonable control" requirement.¹⁵² Further modifications to clause (iii) may be appropriate if one of the parties is, or is owned or controlled by, a governmental entity. Economic hardship is expressly excluded from *force majeure* by clause (iv). Clause (ii) is somewhat redundant of the provisions of Section 1.1(a), but it does provide for payment deferral, with interest, when the *force majeure* event affects all reasonable means of payment, such as a disruption of the system for transferring funds by wire transfer. Finally, clause (v) specifically negates the potential for reserve depletion to be considered *force majeure*.

Section 1.1(e) negates the obligation to seek alternative means of transportation or supplies of the relevant commodity. For this provision to be fully effective the contract should specify the source of supply and the means of transportation.¹⁵³

150. See *supra* notes 85-95, 126-134, and accompanying text.

151. See *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 455 (3d Cir. 1983).

152. See *supra* notes 85-96 and accompanying text.

153. See *supra* notes 101-08 and accompanying text.

2. Notice and Mitigation

Section 1.2(a) provides for the nonperforming party to provide notice of the *force majeure*, including its expected duration and effect and steps being taken to correct the situation. This notice helps the other party mitigate the effect of the *force majeure* and affects that party's rights under Sections 1.4 and 1.6 discussed below.

Section 1.2(b) addresses the nonperforming party's obligation to mitigate. It also makes clear that the parties must continue performing to the extent possible. Finally, Section 1.2(c) gives the other party a right to examine the scene of the event giving rise to the claim of *force majeure*.

3. Other Provisions

Section 1.3 specifically negates the nonperforming party's obligation to settle a strike. Absent such a provision, a *force majeure* event arguably could not exist if a strike could be avoided by agreeing to strikers' demands.¹⁵⁴

Section 1.5 addresses the apportionment of supplies among a seller's customers when only a portion of the seller's ability to deliver is affected by *force majeure*. The specific method of apportionment will vary depending on the type of product involved. This method of allocation should be harmonized throughout the seller's supply contracts to the extent possible.

Sections 1.4 and 1.6 address the rights of the seller and buyer to enter into alternative transactions while the other party is experiencing a *force majeure* event. In general, these provisions are intended to allow the other party to continue its business and mitigate its losses while the nonperforming party is unable to perform. More specifically, this provision allows the other party to rely on the nonperforming party's estimate of the duration of the *force majeure* event when entering into contracts for the product that the nonperforming party would have purchased or sold, as the case may be.

Section 1.7 includes a provision for terminating the contract in the event of an extended period of *force majeure*. This type of clause is included in many, but not all, commodity contracts.

V. CONCLUSION

The common law doctrines of impossibility and commercial impracticability are still viable, but they have significant court-imposed limitations, largely based on the underlying premise that when parties enter into a contract they assume the risk that they will be required to perform

154. *See supra* notes 109-110 and accompanying text.

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except in extreme and unforeseen circumstances. The limitations of these common law doctrines can be addressed in a contract by including a *force majeure* clause that addresses the specific concerns of the parties. However, the drafter of a *force majeure* clause needs to pay attention to the precise words used, as subtle differences in wording can lead to different results. Particular attention is required for the list of specific events that constitute *force majeure*, as unlisted events are more likely to be subject to an unforeseeability requirement. Parties also need to consider their exposure to *force majeure* events not just in a single contract, but in their contracts as a whole. Mismatches in *force majeure* regimes can lead to disastrous results if a *force majeure* excuse is available under one contract but not available under another related contract. In summary, attention to detail is paramount, otherwise there is quite likely no excuse.

APPENDIX A
MODEL CLAUSE

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;

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(vi) acts after the date hereof of a governmental entity, agency, nation, port or other authority having jurisdiction, 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 situations and nothing herein shall require such Person to settle industrial disputes 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 offtakers 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).