

**THE NATURE AND EFFECT OF *FORCE MAJEURE* CLAUSES
IN THE SOUTH AFRICAN LAW OF CONTRACT**

by

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BACKGROUND, PROBLEM STATEMENT AND METHODOLOGY

1.1 Background

Force majeure is the ^{CHAPTER 1} term used to describe an event or occurrence that makes contractual performance impossible. The event which renders contractual performance impossible only arises after conclusion of the contract and is due to an occurrence, event or circumstances beyond the control of any one of the parties. Impossibility, in this sense, could either be permanent or temporary in nature, and opinions on whether impossibility should be measured objectively or subjectively differ.¹ Impossibility of performance is a requirement, and any impact which falls short of that is not currently dealt with under the principle of *force majeure*. The principle of *force majeure* differs from that of hardship caused to either party to a contract due to changed circumstances, in that while hardship impacts on a party's ability to perform, it does not render performance impossible. In South African law, an occurrence which makes contractual performance impossible is categorised under the common law principle of supervening impossibility.

Failure by any party to perform in terms of a contract will constitute a breach of contract, which will give rise to certain contractual and common law remedies and consequences. Parties often attempt to regulate the common law effects and consequences in instances where the reason for non-performance, and therefore the breach, is attributable to events or circumstances beyond the control of the parties. This is done by inserting specific clauses to that effect in the contract. These clauses are referred to as *force majeure* contract clauses. The main aims of these clauses are (a) to change the automatic common law consequence of termination of a contract by inserting a suspensive condition into the agreement in an attempt to allow the obligation to survive the *force majeure* event; (b) to allow for the artificial suspension of the contract until a party elects to terminate by notice without repudiating the

¹ Some writers include descriptions such as performance becoming legally or physically impossible, or excessively difficult, impracticable or expensive into the definition of *force majeure*. See Fazilatfar H "The impact of supervening illegality on international contracts in a comparative context" (2012) *Comparative & International LJ of Southern Africa* 158.

agreement; or in some instances (c) to only allow for a termination in limited situations where the *force majeure* clause provides a description of events or occurrences that will lead to an outright termination.

The French term *force majeure* (synonyms in Roman law are *vis maior* or *casus fortuitus*) has been accepted internationally and is commonly referred to and used in both civil law² and common law³ jurisdictions. In addition, international instruments, such as the CISG⁴ and the UNIDROIT principles⁵ also recognise *force majeure* and its effect on the parties' obligation to perform. *Force majeure* clauses which regulate the relationship between the parties and their resulting consequence, namely the obligation of parties to perform once an event of this nature occurs, are relatively common in the South African law of contract, and it has become trade practice to include such clauses in the standard terms and conditions of most contractual documentation and instruments.

As stated, the concept of an overwhelming force that prevents performance, be it permanently, temporarily, partially or completely, was addressed in early Roman law. Christie, in his book on contract law in South Africa, summarises the definition of the concept to include "any happening, whether due to natural causes or human agency, which is unforeseeable with reasonable foresight and unavoidable with reasonable care".⁶

This type of event terminates the contractual obligation in terms of which the performance that has now become impossible was due. For parties to be able to determine their risks in, for example, construction projects, and to determine which party carries the risk, it has become a trade usage to include an express agreement on what the consequences of such an event would be. This allows a party to then

² In countries such as France, Canada, Germany, the Netherlands, Italy and Greece.

³ In countries such as England, the United States of America and South Africa.

⁴ The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an international treaty which came into effect on 01 January 1988. Its aim is to establish uniform law for the international sale of goods. South Africa has not adopted the CISG.

⁵ The International Institute for the Unification of Private Law (UNIDROIT) drafted the Principles of International Commercial Contracts (PICC) with the intent to harmonise international contract law. The latest issue applied to this study was published in 2016.

⁶ Christie RH & Bradfield GB *Christie's the Law of Contract in South Africa* (2011) 6th edition 493. The following Roman law sources are cited to substantiate the summary of the definition: D 13 6 5 4 18; D 18 1 35 4; D 18 6 14 1; D 19 1 31 pr; D 19 2 25 6.

factor the risk into pricing, insurance cover, performance guarantees, penalties, standing time, damage claims and the like.

Force majeure clauses are described by Hutchison *et al.* simply as

“a clause in a contract that regulates the ability of the parties and the effect on the contract when an extraordinary event or circumstances beyond the control of the parties (e.g. war, strike, riot, crime) or an event described by the legal term ‘act of god’ (e.g. flooding, earthquake, volcano), prevents one or both parties from fulfilling their obligations under the contract.”⁷

Parties include *force majeure* clauses in their contracts to enable them to influence the outcome of the contractual relationship and to deal with the contractual effects of these type of events. In effect, *force majeure* clauses are measures which contractually manipulate the normal consequences of non-performance. The aim of such a clause usually is to allow for the suspension of the contract in the hope that the *force majeure* event or occurrence ceases and the contract may continue. The clause may be expanded to include a resolute time period to prevent prolonged delays, to contain extensive descriptions of events that are classified as *force majeure* and to include duties of notifications that must be given upon the occurrence. No standard form clause exists in South African law, although some standard form construction contracts provide examples of such clauses.⁸

There are clear links and overlaps between the principle of *force majeure*, as discussed above, and that of the English law doctrine of frustration; the doctrine of changed circumstances and hardship, which exists in jurisdictions, such as Germany and the Netherlands;⁹ and the principle of supervening impossibility, which is well known and applied in South African law.

The aforementioned doctrines and legal principles, even though not accepted as part of South African law, provide for the broadening of the initial concept (of an excessive

⁷ Hutchison *et al.* *The Law of Contract in South Africa* (2012) 2nd edition. 496.

⁸ Such examples can be found in The International Federation of Consulting Engineers (FIDIC) *The Conditions of Contract for Construction The 1999 Red Book* (1999); The Joint Building Contractors Committee (JBCC) Series 2000 *Principal Building Agreement* Ed. 6.1 (2014); and The New Engineering Contract (NEC) *NEC3 Engineering and Construction Contract* (2013).

⁹ It is dealt with under the civil code of Germany and the Netherlands. Other Western legal systems, such as Italy, Spain and Greece, also recognise the principle. Also refer to Hutchison A “Gap filling to address changed circumstances in contract law – when it comes to losses and gains, sharing is the fair solution” 2010 (3) *Stellenbosch LR* 414.

or overwhelming force) to include other instances and occurrences where the circumstances that existed at the time of contracting have subsequently changed. It also provides a guideline to parties when it comes to drafting their own clauses, since the intention of inserting such a clause in a contract is to provide broader protection than what the common law will provide on supervening impossibility.

It is the responsibility of the respective parties to draft these clauses to protect themselves and to mitigate unforeseeable and unexpected risks. In many instances, standard clauses are used or taken from international or foreign law examples. This is problematic when one wants to interpret these clauses and apply them to a specific situation. The proper drafting and interpretation of these clauses are of paramount importance to ensure the success of the clause being applied.

1.2 Research question/problem statement

This research paper examines *force majeure* within the context of the South African law of contract. The following aspects are considered:

- a) the history and origin of the principle of force majeure;
- b) the common law application of force majeure within the South African context;
- c) contractual deviation from the common law position;
- d) the responsibilities of the parties involved;
- e) possible expansion of the application of the traditional force majeure principle at the hand of legal principles established in foreign jurisdictions; and
- f) other legal principles and doctrines which relate closely to *force majeure*.

1.3 Methodology and structure

This paper is based on a literature study which includes case law, articles, academic books and literature from foreign jurisdictions. Best practice and international law guidelines regarding *force majeure* and related legal doctrines and principles are also consulted.

In Chapter 2, the history and purpose of the principle of *force majeure*, as well as its nature and Roman law origins, are discussed.

The application of *force majeure* clauses within the South African context is discussed and elaborated on in Chapter 3. Special attention is paid to the common law principle of supervening impossibility. Due to the limited nature of the principle of supervening impossibility and to ensure relief from and certainty about their contractual position, the inclusion of *force majeure* clauses into contracts has become trade practice in South Africa and most other jurisdictions. The suspensive nature of *force majeure* clauses, as well as its effect on the continuation of contracts, is discussed.

Because the application of the common law principle of supervening possibility is extremely limited and the insertion of *force majeure* clauses to address every eventuality is problematic, it is necessary that the common law be developed to close this gap and provide for wider application. This is discussed in Chapter 4 by reviewing similar principles in foreign jurisdictions and international law guidelines.

Aspects pertaining to the drafting and interpretation of *force majeure* clauses are discussed in Chapter 5. The inclusion of *force majeure* clauses into contracts causes difficulties and may be problematic when it comes to drafting and interpreting these clauses. Since the inclusion of specific *force majeure* clauses are the only way for parties to provide for relief beyond the limited application of the principle of supervening impossibility, the proper drafting and interpretation of these clauses are of paramount importance.

The conclusion of the research paper is presented in Chapter 6. The possible refinement and improvement of the current South African position on *force majeure* clauses and their effects, which may impact on the continuation of the contract and the parties' ability to perform their contractual duties, is discussed.

1.4 Delimitations

This paper does not include any discussion on the conclusion of contracts or general aspects pertaining to breach of contract. The foreign law principles are only referred to and referenced to the extent to which they have relevance to and may impact on the South African common law position.

THE ORIGIN AND PURPOSE OF THE PRINCIPLE OF FORCE MAJEURE

2.1 Introduction

The nature, history and purpose of the principle of *force majeure*, as well as their relation to Roman law, are discussed in this chapter.

