

# Commentary on the Law of Frustration and Force Majeure

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## Key points

1. The trend in long term energy and resource contracts is for *force majeure* to be regarded as an important commercial issue to be negotiated with utmost care.
2. In the context of long term LNG sale and purchase agreements, the following matters call for consideration in the drafting of *force majeure* clauses: political risk; the upstream/downstream continuum; supply source flexibility; destination flexibility; DES v FOB; apportionment; and third party contractors.

## Introduction

The central principle outlined in Professor Campbell's paper is that the common law of frustration and common mistake is unclear and unsatisfactory, driving commercial counterparties to develop bespoke *force majeure* regimes in their contracts to cater for the treatment and consequences of events beyond the reasonable control of those counterparties that prevent, impede or delay performance.

A further observation is the importance of not taking a 'boilerplate' approach to the *force majeure* clause, and instead examining the precise risks, and precise factual scenario, that the regime is to address, all in the context of the overall transaction before those counterparties.

As a practitioner focused on the oil and gas sector, and in particular the liquefied natural gas sector, my own experience has been that *force majeure* is now regarded, quite properly, as an important commercial issue, to be negotiated with the utmost care, and not as a legal issue to which commercial negotiators do not turn their mind. This commentary paper briefly addresses, in the context of the natural gas sector, some of the reasons why sophisticated *force majeure* regimes have been developed in long term gas (and LNG) sales agreements, and some of the elements of those regimes.

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