Delhi Metropolitan Education
Affiliated to GGSIP University, New Delhi & Approved by Bar Council of India

RESEARCH ARTICLE
doi: 10.53361/dmejl.v3i01.08

Navigating the Murky Waters of Force Majeure Clauses- A Deep Dive Into Principles Governing Their Interpretation.

Piyush Senapati

National Law University, Jodhpur, Rajasthan, India.

ARTICLE INFO

***Correspondence:**
piyush.senapati@nlujodhpur.ac.in
National Law University, Jodhpur, Rajasthan, India.

Dates:
Received: 02-10-2022
Accepted: 07-11-2022
Published: 28-12-2022

Keywords:
Force majeure, Interpretation of contracts, ejusdem generis, Contra proferentem, Ambiguous terms, Drafting Force majeure clauses.

How to Cite:
Senapati P. (2022) Navigating the Murky Waters of Force Majeure Clauses- A Deep Dive Into Principles Governing Their Interpretation. DME Journal of Law, 3(1), 55-64.
doi: 10.53361/dmejl.v3i01.08

Abstract

"Force Majeure" has quite understandably been a buzzword lately, particularly due to the catastrophic events that have afflicted humanity in the past couple of years, ranging from the pandemic to the war in Ukraine. In such a scenario, the business and commercial world has been particularly hard-hit, since such catastrophic events make commercial activity a near impossibility. Therefore, an increase in Force Majeure related litigation due to non-performance of contractual obligations came to nobody's surprise. However, regardless of the widespread prevalence and importance of Force Majeure clauses in contracts, their interpretation is quite a hefty task due to the problems of ambiguous wordings and non-inclusion of events that cause the non-performance of the contract. This paper seeks to describe and analyse the interpretational doctrines employed by courts to resolve these problems. The first part of this paper will establish and describe in detail the exact nature of the problems that are prevalent when interpreting Force Majeure clauses. The next section analyses the treatment of Force Majeure clauses that omit the event which induces the non-performance of the contract in the first place. This shall be done by probing into the doctrine of Force majeure being a general principle of law, the exhaustive or non-exhaustive nature of the clause and the *ejusdem generis* principle. The second part will focus on how ambiguous terms in a Force Majeure clause are dealt with by examining both the restrictive and non-literalist approaches towards interpretation of Force majeure clauses as well as the *contra proferentem* rule. Overall, this article seeks to provide a comprehensive analysis of the problems that are commonplace in the interpretation of Force Majeure clauses as well as the doctrinal tools courts employ to resolve these difficulties.

Introduction

While *pacta sunt servanda* or the principle that contracts must be kept in good faith is a fundamental principle of contract and commercial law, it is not so strictly followed so as to inflict injustice to the party who fails to perform his obligations on account of circumstances beyond his control or foreseeability. Therefore, despite this doctrine being a general principle common to all legal systems, Force majeure remains a major exception to the same. The phrase is derived from French and literally means 'greater force'. While there is

DME
Journal of Law

no commonly accepted definition of Force Majeure, the phrase is used particularly in commercial contracts to describe events possibly affecting the contract and that are completely outside the parties' control-such events are normally listed in full to ensure their enforceability; they may include acts of God, fires, failure of suppliers or subcontractors to supply the supplier under the agreement, and strikes and other labour disputes that interfere with the supplier's performance of an agreement and an express clause would normally excuse both delay and a total failure to perform the agreement[1]. The main objective of including a force majeure clause in a contract is to limit the scope of the strict liability imposed on a contractual party for performance of their contractual obligations after the occurrence of an unforeseen event which hinders a party's performance. Where a non-performing party to a contract proves that its inability to perform was due to an event which falls within the ambit of the force majeure definition, then that party shall escape liability.[2] Given its relevance and practicability in today's commercial world, it becomes more than important for us to understand and analyse the one of the most vexatious issues surrounding clauses of this kind-the practical difficulties in the interpretation of these clauses and their subsequent application to scenarios that induce contractual non-performance.

Practical Difficulties in Interpretation of Force Majeure clauses.