The principle of *force majeure* originates from the French and Roman law.¹⁰ It is accepted law in most jurisdictions that non-performance of any contractual obligations will constitute a breach of contract, which will have various consequences for the parties involved. *Force majeure* is an exception to the foundational contract law principle of *pacta sunt servanda*¹¹ if it happens that certain specific circumstances arise. It provides an escape from the normal consequences of breach of contract if the reason for the non-performance which caused the breach of contract can be defined as a *force majeure* event. In effect, *force majeure* suspends certain contractual obligations in specific circumstances. Since South African law has its roots in the Roman and Roman Dutch law, a closer examination of the development of the principle from Roman law is required.

2.2 Roman law

In early Roman law sources, there are references to instances where an overwhelming force of nature or human intervention influenced the obligations and liabilities of the parties to an agreement. The Roman law principles were referred to as *vis maior* and *casus fortuitus*.

Vis maior is described as “a superior force which is beyond resistance or control”¹² and refers to events caused by nature, such as earthquakes, storms and fires. *Casus fortuitus* describes an accidental occurrence caused by persons, such as theft, strikes and arson. It is caused by actions not attributable to natural events, or acts of god. In

¹⁰ Lombardi R “*Force majeure* in European Union law” 1997 *International Trade & Business Law* 82-87.

¹¹ *Pacta sunt servanda* refers to the sanctity of contracts. It is an accepted principle in contract law that all legal contracts which are entered into freely and fairly should be upheld and enforced. It is regarded as one of the foundational principles of the South African law of contract. Christie 12 and Hutchison *et al.* 12–13, 21.

¹² Cooper WE *The South African Law of Landlord and Tenant* (1973) 2nd edition 181.

both cases the event or occurrence is unforeseeable and beyond the control of any of the contracting parties.

References are made to the *vis maior* and *casus fortuitus* regarding the standard of care and liability towards the owner in loan for use agreements. Liability for losses in partnership agreements, contracts for purchase, leases and actions of sale are also influenced by these principles:

a) Loan for use

The borrower will not be liable when the damage to the items on loan are caused by disaster by fire, collapse of buildings or loss of some kind by an act of god; nor where performance of certain services becomes impossible due to old age, disease or theft, or when something of value is forcibly carried off by robbers, except when it is the borrower's fault.¹³

Based on this example, Gaius¹⁴ further writes that the standard of care for items lent for use is the same as that of the head of a family for his own affairs; however, the borrower will not be liable for events which cannot be prevented, such as the death of slaves, attacks of robbers and enemies, pirates, shipwrecks, fire and escape of slaves, unless there was fault on the debtor's part.

b) Partnerships

When it comes to partnerships, Gaius is of the opinion that partners cannot be held liable for unanticipated or unavoidable losses.¹⁵

¹³ D 13 6 5 4.

¹⁴ D 13 6 18.

¹⁵ D 17 2 52 3.

c) Contract of purchase and sale

Gaius confirms that no liability will be incurred when the item which is the subject of the sale is lost. This will still be the case where the item is lost despite the seller's having lived up to the required standard of care.¹⁶

Neratius also contends that this is the position with regard to actions for sale, in that people should not be held responsible for items under their guard which were taken away by force. In his viewpoint, there should be no further consequences other than providing the buyer with the required actions to recover the items.¹⁷

d) Letting and hiring

And finally, when it comes to letting and hiring, Gaius supports the position that higher forces, which could also be described as "a force from god", should not be a source of loss to the lessee if it causes more damage to his crops than that which is bearable.¹⁸

In modern South African law, *casus fortuitus* has been described as

"a species of *vis maior*, [which] imports something exceptional, extraordinary or unforeseen and which human foresight cannot be expected to anticipate, or, if it can be foreseen it cannot be avoided by the exercise of reasonable care or caution".¹⁹

These legal concepts are further described Van der Merwe, Van Huyssteen, Reinecke and Lubbe²⁰ as "events arising from nature or human causation, which cannot be resisted, which is beyond the control of a normal person, and which is unforeseen or unforeseeable by the relevant party." Examples include death, natural disasters, sickness and disease, war, strike action or intervention by authorities.²¹ A wider definition of these concepts includes all unavoidable acts of nature and humans.²²

¹⁶ D 18 1 35 4

¹⁷ D 19 1 31pr.

¹⁸ D 19 2 25 6.

¹⁹ Du Bois F *Wille's Principles of South African Law* (2007) 9th edition 850.

²⁰ Van der Merwe S Van Huyssteen LF Reinecke MF & Lubbe GF *Kontraktereg: Algemene beginsels* (2007) 3de uitgawe 575.

²¹ Van der Merwe *et al.* 575.

²² Hutchison *et al.* 384.

As stated earlier, non-performance of any contractual obligations will constitute a breach of contract in almost all legal systems. A breach of contract will result in certain consequences and avail certain remedies to the disadvantaged party. This is in line with the foundational principle in contract law of *pacta sunt servanda*.

Strict enforcement of such contract terms may lead to extremely unfair and detrimental outcomes, especially when the reason for the non-performance cannot be contributed to any one party, but is objectively beyond their control due to excessive force or external occurrence. This is the exact focus of the principle of *force majeure* and the reason for the inclusion of *force majeure* clauses in contract dealings.

The main objective of the mechanism of a *force majeure* clause is “[t]o relax the obligation and set a limit to the strict liability imposed on a party to perform in terms of a contract in the event of certain circumstances arising, which prevent or has an effect on the party’s ability to perform.”²³

It provides an escape to a party from being liable for damages for breach of contract provided that it can be classified within the ambit of the definition of *force majeure*.

The mechanism of *force majeure* provides parties with the ability to determine, allocate and budget for their risks for certain events over which they cannot exercise any control.²⁴ “It enables parties to include a measure of certainty into their contract dealings and more specifically allows parties to be able to plan for the future and enjoy better freedom of actions.”²⁵ Theroux and Grosse reiterate this purpose of the *force majeure* clause as “*Force majeure* clauses are intended to allocate²⁶ risk for future events that, should they occur, will affect the ability of one party to perform its obligations under the contract.”²⁷

²³Lombardi 84.

²⁴ McKendrick E *Force Majeure and Frustration of Contract* (1991) 10.

²⁵ McKendrick 11.

²⁶ Own emphasis. The question is what ‘allocate’ means in this context. It can be assumed that it means to allocate it as an accepted risk for budget and liability purposes.

²⁷ Theroux MP & Grosse AD “*Force majeure* in Canadian Law” 2011 *Alta Law Review* 398.

APPLICATION OF THE PRINCIPLE OF *FORCE MAJEURE* IN THE MODERN SOUTH AFRICAN CONTEXT

3.1 Introduction CHAPTER 3

The application of *force majeure* clauses within the South African context is discussed and elaborated on in Chapter 3. Definitions of related concepts are discussed, as well as the current position in South African law. Special attention is paid to the common law principle of supervening impossibility. Due to the limited nature of the principle of supervening impossibility and to ensure relief and contractual certainty, the inclusion of *force majeure* clauses into contracts has become trade practice in South Africa and most other jurisdictions.

As stated in Chapter 2, the South African law of contract has its roots in the Roman and Roman Dutch law. Therefore, the Roman law principles form the basis of the application of the principle of *force majeure* in the South African context. The Roman law principles of *vis maior* and *casus fortuitus* have developed into and are applied as the principle of supervening impossibility.

3.2 Definitions of related concepts

For purposes of clarity, some concepts and terms used in this paper are defined below:

- “*Force majeure* clause”

A clause in the contract that regulates the liability of the parties and the effect on the contract when an extraordinary event or circumstance beyond the control of the parties prevents one or both parties from fulfilling their contractual obligations.

- “Frustration of contract”

The English law principle which allows for contractual relations to be discharged should performance become impossible, or if the reason for performance becomes frustrated.

- “Hardship due to changed circumstances”

In instances where the circumstances surrounding the contract has, after contract conclusion, changed to the extent that either one or both parties will suffer undue hardship if they are forced to perform, some legal systems allow for relief. This is done by allowing parties to renegotiate the terms of the agreement based on the new circumstances.

- “Supervening impossibility of performance”

Impossibility which arises after contracts have been concluded. Certain common law requirements will apply as discussed in further detail in 3.3 below.

3.3 The current South African law position

In the context of modern South African law, any occurrence or situation beyond the control of the parties which makes performance impossible after contract conclusion is dealt with in the context of the principle of supervening impossibility. According to Hutchison *et al.*, if performance becomes objectively impossible after the contract was concluded without any fault of the parties and as a result of unforeseen and unavoidable events, the common law general rule is that the obligation to perform, as well as the corresponding right to performance (if any), is extinguished.²⁸ The common law position is that both parties will be excused from performing, because the impossibility of performance due to an event beyond the control and foreseeable expectation of the parties causes their intention of performing an agreement to be extinguished, and frustrates the purpose of their agreement.²⁹ This is based on the *impossibilium nulla obligatio est* maxim.³⁰ If performance of an obligation becomes wholly impossible after contract conclusion due to no fault of any of the parties, all parties are discharged from their obligations. This would also be the case in the

²⁸ Hutchison *et al.* 383. This view is also supported by Van der Merwe *et al.* 575, *Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) 425, 432, as well as *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) 198 B-E and *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 434-435.

²⁹ The two requirements are discussed and explained by Hutchison *et al.* 383, Van der Merwe *et al.* 575 and Christie 490.

