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CITE AS
26 *Energy & Min. L. Inst.* ch. 6 (2005)

Chapter 6

Force Majeure Under Coal Supply Contracts

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Synopsis

§ 6.01. Introduction.

During the performance of a coal supply contract, it is not uncommon for one or both parties to be unable to perform their obligations for brief periods of time because of unexpected mechanical breakdowns, accidents, floods or other natural disasters or unexpected events. These have commonly become known as events of "*force majeure*."[1] While virtually every coal supply contract has such a clause, like snowflakes, none seem to be the same. Yet business people often treat these clauses as legal "boilerplate"

[1] *force majeure* \fōrs mä-zh ər'\ n. [Fr. 1883]; 1. superior or irresistible force; 2. an event or effect that cannot be reasonably anticipated or controlled – *cf.* Act of God.

and lawyers often negotiate them with little or no coordination with their client. Frequently, there is no negotiation of the clause at all with large utility buyers. This chapter examines the limited appellate caselaw available on this issue, identifies how the clause is usually constructed in coal supply contracts, considers the impact of *force majeure* declarations, and finally offers some aids to drafting such clauses and some examples of recently used clauses in coal supply contracts.

§ 6.02. Origins of the Term *Force Majeure*.

[1] — Excuse of Performance in Early Common Law.

In early common law, unconditional promises made by the parties to a contract gave rise to absolute liability.[2] Gradually, the law began to recognize physical impossibility as an excuse for nonperformance.[3] By the mid-nineteenth century, the analysis had begun to move away from objective impossibility to recognition of the parties' contractual assumptions.[4] It was not until after the turn of the last century, however, that courts began to recognize the economics of nonperformance as the doctrine of "commercial impracticability."[5]

[2] — Code Napoléon.

In the face of an inhospitable common law, parties quickly recognized that excuses for nonperformance had to be written into the contract. The French term *force majeure* comes from the Code Napoléon[6] and as a civil law concept, has no real meaning under common law. English contract law adopted the term to refer to those events upon which contracting parties agreed would excuse nonperformance. The Kings Bench in *Matsoukis v.*

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2 Paradine v. Jane, 82 Eng. Rep. 897 (1647).

3 Hinde v. Whitehouse, 103 Eng. Rep. 216 (1806).

4 *See* Taylor v. Caldwell, 32 L.J.Q.B 164 (1863).

5 *See* Mineral Park Co. v. Howard, 156 P. 458 (Cal. 1916).

6 Alphonse M. Squillante & Felice M. Congalton, "*force majeure*" 80 Com. L.J. 4, 5 (1975)("[t]here is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from [performing]. . . ")(quoting § 1148 of the French Civil Code from which the concept of *force majeure* is derived.).