It is commonly said that the only thing predictable about life is unpredictability and that change is the only constant. These general maxims are more than true when it comes to the commercial and business world, wherein the occurrence of unexpected events that might derail contractual performance is ironically an expected constant. A perfect example would be the Covid Pandemic of 2020-few events in recent modern history have wrecked as much havoc and caused as much death and economic losses as as it did. The business and commercial community was particularly hit, for the lockdowns imposed in most countries of the word for several months and other restrictions that continued for more than a year put business activities at a standstill. Even in 2022, businesses are yet to recover from the huge losses sustained during that period and to attain pre-pandemic levels of profitability and smooth conduct of commercial activities is a tough challenge indeed.

It seems obvious that businesses should be exempt from performance of contractual obligations on account of covid-19, for the pandemic was an event that bought the world to a standstill for a considerable period of time and the government-imposed restrictions all over the world made the conduction of commercial activities a near impossibility. However, the situation is not that simple, for Force Majeure clauses are a creature of the contract and in interpreting them, courts will mostly follow the same approach as with any contractual term by looking at the language of the parties' agreement.[3] Hence, as a result of Force Majeure being a contractual doctrine, the standard rules of contract interpretation are applied to force majeure clauses, and the wordings of the clause governs its scope and application. Thus, unless the force majeure provision is found to be ambiguous, the plain language of the clause will control its interpretation, and the court cannot rely on extrinsic evidence to interpret the provision.[4] Although the decisions relating to force majeure often reach different results and contain conflicting analyses, the one common thread is that a court will not save a party from its own haphazard contract drafting.[5] This principle is also reflected in the judgement of *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)*[6] wherein the Court of Appeal held that the proper approach to a force majeure clause is to interpret it by reference to the words the parties had used, not their general intention.

1 Force majeure, Dictionary of Law (4th ed.1997).

2 Jaggadishen Chelumbrun, A Critical Evaluation of a Force Majeure Clause in English Contract Law, (2019)(Phd dissertation, Selinus University).

3 Jennifer Roach and Matthew Ridings, Force Majeure & Commercial Contracts, Bloomberg Law (last visited Sep.20, 2022) https://www.bloomberglaw.com/product/health/document/XDBFHDLK000000

4 Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (1990).

5 Supra note 3.

6 [1996] 2 LR 383 (QB).

As a consequence of the abovementioned principles, if the Force Majeure clause specifically includes epidemics or quarantine restrictions, the COVID-19 outbreak would almost certainly be considered a force majeure event. Thus, if performance under a contract is rendered impossible or impracticable by COVID-19 or any governmental response thereto, and the contract contains a force majeure clause with governmental orders or health emergencies, there is ahigh chance that any court will excuse the non-performing party from liability on grounds of Force Majeure.[7]

However, this extreme importance given to the language of the parties' agreement in contractual interpretation can create complications in those cases wherein the Force Majeure provision does not include any specifically identified events or excludes words like 'epidemic' and lists terms like acts of God, natural disasters or includes a 'catch-all' provision which a party may argue that applies to the COVID-19 pandemic.

Thus, the recent spurt in force majeure related litigation due to covid has demonstrated that these Force Majeure clauses can be as varied in terms of language and express stipulations as the events which may derail contractual performance and can be divided into two broad categories- while some list a multitude of possibilities which may excuse contractual obligations, others may contain very broad and vague terms. Typical examples of the two broad types of Force Majeure clauses are reproduced as below

Type I- Broad and vague clause.

A force majeure event is any event which is not due to the fault of the party seeking to rely on this clause, beyond the reasonable control of the parties and could not have been reasonably avoided.

Type II-Clause containing specifically listed events.

Event of Force Majeure means an event beyond the control of the Parties which prevents a Party from complying with any of its obligations under this Contract, such as riot, war, invasion, earthquakes, floods, fire, Act of God, strike, government action, industrial disputes or any other causes beyond the parties' control.

The nature and manner in which force majeure clauses are worded may lead to a situation of grave ambiguity wherein one party may claim a certain event to be covered within the ambit of force majeure clauses, while the other party denies the same. Further, the situation is worsened wherein the clause prescribes a list of events but omits the particular event that actually leads to a failure to perform contractual obligations. Thus, the diversity and inconsistency in drafting of Force Majeure clauses along with the extreme importance placed on the wording of the clause leads to two kinds of interpretational problems that arises before courts in Force Majeure related litigations- when the term stipulated in the contract is ambiguous and one is unsure whether the event that is claimed as a Force Majeure event falls within the former's ambit or not, and the second situation being when the event being claimed as a ground for Force Majeure is not stipulated in the clause.