³⁰ This Latin maxim is accepted in our law and means that nobody has an obligation to the impossible.

unforeseen situation where the circumstances of the parties changed after contract conclusion.³¹

For performance to be regarded as being objectively impossible, the following two requirements should be met:³²

- a) “Performance should be objectively impossible and not merely difficult, more burdensome or economically onerous”.³³ However, absolute factual impossibility is not a requirement in all cases. Instances where a court will regard performance to be objectively impossible include cases when performance might still be factually possible, but illegal; or where performance has become so difficult and onerous that it can, under no circumstances, be reasonably expected that a party must comply.³⁴
- b) It is a further requirement that “impossibility of performance must have been unavoidable by a reasonable person”.³⁵ Even if the event could have been foreseen by the debtor, it must be unavoidable in order to be objectively impossible. In a nutshell, this means that even though a party may reasonably be able to foresee that an event may happen, it has no control over its actual occurrence.

As stated previously, the common law consequences of objective impossibility are that the obligation(s) be terminated and the debtor be excused from performing.³⁶ This generally also excuses the creditor from counter-performing as the reciprocity of performances cannot be satisfied. There are, however, two situations in which the obligation for performance will not be terminated, namely when the debtor was in *mora* when performance became impossible, and where the impossibility of performance was the fault, being the intent or negligence of the debtor.³⁷

³¹ Coetzee J “The case for economic hardship in South Africa: Lessons to be learnt from international practice and economic theory” 2011 (2) *Journal for Juridical Science* 6.

³² The common law position is discussed in Christie 491, Hutchison *et al.* 383–385, Van der Merwe *et al.* 57–577.

³³ Hutchison *et al.* 383.

³⁴ This principle was established in the case of *Unibank Savings & Loans v Absa Bank Ltd* 2000 (4) SA 191 (W) 783B–E

³⁵ Hutchison *et al.* 384.

³⁶ *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 434–435.

³⁷ Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials & Commentary* (1988) 3rd edition 303.

Due to the risks and realities of supervening impossibility in South African law, a need arises to negotiate and include specific clauses into the parties' agreement to manage their legal position in this event. The parties will be able to rely on it as a ground of justification to escape liability for non-performance in instances where it falls short of objective impossibility. The parties may include a *force majeure* clause that expressly stipulates what the consequences are and how their liabilities will be recognised where a *force majeure* event occurs.

The courts in South African law are inclined to adhere strictly to sanctity of contract and enforce these clauses as strictly as possible. The court in the case of *Rumdel Cape v South African National Roads Agency Soc Ltd*,³⁸ for example, only examined the specific clause included in the contract which the parties had agreed to and did not consult any general principles which may have existed in common law. For this reason, the drafting of these clauses that are intended to expressly deal with the issue as agreed upon between the parties, is of great importance.³⁹ The narrow scope of the common law principle of supervening impossibility can be contrasted with the flexibility which is found when express custom-drafted *force majeure* clauses are included in contracts.⁴⁰

Over time a type of standard wording has taken hold in most industries, and clauses are copied from one agreement to another. Often only minor changes are made to these clauses to accommodate the wishes of the parties in the specific situation or relationship. As may be expected, the modern habit of cutting and pasting from documents written by others has increased the risk of duplication without proper consideration. The list that defines a *force majeure* event is can differ vastly and is often outdated.

In practice, events may occur which do not render performance objectively impossible,⁴¹ yet these events may still have a significant impact on the parties' ability

³⁸ 2015 JDR 0388 (KZN) 2015 14-23.

³⁹ This will be discussed in detail in Chapter 5.

⁴⁰ McKendrick E & Parker M "Drafting *force majeure* clauses: Some practical considerations" 2000 *International Company and Commercial Law Review* 132. The writers make this argument with reference to the English law principle of frustration of contract. I have expanded this to apply to the principle of supervening impossibility in the South African context.

⁴¹ Objective impossibility is a requirement for the common law principle of supervening impossibility to apply and come into effect.

to perform in that they make it economically onerous, less profitable or practically more burdensome to comply with the performance requirements. In instances like these, the obligation has not become objectively impossible in terms of the common law. Clauses seldom include references to these types of events.

It is in such instances that an alternative remedy will be required to escape the obligation to perform. Should there be no specific clause inserted into the contract (in the form of a *force majeure* clause) that stipulates the contractual consequences, there will be no remedy. This will also be the case for temporary impossibility and partial impossibility.

Examples of such instances experienced in recent times in South Africa are:

- a) amendments to interest rates due to economic changes;
- b) economic downgrades by rating agencies;
- c) internal political instability leading to drastic changes in the value of the South African currency; and
- d) international occurrences and incidents affecting the value of the South African currency.

The above-mentioned events and circumstances are unforeseen in most cases and can impact on a party's ability to perform. These circumstances may have a material effect on the economic aspects of a contract and can be classified as economic hardship. Hardship is, however, not traditionally categorised as being a *force majeure* event; neither does it render performance impossible, but rather more onerous or impractical. As summarised by Coetzee:

“Events such as these could place parties in a materially different position than they were in when the contract was concluded. The degree of the impact will vary, however it is unquestionable that in at least some instances, this could lead to the equilibrium of the contract being severely upset.”⁴²

In the view of Hutchison “the contractual equilibrium exchange is regarded as being upset when the factors on which consensus are based are fundamentally changed.”⁴³

⁴² Coetzee 6. The writer refers to the concept of the change in the contractual equilibrium due to circumstances beyond the parties' control. His argument is that once the equilibrium is disturbed, the law should provide for a remedy to restore the equilibrium, even though this falls short of rendering performance objectively impossible.

⁴³ Hutchison A 414.

Even though performance is not rendered impossible, the economic impact may be severe enough to raise the question whether hardship should be regarded as a *force majeure* occurrence and whether it should enjoy the same legal consequences as a *force majeure* occurrence.

According to South African law as it currently stands, situations such as the above will not *ipso facto* be regarded as supervening impossibility of performance and the South African common law will not provide any relief. General standard *force majeure* clauses will also not include these events specifically and will, in most instances, also not provide affected parties with an escape. Therefore, it is the duty of the parties to a contract to make provision for all eventualities when drafting *force majeure* clauses before they conclude a contract. Should parties want to allow for economic hardship to be regarded as a *force majeure* event, it should be addressed specifically in their contract, since no principle of general application is available in this regard.

In some other jurisdictions, changed circumstances or frustration of contract is expressly recognised as *force majeure* events, and rules and doctrines have been developed over time to deal with their occurrence. These doctrines would apply in instances such as the above.⁴⁴ These are, however, not part of our law, even though it is clear that events such as those listed above do indeed affect a party's ability to perform. In the South African law as it stands, there are no rules that can be applied specifically and consistently for hardship, changed circumstances or frustration to address this problem.

In Chapter 4, the extent of these doctrines in foreign jurisdictions is briefly addressed, and the possible expansion of the South African common law in this regard is elaborated on.

3.4 The effect of the *force majeure* clause on the continuation of the contract

Force majeure clauses are contractual provisions that excuse non-performance of contractual obligations upon occurrence of a particular supervening event (*force majeure* event). Such clauses then suspend the contractual obligations for an

⁴⁴ This is discussed in detail in Chapter 4.

unknown period.⁴⁵ The nature of a *force majeure* clause is that it is a suspensive condition, resulting in the consequences of breach of contract (this could be termination, a claim for damages, specific performance, etc) being suspended for the duration of the *force majeure* event. Therefore, once the *force majeure* event has come to an end and performance has become possible again, the contract will continue. In effect, it provides an excuse for non-performance due to the impossibility to perform.⁴⁶

Because a too long suspension period could cause a practical impossibility to continue for the duration of the contract, parties often include a resolute time period in the *force majeure* clause. This gives any party the right to elect to terminate the agreement unilaterally by way of notice to the other should the *force majeure* event continue for longer than the set period. This period will depend on the agreement between the parties and the nature of the obligation, the contractual performance and the practicality of allowing for such a suspension.

Therefore, where parties prefer to adopt a wait-and-see approach in case performance becomes possible at a later stage, parties include a *force majeure* clause which will suspend the contract, rather than being faced with a termination situation.⁴⁷

A *force majeure* clause is unique in the sense that, to deal with a *force majeure* situation, a suspensive condition is applied to make provision for time to assess the outcome of the event instead of giving effect to contractual consequences right away. The importance of the resolute period lies in the fact that the practical realities of such a suspension need to be managed.

⁴⁵ Robertson D “Contracts – Interpretation & construction; *Vis major*” 2009 (1(25)) *Journal on Contract Law* 62.

⁴⁶ Declercq PJM “Modern analysis of the legal effect of *force majeure* clauses in situations of commercial impracticability” 1996 *Journal of Law and Commerce* 214.

⁴⁷ Hutchison *et al* 412.

THE DEVELOPMENT OF THE SOUTH AFRICAN COMMON LAW TO ADDRESS THE VOID RELATING TO CHANGED CIRCUMSTANCES

4.1 Introduction CHAPTER 4

Because the application of the common law principle of supervening possibility is extremely limited and the insertion of *force majeure* clauses to address every eventuality is problematic, it is necessary that the common law be developed to close this gap and provide for wider application. This is discussed in this chapter by reviewing similar principles in foreign jurisdictions and international law guidelines.

4.2 Current position in the South African law of contract

As stated before, it is a universally accepted principle that contract law is based on *pacta sunt servanda*.⁴⁸ Such is also the case in South Africa. In practice, however, situations may arise in which circumstances have changed fundamentally and that enforcement of the contract will lead to hardship for one of the parties to the contract. Since the South African common law does not address the issue of changed circumstances or hardship beyond that of objective impossibility,⁴⁹ there will only be relief if the parties provide for these instances contractually. This void in the South African common law may be closed by developing the current position in the South African law of contract.