As one commentator noted, "One cannot be sure what meaning a court will give to a force majeure clause. At best a significant amount of time is likely to be wasted in arguing about the proper construction of the clause".[8] Disagreements over the meaning and scope of terms in Force majeure clauses are the primary area of litigation over these clauses. A force majeure clause is, in essence, a bargained-for allocation of risk among the parties that will not be disturbed by a court, even in the event of a disaster or, more accurately, especially in the event of a disaster.[9] This has implications both for a declaration of a force majeure and for the drafting of the clause. Whether a force majeure clause is triggered by an event will depend on the proper interpretation of the clause and that subsequently will determine the rights and liabilities of the parties. Fortunately for the contracting parties who have found themselves embroiled in a force majeure related dispute, there exist principles and methods

7 *Daniel J. Schneider, "The COVID-19 Pandemic and Force Majeure", marine county bar association (June 3, 2020), available at https://marinbar.org/news/article/?-type=news&id=550 (last visited on Sept. 20, 2022).*

8 Ewan Mckendrick, Force Majeure and Frustration of Contract 59 (Lloyd's of London press ltd. 2nd ed.1995)

9 Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 991-992 (1976).

of interpretations laid down by courts that will help resolve these anomalies. The doctrines used by the courts and tribunals while handling cases of both missing and ambiguous terms are analysed as below.

In Cases of Missing Terms in the Force Majeure Clause

A pertinent question that has arisen in the jurisprudence of force majeure clauses is whether the clause can be invoked based on a ground that is not stipulated in the contract-especially when it comes to Force Majeure clauses which specifically list out the events which would result in the clause being evoked. Such a question is answered in the affirmative by the principle that the force majeure is a general principle of law not depending on express contractual stipulation and the ejusdem generis principle of contractual interpretation. Further, emphasis would have to be placed on the wording of the particular clause under scrutiny- whether the clause is exhaustive or non-exhaustive in nature.

Force Majeure as a general principle of law.

Force Majeure can be considered a general principle of international law and the right to invoke it does not depend on, or arise out of an express contractual provision.[10] Thus the existence of force majeure circumstance does not depend on, or arise out of, an agreement between the parties as to the existence of such circumstances.[11]

The application of the above-mentioned principle is elaborated upon in the case of *Jordan investments ltd. v. Soiuzneftеksport*.[12] In that case, it was contended that the force majeure clause in the party's contract did not stipulate failure to obtain licenses from the Ministry of Foreign Trade as a ground for force majeure and thus the same could not be claimed to excuse non performance. It was held by the tribunal in that case that the "force majeure clause provides for release from liability for non-performance of the contract if such non-performance results not only from the instances of insuperable force listed in it, but also from any other cause which does not depend upon the nonperforming party".

It follows from this interpretation of the principle of Force Majeure that the respondent cannot be held liable for failure to perform the contract, inasmuch as it was unable to export without a permit from the Ministry of Foreign Trade and inasmuch as the denial of such a permit was beyond its control.[13]

Thus it can be concluded from this case that the list of specific types of impossibility-producing events is held not to limit the more general category. Usually, a force majeure event is an express term in the contract contemplating an event beyond the reasonable control of either party.[14] Where no such express term exists, the courts may imply such a term into the contract, as held in the case of *Ambatielos v Anton Jurgens Margarine Works,*[15] making it clear that not every ground for force majeure has to be explicitly written in the contract. It can thus be inferred from the discussion above that a force majeure clause need not explicitly stipulate all the grounds based on which it can be claimed, events that are not provided for in the force majeure clause can be a ground for the same. A major boon of such an approach might be that it discourages a pedantic loyalty to the wordings of the clause and at the same time allows the clause to be spontaneous enough to cover situations which the parties might not have contemplated at the time of entering into the contract. However, this boon must be accompanied by a cautionary rider as well- while the court may imply terms into the parties' force majeure clause as per this concept, in doing so there is a possibility that the court may imply a term that the parties never actually intended to be a ground for Force majeure. The same can be problematic,

10 Anaconda-Iran, (1992) Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company, IUSCT Case No. 167, Award, (Oct. 29 1992).