One of the foundational principles of the South African law of contract is freedom of contract.⁵⁰ This enables parties to contract freely and insert any contractual clauses they wish to include, provided the clauses are legal. In this case, the aspect of equal bargaining power and just and fair contract terms are applicable, as well as the effect they have on true freedom of contract for the parties. The problem in the South African context is that, if provision is not made contractually by way of a *force majeure* clause or where the provision does not address the specific circumstances, parties will only be able to rely on the very stringent provisions of the common law doctrine of

⁴⁸Refer to footnote 11.

⁴⁹This refers to the common law principle of supervening impossibility for which objective impossibility is a requirement.

⁵⁰ Refer to footnote 11.

supervening impossibility. The common law does recognise contract discharge based on impossibility,⁵¹ but does not address hardship caused by changed circumstances as a principle.⁵² This leads to the relevant question of whether a change in the economy qualifies as hardship or changed circumstance and therefore justifies its classification as a *force majeure* event that is similar or even equal to a more classic case of supervening impossibility of performance (for example, where natural forces destroy property, thus rendering performance impossible).

In this instance we need to investigate the possibility of using alternative principles that relate to a doctrine or practice which can be described as an “excuse doctrine”⁵³ to develop the South African law. Some of the principles applied in foreign law, such as the doctrines of changed circumstances, hardship or frustration of contract, could offer the answer to this void in the South African law in instances where the effect of certain events or circumstances is not regulated contractually. According to Coetzee, there are some principles applied in other jurisdictions which, if applied and incorporated in the South African law, can result in closing the void that exists in our common law. Because so many participants in the economy are illiterate, more should be done for their legal protection, since they are often ignorant of negotiating contractual terms to their benefit beforehand.⁵⁴

Traditionally, the only exception to *pacta sunt servanda* and the subsequent enforcement of contracts was the doctrine of impossibility of performance, which refers to traditional *force majeure* events and frustration.⁵⁵ Modern legal notions accept that hardship short of impossibility should be a ground to excuse performance. For example, in the United States of America, an even more lenient doctrine, known as impracticability, has been accepted.⁵⁶ It seems as if the modern tendency is to move away from only accepting the strict limitations of impossibility of performance, and to recognise and accept the more liberal doctrine of hardship due to changed

⁵¹ Christie 472.

⁵² Christie 772–473.

⁵³ Katsivela M “Contracts: *Force majeure* concept or *force majeure* clauses?” 2007 *Uniform Law Review* 101.

⁵⁴ Coetzee 1.

⁵⁵ Perillo JM “*Force majeure* and hardship under the UNIDROIT principles of international commercial contracts” 1997 (5) *Tulane Journal of International and Comparative Law* 7.

⁵⁶ Perillo 7–8.

circumstances.⁵⁷ To find a solution for the South African context, we need to examine comparative principles in other jurisdictions. Since this dissertation does not aim to provide an in-depth comparative study, a detailed examination of the position in other jurisdictions does not fall within its scope. The discussion below serves to inform the reader of international law principles that may be considered to improve the position in our own jurisdiction.⁵⁸

4.3 Similar principles in foreign jurisdictions

4.3.1 Frustration of contract

The doctrine of frustration has its origins in English law, where a contract is terminated when its aim or performance is frustrated by some extraordinary and unforeseeable event. This relieves both parties of their respective liabilities towards one another.⁵⁹ This doctrine is used to cover cases of impossibility of performance, as well as instances where the reason for performance has fallen away,⁶⁰ in other words, where the aim of the agreement is regarded as frustrated. The foundational elements of the contract play the central role, and since the aim or purpose of the contract no longer exists due to reasons unforeseen and beyond the parties' control, the contract will be seen as discharged and will automatically end.⁶¹

The doctrine was introduced in 1863 in the English case of *Taylor v Caldwell*.⁶² This was the first time that a court, in its judgment, acknowledged that supervening events or circumstances may discharge a contract.⁶³ The case dealt with a contract in terms of which the plaintiff rented a music hall for a concert. A few days before the concert, the hall burnt down and the concert could not take place. Performance became impossible due to an unanticipated event.

⁵⁷Perillo 9–12.

⁵⁸ This is supported by Section 39 of the Constitution of South Africa 1996.

⁵⁹ Coetzee 9.

⁶⁰ Perillo 6.

⁶¹ Firoozmand MR "Changed circumstances and the immutability of contracts: A comparative analysis of *force majeure* and related doctrines" *Business Law International* 2007 178.

⁶² *Taylor v Caldwell* 1863 3 B & S 826 ET 309.

⁶³ Firoozmand 174.

The English case most often quoted to illustrate this doctrine is the *locus classicus* *Krell v Henry*.⁶⁴ The lessee rented an apartment for a specific day so that the lessee could view the procession of the coronation of King Edward VII. The coronation was postponed and, even though it was still objectively possible for the lessee to rent the apartment for the day, the reason for the contract had ceased to exist. The contract was therefore regarded as frustrated and it was subsequently terminated.

The doctrine of frustration does not allow for the possibility of renegotiation or amendment to save the existence of the contract. Should the claim of frustration be successful, the contract will be discharged automatically.⁶⁵ The same applies to the German law principle of *Unmöglichkeit*⁶⁶ and the French law concept of *force majeure* in the traditional sense.⁶⁷

In the United States of America, the term “frustration” is limited to situations where it is objectively still possible to perform, but performance would be senseless.⁶⁸ The standard is not strict impossibility, but rather a form of unforeseen severe hardship.⁶⁹ This is indicative of the fact that the application of the doctrine of frustration in American law is developed more towards impracticability,⁷⁰ a concept which leans more towards hardship and changed circumstances.

4.3.2 Hardship caused by changed circumstances

The concept of hardship and changed circumstances allows for relief in instances where the circumstances surrounding the contract have changed to such an extent that it has given rise to undue hardship for one of the parties.⁷¹ The factors on which consensus were reached by the contracting parties have fundamentally changed to the extent that the equilibrium of the contractual exchange is upset.⁷²

⁶⁴ *Krell v Henry* (1903) 2KB 740.

⁶⁵ Firoozmand 177.

⁶⁶ Section 275 of the German Civil Code (BGB) deals with ‘impossibility’ of performance.

⁶⁷ Article 1148 of the French Civil Code.

⁶⁸ Perillo 6.

⁶⁹ Coetzee 10.

⁷⁰ Coetzee 10. Coetzee states that the term “impossibility” in American law is a broad term and does not only include actual factual or objective impossibility, but also instances where performance is extraordinarily difficult to perform. This type of “impossibility” is referred to as “impracticability”.

⁷¹ Coetzee 4.

⁷² Hutchison A 414.

However, the mere fact that performance has become more difficult to deliver than expected does not exempt the affected party from performance. Hardship can only be found if performance has become excessively onerous, senseless, impractical or as stated in the PICC,⁷³ when the equilibrium of the contract has fundamentally been changed.⁷⁴ Enforcing a contract in such instances would be unfair and unjust, since the burden of the changed situation by unforeseen events would be allocated to either one of the parties by chance.⁷⁵ The accepted legal consequence of such a situation is to adapt the contract to the changed circumstances.⁷⁶ The aim is to renegotiate and to uphold the contract, rather than to suspend or terminate the obligation(s) in totality. Changes to the original obligations are only possible if there is a framework that provides for them. Its express inclusion as discussed in the preceding chapters on the suspension of the contract rather than its termination refers.

The principle of changed circumstances⁷⁷ provides the framework within which obligations can be altered.⁷⁸ The principle itself does not directly change contractual obligations or provide the exact solution; yet, it provides a mechanism through which the adaptation is possible. The international trade community has also accepted the need to address this principle and provisions on hardship are included in the PICC,⁷⁹ as well as the Principles of European Contract Law (PECL)⁸⁰ and the Draft Common Frame of Reference (DCFR).⁸¹

4.3.3 Changed circumstances and hardship in the PICC

Chapter 6 of the PICC is the only section which deals with the issue of excusing a party from delivering performance. Since the PICC serves a universal purpose, it merges and combines various principles that relate to the impossibility of performance, such as frustration and hardship due to changed circumstances. *Force majeure* is

⁷³ The UNIDROIT Principles of International Commercial Contracts Article 6.22.

⁷⁴ S Schwenger I "Force majeure and hardship in international sales contracts" 2008 (39) *Victoria U. Wellington Law Review* 715.

⁷⁵ Hutchison A 416.

⁷⁶ Maskow D "Hardship and force majeure" 1992 *The American Journal of Comparative Law* 658.

⁷⁷ Either by way of common law principles or codified regulations.

⁷⁸ Maskow 660.

⁷⁹ Section 6.1 and 6.2 of the PICC, in the section which deals with performance.

⁸⁰ Article 6:111 of the PECL.

⁸¹ Book III art 1:110 of the DCFR.

dealt with separately in the section that deals with non-performance.⁸² The provisions on *force majeure* are rigid and only allow for an excuse in instances where performance becomes completely impossible. This confirms that the international perspective remains to regard *force majeure* as something different from mere hardship or changed circumstances.

The section on hardship⁸³ starts with a statement that confirms the general rule that contracts are to be upheld⁸⁴ in that it supports the values of the principle of *pacta sunt servanda*. This principle is, however, not absolute and therefore it allows for the amendment of obligations in extraordinary and exceptional circumstances.⁸⁵ Once again, these are novel terms not known in our law. This definition of hardship⁸⁶ and its effects⁸⁷ are discussed in detail and correspond with similar principles in German, English⁸⁸ and French law.⁸⁹ South African jurists should consider adopting these in principle in our laws, provided they are refined to adapt to the local environment and situations.