11 HJ Berman, (1959) "Force Majeure and the Denial of an Export License under Soviet Law: A Comment on Jordan Investments Ltd. v. Soiuzneftekspor", 24 Jahrg h.3 449, 453.

12 Jordan Investment, (1958) Ltd v Soiuzneftеksport (Israel v USSR), Foreign Trade Arbitration Commission of the U. S. S. R. Chamber of Commerce, award of 19 June 1958.

13 Supra note 11 at 453.

14 Naylor Benzon & Co Ltd v Krainische Industrie Gesellschaft [1918] 1 KB 331.

15 Ambatielos v Anton Jurgens Margarine Works [1923] AC 175.

especially in light of the growing trend of giving importance to the parties' commercial intentions and the freedom of contract.[16]

Exhaustive or Non- Exhaustive nature of the clause

A force majeure clause which includes both a list of specific events and an open-ended phrase, also known as a 'catch-all' phrase such as "such other events beyond the control of parties" or "act of god" or "including, but not limited to" designed to cover events not specifically listed in the clause is called an inclusive or non-exhaustive force majeure clause.[17] The use of such phrases as "Including but not being limited to", "not limited to", "such as" and "the enumeration is non-inclusive" has the effect that the list of events is not exclusive.[18] In such cases, specific events are listed as an illustration and not meant to be the only events based on the occurrence of which Force Majeure can be claimed. It has been held that when a force majeure clause started with the 'catch- all' wording, the intent of the drafter was to give examples of what the general clause covered, and that those examples were not intended to be exhaustive, and therefore could include other scenarios as well.[19] But unless specific words are used to suggest that a list is non-exhaustive, it can be difficult to argue that parties who set out a list of specific events but did not include a particular event, nonetheless intended that event to be covered.[20] Therefore, if parties do not wish the applicability of the Force Majeure clause in their contract to be restricted to the specific events mentioned, all they have to do is insert an open-ended phrase after the enumeration of specific events. However, it must be kept in mind that such an open-ended phrase cannot be interpreted to include anything and everything that a party claims to be a Force Majeure event- the phrase has to be interpreted in consonance with the list of specific events enumerated. This is the doctrine of *ejusdem generis*, which is described as below.

The Principle of *ejusdem generis* and its application on Force Majeure clauses

When a statute or contract mentions a 'catch-all' provision, courts are guided by the interpretative doctrine of *ejusdem generis*, which provides that the 'catch-all' is limited to the same or meaning and scope of the 'catch-all' phrase is of the same general kind or class of those things which are specifically mentioned. To give a very rudimentary example, the phrase "and other similar things" in a list enumerating "apples, oranges, grapes and other things" cannot be interpreted to mean cars or perfumes-the open-ended phrase will not be given that expansive a meaning by the courts. Simply put, this rule is applied where a contractual clause contains a general word or definition followed by a list of specific items, to limit the meaning of the general word to only those of "the same class or kind of occurrence" as those listed specifically[21] the implication being that an unenumerated event must be similar to enumerated ones to qualify as falling under that clause, i.e belonging to the same genus as the enumerated events.

An example of the application of this rule in the force majeure context would be the case of Standard *Ice Co. v. Lynchburg Diamond Ice Factory*[22] wherein the force majeure provision excused performance because of "breakdown, fire, high water, washout, or from any other cause whatsoever beyond its control". The Court held the clause to not apply to an illness of the workers because, applying ejusdem generis, that the purpose of the clause was to protect

16 Ahurst, Exclusion clauses and the limitation of the contra proferentem principle (June 8, 2017), available at https://www.ashurst.com/en/news-and-insights/legal-updates/exclusion-clauses-and-the-limitation-of-the-contra-proferentem-principle/. (last visited Sept. 22, 2022).

17 Covid-19 and its Impact of Commercial Contracts, CTCL-NLUD Working Paper (2021) https://nludelhi.ac.in/UploadedImages/be41ba6a-5b69-401a-af05-0496ff3d942f.pdf

18 Parviz Savrai, Excusable Non-Performance Of Contract: International and Comparative Aspects (1994) (Ph.D Thesis, Faculty Of Law And Financial Studies Department Of Private Law, University of Glasgow).