Hardship occurs when there is a fundamental change in the equilibrium of a contract. This can be due to an increase in cost or a decrease in the value of the performance. The requirements, which are similar to those of *force majeure*, are:

- a) the event that caused the fundamental change in the equilibrium should occur after conclusion of the contract;
- b) the event should not have been reasonably foreseeable by the parties to the contract; and
- c) the event should be beyond the reasonable control of the parties.

The recourse available is that the disadvantaged party is entitled to request renegotiation of the contract; however, it is not allowed to withhold performance in

⁸² Section 7 of Chapter 6 of the PICC.

⁸³ Section 2 of Chapter 6 of the PICC.

⁸⁴ Article 6.2.1 of the PICC.

⁸⁵ Article 6.2.1 of the PICC.

⁸⁶ Article 6.2.2 of the PICC.

⁸⁷ Article 6.2.3 of the PICC.

⁸⁸ Referring to the English law principle of frustration of contract.

⁸⁹ Maskow 661 and the comments to Article 6.2.1 of the PICC.

accordance with the *exceptio non adimpleti contractus*.⁹⁰ Should the parties not be able to reach agreement based on the new circumstances, they may resort to take legal action in court, which may make an order that it deems suitable in the circumstances by either terminating the contract, or by adapting the contract in order to restore the equilibrium.⁹¹ It is important to note that the aim of the PICC, like the aim of most *force majeure* clauses, is to uphold the contract through adaptation and not to terminate the obligations.⁹² The duty to renegotiate on the new changed circumstances is based on the duty to act in good faith, a principle common to almost all law systems,⁹³ except the South African system.

Although good faith is a principle which is fundamental to our law of contract, it is regarded as an abstract value and not a substantive rule that can be used as a reason for courts to interfere with contractual relationships.⁹⁴ Therefore, in the South African context, the duty to renegotiate will be based on the specific clause and will therefore be a contractual obligation which is separate from the general duty of good faith.

Hardship, as defined in the PICC, goes beyond the strict requirements of *force majeure* and frustration of contract, and allows for legal relief in instances that cannot be defined within the strict limitations of *force majeure* alone. It allows for wider

⁹⁰ The *exceptio non adimpleti contractus* is a common law defence available to a party to a contract when performance is claimed under the contract and the other party has not tendered or made counter-performance. This is available in instances where the latter party is obliged to perform first or both parties are obliged to perform simultaneously.

⁹¹ Article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts.

⁹² Maskow 657.

⁹³ Schwenger 721. Good faith as the basis of changed circumstances has been recognised in German law and Dutch law. In *A Hutchison* 416, Hutchison argues that the concept of intervention in instances of changed circumstances is based on the desire to do what is fair, and therefore the concept of good faith stands central to the principle of changed circumstances.

⁹⁴ This was the decision on the Supreme Court of Appeal in the case of *Brisley v Drotsky* 2002 (4) SA 1 (SCA). As an abstract value, it underpins the substantive law of contract and therefore performs the function of legitimating rules and doctrines. The notion of good faith cannot be acted on directly to strike down or to refuse to uphold an otherwise valid contract. Such discretionary power in the hands of judges would give rise to legal and commercial uncertainty.

Even though there was some criticism against this conservative view, it was confirmed by the Supreme Court of Appeal again in the case of *Bredenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ). The court stated that a court cannot refuse to give effect to the implementation of a contract simply because it is regarded as unfair and unreasonable by a specific judge. In the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 CC, the Constitutional Court emphasised the importance of good faith in our contract law and the desirability of infusing the law of contract with constitutional values. This is in line with new legislation, such as the *Consumer Protection Act*, which specifically relates to small consumer contracts, but not large commercial contracts.

protection and relief to parties who become victims to circumstances beyond their control to the extent that it is no longer reasonable to enforce obligations.

The German principle of *Wegfallen der Geschäftsgrundlage*,⁹⁵ where the reason for the contract falls away is similar to hardship as defined in the PICC. It was formulated after World War I to allow for relief to parties in instances where performance was more onerous, but did not comply with the strict requirements of impossibility, due to changed circumstances created by the war.⁹⁶ The allowance for relief in instances where performance is not impossible, but also not reasonable is regarded as a modern development of the traditional German law principle of impossibility or *Unmöglichkeit*. Courts will always aim to maintain the contract as far as possible and to adjust contract(s) as far as necessary to do justice to the interests of both parties.⁹⁷ German courts have the authority to make an order reasonable within the circumstances by making a value judgment based on the balance of interests between the parties.⁹⁸

4.4 Development of the South African law position

South Africa lags behind other jurisdictions in that it fails to acknowledge and make provision for the widely accepted problem⁹⁹ of hardship which is caused by changed circumstances that fall short of objective impossibility. Development of our law in this sphere is clearly necessary.

A Hutchison¹⁰⁰ suggests that the solution lies in the development of the common law rather than in legislation. Common law could be developed over time and will not be constrained by the prescriptive meaning of legislation. The concept of changed circumstances brings two concepts into conflict: sanctity of contract (*pacta sunt*

⁹⁵ Section 313(1) of the German Civil Code 1900 allows for contractual adaptation in cases where circumstances have changed dramatically after their conclusion, to the extent that the party cannot reasonably be held to its obligation.

⁹⁶ Coetzee 12.

⁹⁷ Firoozmand 172.

⁹⁸ As above.

⁹⁹ Hutchison A 415.

¹⁰⁰ Hutchison A 419.

servanda) and the requirement of fairness which requires that contractual certainty¹⁰¹ be limited in instances where strict enforcement would lead to injustice.¹⁰²

In support of the foreign and international law principles discussed above, it is suggested that the existing common law doctrine of supervening impossibility¹⁰³ be developed by expanding its application. The requirements of such a broadened application should be the following:¹⁰⁴

- a) a fundamental change in the equilibrium of the contract which is to be judged on whether performance has become excessively onerous for one party;
- b) the hardship should have occurred after the conclusion of the contract;
- c) the hardship should be beyond the party's control; and
- d) the hardship should not have been foreseeable or within the limits of the party's assumed risk.

If these requirements are met, the parties have a duty¹⁰⁵ to renegotiate based on the new circumstances in an effort to restore the equilibrium of the contract.¹⁰⁶ Should parties fail to reach agreement, they will be entitled to approach a court, which will have one of two choices: to discharge the contract or to amend same.¹⁰⁷

Discharge is the remedy of choice in the instance of supervening impossibility. However, A Hutchison¹⁰⁸ states that it is not ideal for the developed principle, since it is an all-or-nothing approach which could give rise to enrichment claims and contractual difficulties. Discharge should therefore be the remedy of last resort in instances of changed circumstances.

¹⁰¹ Declercq 213.

¹⁰² The principles and doctrines discussed in this paper are all instances where parties are excused from the strict enforcement of contracts. The degree of the foundation of the excuse differs. Hutchison A 422; Firoozmand 181.

¹⁰³ Coetzee 17.

¹⁰⁴ Coetzee 18; Hutchison A 419–425.

¹⁰⁵ This duty should be clear and independent, and not solely based on the notion of good faith as in some other jurisdictions. This is due to the difficulties we currently still have in the South African law of contract, in that the principle or value of good faith is not yet recognised as a substantive principle to be applied independently. This might however change in the future. Refer to the discussion under 4.3.3 above.

¹⁰⁶ Coetzee 21.

¹⁰⁷ Coetzee 18; Hutchison A 425. If the courts exercise their right to amend the contract in an effort to save same, guidelines must be included to indicate which factors a court should take into consideration when making an equitable order.

¹⁰⁸ Hutchison A 426.

Renegotiation will be the best way to equitably resolve disputes arising from changed circumstances. Ideally, a duty to renegotiate in good faith should be enforced by courts,¹⁰⁹ since renegotiation is also in line with the notions of *pacta sunt servanda*.¹¹⁰ As renegotiation depends on the parties actually reaching consensus, which is not always the case, one should consider allowing them a last option. This will be to terminate at will in a scenario where there is a deadlock, where negotiations are not even attempted, negotiations fail or where delays exceed reasonable expectations. In view of this, the *force majeure* clauses usually aim to not end the contract, but to suspend it, yet leave the possibility open that once a specific time has lapsed during which the *force majeure* event has not ceased, or the parties have failed to renegotiate different terms, the contract may be terminated by notice without it being repudiated.

¹⁰⁹ Hutchison A 427.

¹¹⁰ Coetzee 21.

INTERPRETATION AND DRAFTING OF *FORCE MAJEURE* CLAUSES

5.1 Introduction

With reference to the discussion in Chapters 3 and 4 on the void that exists in the South African common law, the inclusion of a *force majeure* clause in contracts will offer the only remedy. Therefore, the proper drafting and interpretation of these clauses are of paramount importance.

With contractual freedom being one of the fundamental cornerstones of the South African law of contract,¹¹¹ parties are free to include whatever they wish. However, with great freedom comes great responsibility: the responsibility in this sense is to ensure that the drafting is done properly so that the purpose and intent of the parties to a contract are honoured. To achieve this goal, the drafter needs to consider various factors, such as:

- a) the specific industry the contract will apply to;
- b) the specific circumstances of the parties in general;
- c) the specific circumstances in existence at the time of contract conclusion;
- d) established business practices and ethical considerations; and
- e) customs and cultures.

An important factor to consider is the law and principles regulating and relating to the interpretation of contracts in the jurisdiction(s) in which the contract applies or may apply. Should more than one jurisdiction be relevant, as with cross-border or transnational contracts, the law of all these jurisdictions should be considered when drafting to ensure that the actual and correct intention will come into effect when the *force majeure* clause is applied and enforced.

Basic concepts, such as impossibility or impracticability, may have different meanings in different jurisdictions;¹¹² therefore, very specific detail is required when dealing with cross-border and transnational contracts. In addition, drafters should take note of

¹¹¹ Hutchison *et al.* 22–24; Lubbe & Murray 321.