19 Emilie Jones, Will Covid-19 trigger a force majeure clause? pinsent masons (Mar. 26, 2020) https://www.pinsent-masons.com/out-law/guides/covid-19-force-majeure-clause (last visited on Sept. 24, 2022).

20 Id.

21 Ambatielos v Anton Jurgens Margarine Works [1922] 13 LLR 357.

22 129 Va. 521, 532 (1921).

against physical disability of the factory and the worker's illness quite logically did not belong to the same class or type as the specific events provided for. Similarly, in the case of *Tandarin Aviation,*[23] the court refused to apply *ejusdem generis* to the Force Majeure clause in the parties' contract since those specific examples of force majeure in the clause were not even remotely connected with economic downturn, market circumstances or the financing of the deal- the grounds based on which force majeure was being claimed in that case.

It is to be noted that the *ejusdem generis* rule does not automatically apply to all commercial contracts and the courts will generally first inquire into the parties' intentions and give general words a wider meaning not restricted to the proceeding words, if this is what the parties intended. Thus, the parties' intentions become important, and the Courts will give words their wider and natural meaning only where appropriate.[24] In general, though, the approach used to construe the document of ejusdem generis is one of restrictive interpretation, exemplified by cases like those of.

Also, the rule may be inapplicable where the words "including but not limited to" are used before the list of events, or where the list contains a very broad 'catch-all' at the end. For instance, in the w*orld land* case,[25] the Court held that the ejusdem generis rule did not apply to a force majeure clause because it contained a 'catch-all' for "any other causes beyond the control of the vendors or the purchasers" at the end of the list, and because the specific events listed were not of the same kind or character.

Ejusdem Generis in action- the qualification of Covid-19 as a natural disaster.

One of the best examples of the practical application of ejusdem generis in contemporary times is the qualification of Covid-19 as a natural disaster by American courts. This has been established by the trajectory of cases as described below.

The first case to be noted is *Friends of Devito v. Wolf.*[26] This case did not deal with a force majeure clause, but rather dealt with statutory and constitutional challenges by several business owners who contended that the Governor lacked statutory authority to issue an executive order that compelled the closure of all non-life-sustaining businesses within the state in order to curb the spread of COVID-19. The Petitioners' arguments required the court to determine whether the COVID-19 pandemic was a "disaster" under the Pennsylvania Emergency Code wherein a "natural disaster" is defined as "any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life. The Petitioners contended that because a viral illness like COVID-19 was not included in the list of applicable disasters, the court was required to apply the doctrine of *ejusdem generis* "which prevents the expansion of a list of specific items to include other items not 'of the same kind' as those expressly listed." The court determined that "it is beyond dispute that the COVID-19 pandemic is unquestionably a catastrophe that 'results in… hardship, suffering or possible loss of life." Thus, the court held that the COVID-19 pandemic could be classified as a "natural disaster" based on the application of the doctrine of *ejusdem generis* to hold COVID-19 as falling within "any other catastrophe". The ejusdem generis principle was thus similarly applied in the case of *Desrosier v. Governor*,[27] wherein the governor's COVID-19 orders were upheld because statutory catch-all "other natural causes" was interpreted to include "encompasses a health crisis on the level of the COVID-19 pandemic".

An important case to be noted is *JN Contemporary Art LLC v. Phillips Auctioneers LLC*[28] wherein the Court observed that since the Termination Provision in the parties contract included more than just events that were environmental calamities, "a pandemic requiring the cessation of normal business activity is the type of 'circumstance beyond the parties control' that was envisioned by the Termination Provision" thus reflecting an application of the *ejusdem generis* principle . In holding so, the court notably rejected JN's argument that as per the principle of *ejusdem*

23 [2010] EWHC 40 (Comm).

24 Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240.

25 227 A.3d. 872 (2020).

26 Friends of Danny Devito v. Wolf, 227 A.3d 872 (2020).

27 86 Mass. 369, 378–79 (2020).

28 JN Contemporary Art LLC v. Phillips Auctioneers LLC, No. 20cv4370 (DLC), 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020).

generis, the pandemic and resulting government restrictions were not sufficiently similar to the other circumstances outside the parties› control listed in the Termination Provision. The takeaway from these judgements is that the parties can rely on the ejusdem generis principle to bring Covid-19 within the ambit of their force majeure clause if the clause in question contains a broad 'catch-all' phrase after the enumeration of certain events which maybe regarded as natural disasters or those terms that reflect governmental restrictions.

In Cases of Ambiguity in Terms Mentioned in Force Majeure Clauses

There are often cases of ambiguity in the drafting of contracts and Force Majeure clauses are no exception to the same. Every term mentioned in the clause as an example of an event that triggers the Force Majeure clause can have a range of meanings- for example, will the term "war" include cyber wars as well, or will it be restricted to war as is understood in the conventional sense? Or will the term "government action" be limited to actions of the executive only, or will it encompass within it change of law by the legislature too? While these questions are certainly perplexing, the courts do have the requisite tools to deal with them, as is made evident by the doctrines enumerated below.

The Restrictive Approach.

The legal elements for the qualification of an event as force majeure are essentially the same in most legislations, and court decisions show a universal trend to a comparable restrictive interpretation of these clauses.[29] It is a general rule throughout various legal systems that Force Majeure clauses should be interpreted restrictively and narrowly.[30] The general words in a force majeure clause are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.[31] The rationale behind this restrictive approach is that when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.[32] Thus, a force majeure clause will be construed according to its natural and ordinary meaning, read in the light of the contract as a whole, and given due weight to the context in which the clause appears and to the nature and object of the contract.[33]

The rationale behind this restrictive interpretation was enumerated in the *Atcor* case,[34] wherein it was held that with a broad list of force majeure events in a contract there are risks that the bargain can be turned around. The court further found that when the list of force majeure events is broad, it would be important to look at the other elements of the clause, such as its impact and legal effect. Those shall have to be drafted and interpreted in such a way to put reasonable limits on the application and extent of force majeure. The court was of the opinion that although there is no rule of law which requires a narrow interpretation of a force majeure clause against the party relying on such clause,[35] a restrictive interpretation would be preferred in order to prevent unnecessary expansion of the clause and also because sometimes the clause is considered as an exclusion of liability clause and this requires a strict interpretation *against the party relying on this clause to avoid liability.*[36] The restrictive interpretation doctrine is exemplified by the case of *Kyocera Corp. v. Hemlock Semiconductor.*[37] In that particular case, even though the contract contained a force majeure clause that included "acts of the government," the court determined that no force majeure event had occurred when a

29 Werner Melis, "Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration", 1(3) 213, 215 Journal of international arbitration (1984).

30 Kel Kim Corp. v. Cent. Markets, Inc 519 N.E.2d 295 (1987); Allegiance Hillview, L.P. v. Range Texas Prod., LLC, 347 S.W.3d 855 (2011).

31 Kel Kim Corp. v. Cent. Markets, Inc.519 N.E.2d 295 (1987); Wisconsin Elec. Power Co. v. Union Pac. R. Co., 557 F.3d 504 (2008).

32 Constellation Energy Servs. of New York, Inc v. New Water St. Corp 146 A.D.3d. 135. (2017).

33 Darlington Futures Ltd v. Delco Australia Ltd 68 A.L.R. 385 (1986).

34 Atcor Ltd v Continental Energy Marketing Ltd 178 AR 372 (1996).

35 Supra note 2.

36 Id.

37 Hemlock Semiconductor Corp. v. Kyocera Corp., No. 17-2276 (6th Cir. 2018).

"trade war" between the United States and China resulted in dramatic price fluctuation for solar panel parts. After considering the contract as a whole, the court came to a conclusion that honouring the force majeure clause by giving the disputed term such a broad meaning would "nullify a central term" of the contract, and thus the clause was not applied in that particular case.

The Non-literalist Approach

However, the construction of force majeure clauses is not always a literalist one and limitation/exclusion clauses will not be given a literal interpretation which would otherwise produce a result at odds with the main object of the contract.[38] Interpreting a clause is "not a literalist exercise, focused solely on a phrasing of the wording of the particular clause. One must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning".[39] This implies that clauses in a contract are not always to be given their strictly legal meaning, the meaning can definitely be expanded upon and enlarged. This doctrine implies that the courts can indeed enlarge the scope of the term concerned in the force majeure clause and a pedantic loyalty to the word's natural meaning is not at all a requirement. This approach is reflected in the case of *In Luigi Monta of Genoa v. Cechofracht Co. Ltd*[40] where the court interpreted the term 'national government' in the force majeure clause of the parties contract to mean 'qualities or character required by the body giving the order must, therefore, include essentially the exercise of full executive and legislative power over an established territory'.