¹¹² Firoozmand 185.

international instruments, such as the CISG¹¹³ and the UNIDROIT principles, if the parties agree to them.¹¹⁴ If the contract in question applies within the jurisdiction of countries which have adopted the CISG, drafters should be mindful of whether the CISG applies to contracts automatically and *force majeure* clauses should be drafted accordingly. Where the agreement is based on or incorporates the UNIDROIT PICC, parties must be mindful that these standard terms already address *force majeure* occurrences and their consequences.

As mentioned previously, the reality is that in most instances standard *force majeure* clauses are inserted mechanically into contracts or simply copied and pasted from foreign sources. Little or no attention is given to the specific and unique circumstances and requirements of the parties. Often the consequences of an unknown future event are far from the parties' minds when the contract is concluded. The result is that the parties do not consider the possible outcomes or do not use of the opportunity to regulate the effects of unknown future events effectively. Subsequently, they have only an ill-fitted remedy or no remedy at all when disaster strikes. Furthermore, an inequality in bargaining power often makes these clauses unfair towards one party, by, for example, not granting the same relief and remedies to both parties.

When drafting these clauses, the most likely interpretation of similar clauses must be considered. This will be key to the success of the clause, which will only really be determined when the unforeseeable happens and the clause is invoked and applied.

5.2 Application of rules and principles of interpretation

5.2.1 Introduction

In South African law, as set out by Cornelius, contracts, being legal instruments, are interpreted by taking account of “the theoretical basis of contractual liability as well as the legal framework underlined by substantive law and jurisprudential views”.¹¹⁵ To attribute meaning to the text and facilitate the process of interpretation, certain rules

¹¹³ The United Nations Convention on Contracts for the International Sale of Goods. Refer to footnote 4 above.

¹¹⁴ Principles that set forth general rules for international commercial contracts which were drafted by the International Institute for the Unification of Private Law. UNIDROIT is an independent intergovernmental organisation situated in Rome, Italy. Refer to footnote 5 above.

¹¹⁵ Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* (2016) 3rd edition 2.

and presumptions of interpretation are applied. This is done consciously or even subconsciously.¹¹⁶

It is important to understand that the interpretation is based on the underlying philosophical, historical and structural peculiarities, as explained by Firoozmand¹¹⁷ that are exclusive to a specific legal system and within a certain jurisdiction. In South Africa, the founding values of our constitutional democracy are human dignity, equality, freedom, and the advancement of human rights and the rule of law.¹¹⁸ These values influence how contract terms are interpreted. In the case of *Barkhuizen v Napier*,¹¹⁹ the court confirmed the important objective that the common law (including the laws of interpretation) should be developed by taking into account the Constitution.^{120 121}

Similarly, other legal systems and jurisdictions have their own sets of values, laws and provisions which will influence the interpretation of legal instruments. Therefore, it is essential for parties who negotiate and contract across borders, to understand the local conditions and circumstances that will affect the interpretation of the clause in those foreign jurisdictions.¹²² Even more important from a drafting perspective is that the parties agree on a governing law to provide clarity and certainty to the jurisdiction within which they contract with each other to avoid landing in the predicament of trying to determine what the governing law should be.¹²³ As stated, clauses are often copied, and as time goes by, the lists of events and occurrences are expanded as parties

¹¹⁶ Cornelius 26, 27, 95.

¹¹⁷ Firoozmand 185.

¹¹⁸ Confirmed by Ngcobo J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 333A–334B.

¹¹⁹ 2007 (5) SA 323 (CC).

¹²⁰ Cornelius 47. Confirmed in *Knox D’Arcy Ltd v Shaw* 1996 (s) SA 651 (A) and *Polygraph Centre – Central Provinces CC v Venter and another* 2006 4 All SA 612 (SCA).

¹²¹ The Constitution of the Republic of South Africa 1996.

¹²² Wright CW “Force majeure delays” 2006 (26(4)) *The Construction Lawyer* 37.

¹²³ A clause should be included to this effect. An example of such a clause is simply a statement to the following effect: “This Agreement will be governed by and construed in accordance with the laws of South Africa”. In deciding what jurisdiction to choose, parties should consider factors, such as in what country most of the services are rendered and/or most of the risk lies. Should parties not be able to agree, they could elect to choose a third independent jurisdiction. It is extremely important that both parties, and especially the individual drafting the contract, are aware of the responsibility to understand the laws and regulations of the jurisdiction chosen as the governing jurisdiction

realise what the omissions are or when they encounter a new scenario not envisaged by previous drafters or parties to other contracts.

5.2.2 Interpretation of lists

Force majeure clauses generally contain a list of events that are regarded as events or circumstances that will trigger application of the clause. These lists are the focal point when it comes to interpretation, since the wording may be unclear, terms could overlap and both the wording and terms could be implied, yet not expressly mentioned. The following is a typical example of a list of *force majeure* events:

“*Force majeure* events or circumstances shall include but shall not be limited to: an act of God, act of public enemy, act or threat of terrorism, war, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, explosions, lightning, fire, flood, storm, drought, earthquake or extreme weather, governmental restraint or Act of Parliament or other legislation, by-law, regulation or directive (such restraint, Act, other legislation, by-law or directive arising or coming into effect after the Signature Date) of any authority having jurisdiction over such Party or any inability to obtain or cancellation of any consent, approval or licence rendering it unlawful for such Party to comply with its obligations hereunder, or strikes, lockout, work stoppage or other industrial action or disturbance by workers or employees, or any other related events.”¹²⁴

Including such a list may be problematic when it comes to determining what is included and excluded, and what effect these exclusions or inclusions may have on the interpretation. This is particularly true when an event is omitted or when the factual situation deviates slightly from the scenarios listed.

In the quote above, the terms “earthquake” and “extreme weather” are both mentioned in an attempt to provide a default. Yet none of these terms, on face value, include the occurrence of a devastating tsunami event.¹²⁵ An earthquake causes a wave that is not a tidal wave and also not a weather event. The term “earthquake” does not include the occurrences that result from the earthquake. Therefore, in this case, the clause could omit the impossibility of performance caused by tsunami damage as a *force majeure* event and tsunami damage will thus not be covered by the clause.

¹²⁴ Example taken from a *force majeure* clause which forms part of the general terms and conditions of a services contract in the mining industry.

¹²⁵ The tsunami of 2004 and damage to Phuket, and the massive destruction caused to Fukushima in 2011 illustrate the issue at hand.

If these lists are vague in their descriptions and incomprehensive, their interpretation could be problematic in certain instances; consequently, the intent of the parties will not be realised when the clause is applied.

In addition to the direct rules of interpretation, presumptions of interpretation are also used to ascertain the meaning of words. Such presumptions include: that words are used precisely and exactly,¹²⁶ that parties choose their words carefully to express their intention precisely, and that no superfluous words are included. This gives rise to further presumptions, namely, that

- a) the same word or expression has the same meaning throughout the contract;
- b) different words have different meanings;¹²⁷ and
- c) words are used in their ordinary and everyday sense.¹²⁸

In addition to these presumptions, there are rules of interpretation which apply to the interpretation of the lists. The *eiusdem generis rule*¹²⁹ is such a rule. It states that words with a general meaning are restricted when used in association with words relating to a specific definition. Therefore, general words that follow specific words in a list must be construed as referring only to the type of things identified by the specific words. The meaning of general words will therefore be interpreted in relation to the company they keep, namely the words specifically listed,¹³⁰ for example, where the phrase “or other weather conditions” follows on terms such as “storm”, “rain”, “hail” and “wind”.

Another such rule is the *ex contrariis* rule, which states that, if a specific provision is made for a case, it, by implication, makes a contrary provision for another or the opposite case. A third rule which will impact the interpretation of lists, such as those listing *force majeure* events, is the *inclusio unius est exclusio alterius* rule.¹³¹ This rule

¹²⁶ Cornelius 100. *Nelson v Hodget's Timbers (East London) (Pty) Ltd* 1973 (s) SA 37 (A) 42C-D.

¹²⁷ Cornelius 101. *Minister of Interior v Machadodorp Investments* 1957 (2) SA 395 (A), as well as *Durban City Council v Shell and BP SA Petroleum Refineries* 1971 (4) SA 446 (A).

¹²⁸ Cornelius 99. *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 590E-F, as well as *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) 589 (G).

¹²⁹ Hutchison *et al.* 267; Christie 230. This is referred to and applied in the case of *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) 196–198.

¹³⁰ Christie 230.

¹³¹ Christie 232.

states that inclusion of the one, by implication, means exclusion of the other. Therefore, if something is expressly mentioned, it indicates the intention to treat items not mentioned differently. Thus, it follows that where “snow” and “hail” are listed, but not “rain” and “floods”, it must be assumed that the latter weather events are excluded.

The application of the aforementioned rules may lead to a narrow interpretation in most instances where lists of *force majeure* events are included in contract clauses.¹³²

The above discussion clearly shows that specific care should be taken when these lists are compiled. The list should be comprehensive and complete,¹³³ and a catch-all category should be added at the end of the list of specific events. An example of such a phrase: “and any other similar or related event(s)” or the ever-popular wording “or any other natural occurrence”.