While the restrictive and non-literalist approach may seem contradictory at first, they can certainly be harmoniously construed. While the non-literalist approach emphasizes that words in a force majeure clause should not be given a dictionary meaning, the restrictive interpretation does not argue for a pedantic, dictionary meaning either- it simply prohibits an interpretation that is expansive in nature. There is certainly a middle ground between not being too expansive and while at the same time not confining oneself to a word's exact meaning. The interaction and harmonious construction of these two doctrines would empower the courts to arrive at this middle ground, although there is a possibility that this exercise could involve an element of subjectivity.

The Rule of Contra Proferentem.

The rule of *contra proferentem* principle essentially states that if there is any doubt regarding the meaning and scope of an exclusion clause, the ambiguity should be resolved against the party seeking to rely on the said clause.[41] A literal translation of this principle is "the words of documents are to be taken strongly against the one who 'puts forward' the clause under consideration", which can mean the party for whose benefit the clause operates.[42] Essentially, wherever there is a doubt in any term of the contract and if such term is likely to benefit or favour a party to the contract, it should be read against that party[43] or language used in a contract must be held against a party attempting to rely on such construction with the intent to escape liability.[44] Thus, when it comes to the interpretation of force majeure clauses, in accordance with the *contra proferentem* rule[45] and in the event of any ambiguity, against the interests of the party that relies upon it.[46]

A contract is considered to be ambiguous if some provisions are reasonably subject to more than one interpretation or that a specific term, word, phrase, or definition is vague or unclear[47] or ambiguous

38 Mitsubishi Corporation v Eastwind Transport Limited and Others [2005] 1 LR. 383.

39 Wood v Capita Insurance Services Limited [2017] UKSC 24.

40 [1956] 2 Q. B. 552.

41 Supra note 16.

42 Sir Kim Lewison, The Interpretation of Contracts 362 (5th ed. 2016).

43 Burton v.English, [1883]12 Q.B.D. 218.

44 Dr. O. N. Ravi, (2020) "The Contractual Interpretation Rule – Contra Proferentem : It's Relevance in Modern Law", 2(1) CMR university journal of contemporary legal affairs.

45 Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd [1957] 1 W.L.R. 136

46 Hong Guan & Co Ltd v R Jumabhoy [1960] 1 LR 405.

47 JRank Articles, Contracts - Ambiguity - Meaning, Party, Ambiguous, and Reason ((last visited Sept. 22, 2022). https://law.jrank.org/pages/5699/Contracts-Ambiguity.html#ixzz7OMv6gn2c

if it is reasonably susceptible to more than one interpretation or construction.

The existing corpus of case law generally supports the notion that broad wordings of a force majeure clause which creates ambiguity should be interpreted against the drafter and thus this doctrine will cast the burden on the party that supplies the ambiguous term in that contract, which would subsequently be interpreted in a manner that is least favourable to that party. A case that highlights this principle would be *M.A. Hanna Co.* v. *Sydney Steel Corp,*[48] wherein the Court considered a standard form of force majeure clause in the contract between the parties which was part of the boilerplate in the contract provided by the plaintiff, M.A. Hanna Co., and it was the defendant that invoked the clause. In its analysis of the force majeure clause, the court found that the plaintiff had employed "some broad phraseology" in its definitions of *force majeure* triggering events.[49] As such, the court found that "the broad wording of the clause creates an ambiguity which should, in this case, be interpreted against the drafter".

Thus, the court applied the *contra proferentem* rule to give effect to the *force majeure* clause and relieved the defendant from its obligations. The "broad phraseology" referred to in the case is a reference to general all-inclusive language and this case perfectly demonstrates the risk involved in relying on broad general language to define the force majeure triggering events.

The Diminishing Importance of the contra proferentem rule.