It could also be helpful to include events that would not constitute *force majeure* into the clause.¹³⁴ However, to overcome the obstacle of the above-mentioned presumptions and specifically the *eiusdem generis* rule, the catch-all provision should rather be stated as follows: “any other event, whether similar or not to the events or circumstances listed above”.¹³⁵ “Without limitations” could also be added to the catch-all clause.¹³⁶

As an alternative, a somewhat safer approach will be to draft the *force majeure* clause to address the effects of these events and not the specific events themselves.¹³⁷ This is done to cast the net wider and extend the ambit of the application of the clause. The focus will then not be on the description of the event and on whether the event falls within the boundaries of the definitions of the events listed in the contract, but rather on the specific effects and outcomes, regardless of what caused these effects, as long as the cause was beyond the reasonable control of the parties.¹³⁸ However, care

¹³²Wright 34 as well as Treitel G.H *Frustration and Force Majeure* (1994) 12.

¹³³Bund JM “*Force majeure* clauses: Drafting advice for the CISG practitioner” 1998 (17) *Journal of Law and Commerce* 411.

¹³⁴Kratochvilova E & Mendelblat M “*Force majeure* clauses” 2012 28(1) *Construction Law Journal* 20.

¹³⁵Bund 408.

¹³⁶Theroux & Grosse 403.

¹³⁷Bund 411.

¹³⁸Declercq 235.

should be taken not to draft the clause too widely in case it becomes vague. Contractual certainty should still be achieved and therefore specificity is important.

A list could still be included; however, this will be for illustrative purposes only, for instance where parties insert a clause that states “*force majeure* includes for example...”. The list that follows does not limit the concept, but merely provides an example.

Should parties wish to include hardship and changed circumstances in the definition of *force majeure*, they should be very precise, since the narrow interpretation would exclude these circumstances if they are not stipulated clearly. For instance, if economic hardship¹³⁹ is not included as a specific *force majeure* event or effect, parties will not be able to rely on it as an excuse, even if the event or circumstances do comply with the general requirements of *force majeure*.

In order to illustrate the difficulties of including lists, The following two situations extracted from case law from the United States of America serve as illustrations of the case in point:

- a) The court held that a *force majeure* clause which listed “riots and wars” as *force majeure* events did not cover an act of terrorism, since acts of war and acts of terrorism were not interpreted as having the same meaning.¹⁴⁰
- b) In another case which dealt with the 09/11 terrorist attacks on the New York Twin Towers,¹⁴¹ the court held that the *force majeure* clause excused performance “due to the acts of third parties”, and interpreted it broadly to include terrorist activities.

5.2.3 Interpretation of the requirement of unforeseeability

One of the traditional requirements for a party to claim *force majeure* is that the events should have been unforeseeable and beyond the party’s reasonable control,¹⁴² specifically at the time of contracting. The risk of such an event should not have been

¹³⁹This example is discussed in 3.3 above.

¹⁴⁰*Pan American World Airways, Inc v Aeta Casualty & Surety Co* 505 F.2d 989 (2d Cir. 1974).

¹⁴¹ *World Trade Centre LLC v Fitzgerald* 789 N.Y.S2d 652 (2004).

¹⁴² *Hutchison et al.* 383.

assumed, or expected to have been assumed by the party now wanting to invoke *force majeure*.¹⁴³ Some contracts or business endeavours are risk-taking contracts and it is mutually understood that risk is the object of the contract or the business undertaken.¹⁴⁴ In instances where risks have been assumed by any of the parties, these risks will influence what is expected to be foreseen by the parties. The allocation of risk might also be an implied term to such an agreement.

Force majeure clauses are not intended to provide a buffer or protection against normal business risks known in the specific sector the contract operates in.¹⁴⁵ The question of whether an event or circumstance is foreseeable and within the control of the party should be interpreted by considering the following aspects identified by Robertson:

- a) the specific surrounding circumstances of the parties;
- b) the nature of the contract;
- c) the way in which the explicit risks are allocated;
- d) the length of the contract term; and
- e) the specific industry practices and norms.¹⁴⁶

According to Wright,¹⁴⁷ the question of foreseeability often only becomes clear when the clause is applied to a specific event. Situations may be foreseeable generally, but not specifically. Therefore, as discussed in 5.2.2, to ensure that the interpretation is clear, one should attempt to focus on the effects of such events rather than the event itself, and the clause should be drafted accordingly.¹⁴⁸

¹⁴³ Schwenger 719.

¹⁴⁴ Draetta U "Hardship and *force majeure* clauses in international contracts" 2002 *International Business Law Journal* 358.

¹⁴⁵ Konarski H "*Force majeure* and hardship clauses in international contractual practice" 2003 *International Business Law Journal* 406.

¹⁴⁶ Robertson 75.

¹⁴⁷ Wright 33.

¹⁴⁸ Wright 34.

5.2.4 Interpretation in the context of the contract as a whole

Force majeure clauses are interpreted as part of the contract and not in isolation. In this regard, the following two presumptions relating to the interpretation of contracts should be noted:

- a) In the first instance, it is presumed that the parties intend to conclude a legally valid agreement.¹⁴⁹ Should this be expanded and applied more widely, it will include the suggestion that parties intend to uphold a valid contract and not seek to escape from and cancel agreements for frivolous reasons.

Specific examples where the clause should be interpreted by considering the agreement in its totality, include the following:

- (i) If a contract contains a warranty and/or guarantee clause whereby one party gives a warranty guaranteeing its future performance, as well as a *force majeure* clause excusing its performance in certain instances, this could cause ambiguity¹⁵⁰ and will become a question of interpretation.
- (ii) If the *force majeure* clause makes provision for termination of the agreement and the agreement itself also has a separate termination clause,¹⁵¹ one of the clauses should be limited and made to be subjected to the other.¹⁵²
- (iii) If a contract contains both a “take-or-pay” clause and a *force majeure* clause, then the buyer may have difficulty invoking the *force majeure* clause when it has become impossible for it to “take”.¹⁵³

- b) The second presumption is that parties intend a reasonable and equitable result.¹⁵⁴ Therefore, it can be concluded that if the parties included a *force majeure* clause in their contracts, it can serve as proof that the parties

¹⁴⁹ Cornelius 106. Confirmed in *Lesotho Diamond Works v Lurie* 1975 (2) SA 142 (O) at 146F.

¹⁵⁰ Bund 410.

¹⁵¹ *Kratochvilova & Mendelblat* 20.

¹⁵² Bund 410.

¹⁵³ Bund 410.

¹⁵⁴ Cornelius 110 and Christie 219. Also see *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317.

intend to remedy the necessary situation should factors, circumstances or a specific event upset the equilibrium of the contractual exchange.¹⁵⁵

5.3 The drafting of *force majeure* clauses

5.3.1 *Force majeure* events

When it comes to the drafting of *force majeure* clauses, it is important to be very specific and detailed in the approach. The importance lies in the fact that the common law dictates that, if performance become impossible (supervening impossibility), the contract will be terminated.¹⁵⁶ The fact that parties include a clause to the contrary in their contract is evident of the fact that they wish to provide for a different outcome in the case of such events arising. This needs to be specified clearly and without ambiguity.

Parties are free to custom make *force majeure* clauses to cover such events and their legal consequences.¹⁵⁷ The scope of the clause should be moulded to suit the parties' needs in any given circumstance.¹⁵⁸ As with the interpretation of clauses, the parties must consider important aspects in the initial drafting process, including:

- a) the circumstances at the time of contract conclusion;
- b) the industry or business practice;
- c) the commercial context;
- d) the nature of the transaction or contract; and
- e) all the circumstances and facts relevant to the parties when the agreement is concluded.

The advantage of contractual freedom is that the *force majeure* clause can be used to address situations that will be unique and of specific significance to the parties, their circumstances and operations.¹⁵⁹

¹⁵⁵ Hutchison A 414. The writer uses the expression "upsetting the equilibrium" to support his argument for the development of the South African common law to include relief for instances of hardship caused by changed circumstance.

¹⁵⁶ Refer to Chapter 3.

¹⁵⁷ Theroux & Grosse 401. Based on the principle of contractual freedom. Also refer to footnote 113 above.

¹⁵⁸ McKendrick & Parker 133.

¹⁵⁹ Theroux & Grosse 403.

The parties will have the responsibility to consider the future, as difficult as this may be. They should contractually provide for events that are a possibility, despite it seeming uncertain or improbable at the time. This includes particulars about the operation of the clause itself, for example, mitigating actions that may be taken by any of the parties; any additional non-traditional events that could be regarded as *force majeure* events; the way in which notices should be given; and the timing of such notices in order to claim *force majeure*.

5.3.2 Consequences of *force majeure* events and the effect of the clause

It is necessary that a more sophisticated clause, rather than a general catch-all clause that attempts to cover all *force majeure* events, be drafted should parties wish to make provision for different consequences of events or effects.¹⁶⁰ In some instances, where performance has become impossible and is prevented completely, the contract will be terminated upon triggering the *force majeure* clause; yet other consequences such as financial liabilities arise; while in other instances, such as when delayed performance is still possible, it could be accepted at a reduced price. The clause should then include a mechanism to calculate the reduction in price to comply with the contractual requirement of certainty of performance.¹⁶¹

When one looks at a broader definition and application of the *force majeure* clause, the consequences of certain effects could include an obligation to renegotiate the contract terms, such as time schedules, or a mechanism to recalculate and automatically adjust the counter-performance. The *force majeure* clause must detail the different consequences for the various events and/or effects clearly.

This aligns with the aim of the *force majeure* clause which is to allow for suspension of the contract, rather than termination thereof, until the *force majeure* event ceases. Where a resolute time period is included, any party may choose to unilaterally terminate the contract by notice once the state of suspension has exceeded the time limit. In more sophisticated contracts, additional duties may be included, for example,

¹⁶⁰ McKendrick & Parker 135.

¹⁶¹ When drafting a legal instrument, certainty is of paramount importance. This includes the requirement that performance should be certain or objectively determinable. As performance is one of the essential terms of the contract, vagueness could lead to the clause or the contract being void.

renegotiation of the contract based on the new circumstances or recalculation of performance. More detail could also be included, for example, duties of notifications to be given upon the occurrence and different resolute time periods for different events.