However, judicial trends of recent years show that the importance and application of the *contra proferentem* doctrine is declining in importance. In *K/S Victoria Street v House of Fraser (Stores Management) Ltd,*[50] the Court of Appeal held that the *contra proferentem* rule was rarely decisive as to the meaning of a commercial contract. Instead, what the courts should prioritize are the words used, commercial sense, and the documentary and factual contexts in order to ascertain the meaning of the clause. A similar approach was taken in the Court of Appeal's decision in *Transocean Drilling UK Ltd v Providence Resources PLC.*[51] In the case of *Persimmon Homes v Ove Arup [2017],*[52] Court of Appeal declined to apply *the contra proferentem* rule to an exclusion clause in a major commercial contract. The Court of Appeal stated that the *contra proferentem rule* now had a very limited role in relation to commercial contracts negotiated between parties of equal bargaining strength, especially where exclusion clauses are concerned.

The ruling that the *contra proferentem* doctrine should not be applied between parties of equal bargaining reflects the court's consideration for contracts between parties with unequal bargaining powers, and prevents the stronger party from taking undue advantage of the weaker ones by inserting broad and ambiguous wording in the force majeure clause to unjustly exonerate itself of liability. But the diminishing importance of the *contra proferentem* doctrine makes it clear that the courts consider that the natural meaning of the words used in the clause is to be of primary importance in interpreting exclusion clauses. If the wording used is ambiguous, the relative "commerciality" of the possible interpretations of the clause and/or the extent to which they uphold the purpose of the clause should be considered.[53] This approach supports the growing judicial trend of supporting freedom of contract, and standing by the literal meaning of the words used and/or the commercial intention of the parties.[54] The bottom line is that the contracting parties must ensure that the force majeure events listed in the clause are not broad, vague and ambiguous in nature since the reluctance of the courts in recent years to apply the *contra proferentem* rule makes it clear that a party may not be able to rely on this rule to fix liability on the party which supplied the ambiguous wording.

CONCLUSION

The catastrophic events of the last couple of years, particularly the Covid pandemic have bought the

48 136 N.S.R.(2d) 241(1995).
49 Joni R. Paulus & Dirk J. Meeuwig, "Force Majeure - Beyond Boilerplate" 37(2) Australia law review (1999).
50 [2011] EWCA Civ 904.
51 [2016] EWCA Civ 372.
52 [2017] EWCA Civ 373.
53 Supra note 16.
54 Supra note 16.

concept of Force Majeure into public consciousness and the word has indeed become common legal parlance. However, it can only be hoped that all of these events have made businesses and other commercial entities realise the importance of these clauses and made them understand the necessity of properly negotiating the same. Indeed, so much litigation could have been avoided if proper care had been taken to avoid the use of ambiguous terminology in Force Majeure clauses instead of just treating them as any other boilerplate clause. Careful deliberation must be exercised by both parties to the contract so as to avoid the use of ambiguous terminology, especially in light of the reducing importance of the *contra proferentem* principle. While drafters cannot be expected to have a Nostradamus-like ability to predict future events that may hinder fulfilment of contractual obligations, they must have an understanding of emerging, non-conventional threats and include the same in the Force Majeure clause. This element is definitely lacking in the case of Covid- as despite the robust canon of pandemic predictions, the term "pandemic" is glaringly absent from most pre-COVID-19 contracts.[55] While pandemics themselves are nothing new, the world is changing rapidly and new forces that might disrupt commerce are emerging at a rapid rate, from cyber threats to civil unrest and there is no reason for drafters to exclude the same from the Force Majeure clause. Care must also be taken to not render the Force majeure clause too exhaustive or too open so as not to prevent any party from taking undue advantage. The sample Force Majeure clauses issued by institutions like the ICC and the UNIDROIT might provide parties some guidance on drafting these clauses and they could also contribute towards achieving some uniformity in the same. All in all, much more care and attention needs to be paid to the drafting of Force majeure clauses so as to cope up with the constantly changing state of affairs in the modern-day world.

55 Amy Sparrow Phelps, (2021) "Contract Fixer Upper: Addressing the Inadequacy of the Force Majeure Doctrine in Providing Relief for Non- performance in the Wake of the Covid-19 Pandemic" 66 villanova law review 647 (2021).\"Contract Fixer Upper: Addressing the Inadequacy of the Force Majeure Doctrine in Providing Relief for Non- performance in the Wake of the Covid-19 Pandemic\" 66 villanova law review 647