In practice, it might be that the clause which deals with these type of events and consequences is titled a *force majeure* clause, but in reality, the actual reach and boundaries of its application can be much broader than the traditional definition of *force majeure*. Parties are free to set the limits of the definition in each individual instance. The drafter should ensure that certainty of contract prevails without compromising on reasonableness and equity, even though the clause itself deals with very uncertain future events.¹⁶²

5.3.3 Inequality in bargaining power

The question that arises when discussing the drafting and interpretation of *force majeure* clauses is whether a *force majeure* clause is always fair and reasonable towards both parties, especially where the bargaining power and footing negotiated from is not equal between the parties.

An example of this is where individual farmers contract with large corporations for the delivery of their crops. Since the buyer corporations usually have greater bargaining power, the *force majeure* clause (as well as other clauses in the contract) could be drafted in their favour. The mere existence of the clause could be detrimental to the seller when compared to the common law position which would have prevailed in the absence of a contract clause.

These issues may considered where a clause is challenged on inequality. The right to equality is found in the Constitution;¹⁶³ yet, to date there is no factor in our common law that allows for the setting aside of clauses based merely on inequality. Unless there is an error, misrepresentation, duress or undue influence present that induces

¹⁶² Declercq 213. Declercq makes a statement that contract law is a balancing act between the notions of legal certainty (*pacta sunt servanda*) on the one hand, and reasonableness and equity on the other. This statement is especially true for *force majeure* clauses, since it deals very specifically with the legal consequences of events which are, at the very least, detrimental to one of the parties.

¹⁶³ Section 9 of the Constitution of South Africa 1996.

consensus, the parties remain bound to their agreement. Furthermore, all contracts must comply with public policy. A clause may also be measured against these criteria and found to be lacking, and as a result, unenforceable. However, if it is a consumer contract, the relevant provisions of the Consumer Protection Act¹⁶⁴ come into play.

A further concern is whether *force majeure* clauses are always in line with public policy and negotiated and entered into freely, fairly and in good faith.¹⁶⁵

Drafters should take cognisance of this possibility and protect the rights of both parties equally, as both public policy and the Consumer Protection Act essentially require equality in our society.

5.3.4 Drafting of industry-specific *force majeure* clauses

When drafting *force majeure* clauses, it is important to look at the specific industry the contract will be operating in. This will provide direction regarding the need to:

- a) amend and set the applicable limits to certain definitions;
- b) include certain specific events or circumstances; and
- c) direct the specific legal outcomes and the requirements for specific actions to be taken by a party.

Specific type of agreements within different industries can serve as evidence that *force majeure* clauses are not “one-size-fits-all” clauses and should not be used as such. Construction and transport contracts are vastly different when it comes to events which can lead to *force majeure*; therefore drafters should investigate and note the specific circumstances and risks involved in each case to protect the parties involved when drafting the bespoke clauses. Furthermore, clauses in building and construction industry contracts will differ from those used in software engineering contracts, although both fall within the broader classification of “construction”. For example, in the construction industry in South Africa, it is important to specifically refer to “industrial action”, “lock-out”, “strikes” and “civil unrest” separately, since they do not have the same meaning. Events, such as police action or custom clearance and other state

¹⁶⁴ Consumer Protection Act No 68 of 2008.

¹⁶⁵ The development of the common law in the light of the Constitution of the Republic of South Africa 1996, as well as the rights granted to consumers in the Consumer Protection Act No 68 of 2008, may be the preferred recourse, should the agreement be protected under the Consumer Protection Act.

interferences, should also be included, dependent on the countries and industries involved.

5.3.5 Foreign jurisdictions

When contracting across borders, a serious responsibility rests on the parties and the drafters to ensure they thoroughly investigate and clearly understand all the relevant circumstances that may be beyond their control in foreign jurisdictions, so that they can make proper provision for the allocation of risks. As this study does not aim to provide a comprehensive comparative study, some general remarks may suffice.

An event that is not a risk in one's own country might become an overwhelming force in another. Examples of such conditions include weather conditions specific to certain areas, as well as labour laws.¹⁶⁶ Political instability and economic factors, and the ability of governments to amend legislation on short notice can also have a material effect on the ability of a party to perform.¹⁶⁷ This will also play a role in the interpretation of whether an event was foreseeable to the party claiming *force majeure*.¹⁶⁸

In addition, some legal expressions used in contracts might have a slightly different meaning within the context of a different jurisdiction. This does not only apply to the legal contexts of the foreign jurisdiction, but also to its customs, culture and traditions, since these factors all play a role in the interpretation, and will therefore influence the drafting requirements, of such a clause. The same applies for international law, international treaties and customary international trade law.¹⁶⁹ Furthermore, drafters should be extremely mindful of the implied and imputed tacit terms applicable in certain jurisdictions and business industries which could affect the way in which the contract should be drafted.

Guidelines and best practice in international law can assist drafters.¹⁷⁰ When dealing with multinational or cross-border contracts, it is even more important to draft clauses

¹⁶⁶ Wright 38.

¹⁶⁷ Schwenger 709.

¹⁶⁸ Also discussed in 4.1.

¹⁶⁹ Firoozmand 185.

⁷⁹ Such as the UNIDROIT Principles of International Commercial Contracts (PICC), United Nations Convention on the International Sale of Goods (CISG), the Principles of European Contract Law (PECL) and The International Chamber of Commerce (ICC) model clauses. It may also be helpful to refer to standard contracts in certain

clearly. As discussed above, the law and rules, as well as the underlying understandings regarding interpretation, differ in jurisdictions. Parties should know and understand that principles and definitions may be interpreted differently. For this reason, it is suggested that parties agree on a governing law to preside over the contract.¹⁷¹ However, even if a governing law is agreed on, clauses should be drafted to define all concepts in plain and unambiguous language. The concepts that must be defined clearly include the qualifications for an anticipated event, the event itself, its effects on the contractual obligations and the duties and responsibilities of all parties in the event of such an incident.¹⁷²

5.3.6 *Force majeure* clauses in the context of the contract as a whole

As in the case of interpretation, a *force majeure* clause is also not drafted in isolation,¹⁷³ but rather as part of the contract or legal instrument. Cognisance should be taken of the interaction between the *force majeure* clause and clauses dealing with, for example, breach of contract, guarantees, performance, and the way in which performance should be affected. The same applies to any suspensive conditions to performance, as well as any clause making provision for early termination.

specific industries, such as FIDIC for the engineering & construction industry, and codified law in other jurisdictions.

¹⁷¹ As discussed under 4.2 above.

¹⁷² Firoozmand 185.

¹⁷³ Van der Merwe 327 and Christie 219. The rest of the document will form part of the context against which specific words and clauses will be interpreted.

CHAPTER 6

CONCLUSION

In this chapter, the conclusion and recommendation are presented. The possibility of refining the current South African law position on *force majeure* and the associated effects on a party's ability to perform are also discussed.

The principle of *pacta sunt servanda* requires that contracts entered into freely and fairly be upheld and enforced. It therefore demands that contracting parties exhaust all reasonable efforts to perform their contractual duties adequately. Yet, there seems to be consensus in most legal systems that parties should be released from their duty to perform where an event beyond their control undermines their ability to perform.¹⁷⁴ The reason for this is the understanding that the strict application of *pacta sunt servanda* could be contrary to what is reasonable and fair, public interest and the principles of justice. South African law only allows for a party to be released from its obligation if the strict requirements set for impossibility of performance are adhered to. It does not provide for any redress outside the strict limits of objective impossibility.

To create relief from the strict requirement for performance, parties include *force majeure* clauses in their contracts. These clauses allow for suspension of the contract, rather than termination, until the *force majeure* event has ceased and the extent of the impact on performance has been established. The inclusion of *force majeure* clauses in contracts is accepted as the standard, and the custom is well established within the contractual landscape of South Africa. However, two questions remain:

- a) Do these clauses provide adequate relief in that they address the specific requirements of the parties in all circumstances?
- b) Do they make provision for the unexpected and unforeseen?

The difficulties of drafting and interpreting *force majeure* clauses have been highlighted in this paper. It is important to take all the necessary steps when drafting these clauses to ensure that the application and enforcement of same give effect to the true purpose and intent of the parties and the principle itself. To achieve this, the clauses should be tailored to the unique circumstances of the contract. If they fall short

¹⁷⁴ Firoozmand 181.

of making provision for every unexpected eventuality, the parties will be without relief, since the common law provides no backup.

This is where the need for development in our law lies. Other jurisdictions acknowledge the problem and allow for relief in instances other than strict impossibility; as does the international trade community in that the PICC, PECL and DCFR provide relief and recourse in such instances.

It is suggested that the existing common law principle of supervening impossibility in the South African context should be developed to allow for a broader application to include circumstances and events which go beyond the strict limitations of the current definition. The definition and requirements should be extended to include the consequences of changed circumstances and hardship; similar to how it is known and applied in other jurisdictions and defined in the PICC.

However, the desired outcome is still a valid contract and therefore successful renegotiation on the new circumstances should be the remedy of first choice. Where renegotiation is impossible, a party should, at the most, have the right to unilaterally terminate by notice. Discharging the contract should be allowed for in extreme situations, or only if so ordered by a court. This will ensure that the commercial and legal certainty of contracts is guaranteed and not interfered with any more than required to uphold that which is fair and reasonable.

It is necessary to allow for a mechanism that will address the inequalities created in contracts by the occurrence of unforeseen events in a fair manner. The South African common law should be developed by our case law to close this gap.

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