CANADIAN CONTRACT AND TORT LAW: THE CONCEPT OF FORCE MAJEURE IN QUEBEC AND ITS COMMON LAW EQUIVALENT

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The present article constitutes a comparative legal study of Canadian tort and contract law concepts. It comments on the concept of force majeure contained in article 1470 of the Quebec civil code and seeks to identify its Canadian common law equivalent in the fields of contract and tort law. Common law terms examined in this regard are the frustration doctrine, and the act of God and inevitable accident defences. The intent of the author is to discover the main differences and similarities between the examined concepts.

Cet article constitue une étude de droit comparé de certains concepts qui sous-tendent le droit de la responsabilité civile extracontractuelle et contractuelle au Canada. Le texte analyse la notion de force majeure que l'on retrouve à l'article 1470 du Code civil du Québec et tente d'identifier, en common law, les théories équivalentes. Les concepts étudiés en common law touchant ce moyen de défense sont : l'impossibilité d'agir, les faits de la nature et l'accident inévitable. L'auteur tente de découvrir les différences et les similitudes principales entre ces diverses notions.

1. Introduction

Our analysis deals with comparative law, more specifically with the study of common law and civil law, the two main legal traditions in Canada and worldwide.[1] It comments on the force majeure concept under article 1470 of the *Civil Code of Quebec* (CCQ)[2] and seeks its Canadian common law equivalent in the fields of contracts and torts. Both these areas form part of private law, which is governed by civil law rules in Quebec and common law rules elsewhere in Canada.

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1 Throughout the years, comparative law topics in this area have retained the attention of a large number of legal scholars; see e.g. Arthur T von Mehren, "The Comparative Study of Law" (1991/1992) 6/7 Tul Civ LF 43 at 45; John Henry Merryman, "Comparative Law Scholarship" (1998) 21 Hastings Int'l & Comp L Rev 771.

2 Art 1470 CCQ.

We have chosen to examine the areas of torts and contracts under Canadian common law because CCQ article 1470 deals precisely with these two fields. Common law regards contracts and torts as two essentially separate areas,[3] which overlap sometimes, but which do not share common principles. In Quebec, even though different rules govern contractual and extra-contractual liability regimes (the latter corresponding to common law torts) the CCQ groups both regimes under its Book Five, entitled *Obligations,*[4] which contains article 1470. This is because there is a conceptual unity underlying the general theory of obligations in Quebec, a unity that has no equivalent in common law.[5] As a result, both contractual and extra-contractual liability regimes require proof of fault, a causal link and the production of damage.[6] If the claimant proves these elements, the debtor must compensate him. Also, the notion of fault in Quebec is defined as the lack of compliance with a contractual or an extra-contractual obligation, and its gravity is not determined differently based on the nature of the obligation. Even though differences exist between the two regimes, their common characteristics place them under the same umbrella of *Obligations*. Commenting on article 1470 necessarily involves, therefore, the study of contract and tort notions when reasoning in common law terms.

In Quebec, the law of civil liability oscillates between subjective or "fault-based" responsibility requiring careless (negligent) or intentional conduct by the defendant, and objective, risk-based or strict liability where the level of caution in the defendant's conduct is not relevant.[7] The former regime corresponds to the common law tort areas of negligence and intentional torts – two distinct areas with their own liability defenses. The latter regime is similar to common law strict liability.[8] In the common law

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3 Nathalie Vézina, "Part One: Preliminary Notions, Duality of Regimes, and Factual Basis of Liability" in Aline Grenon and Louise Bélanger Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) [Grenon and Bélanger Hardy, *Elements of Quebec Civil Law*] 325 at 327-28.

4 Grenon and Bélanger-Hardy, *Elements of Quebec Civil Law*, *ibid* at 335. The term "civil liability" is often used in Quebec to denote both types of liability regimes.

5 *Ibid*.

6 On the conceptual unity of the two regimes see Jean Louis Baudouin and Patrice Deslauriers, *La Responsabilité Civile*, 7th ed (Cowansville, Québec: Éditions Yvon Blais Inc., 2007) at 28-30. In this article, the term "debtor" refers to the person who has an obligation toward another person based on a contractual or an extra-contractual relationship.

7 Vézina, supra note 3 at 350.

8 *Ibid*. In both systems, strict liability in torts (extra-contractual liability) is much less important in practice than the fault theory. For civil law see *ibid* at 352. For common law see Louise Bélanger Hardy and Denis Boivin, *La Responsabilité Délictuelle en Common law* (Cowansville, Québec: Éditions Yvon Blais, 2005) at 853-54; Allen M

area of contracts, however, responsibility is not based on fault but on strict liability.[9] The CCQ force majeure concept in article 1470 constitutes a general defense for the debtor in the area of civil liability. The same cannot be affirmed for the Canadian common law provinces where we will have to examine corresponding notions in the fields of contracts and torts including, for the latter, negligence and strict liability.

Article 1470 of the CCQ is the only provision on force majeure that will concern us. We will not examine in detail other laws that may refer to this concept. The CCQ is one of the central pieces of legislation in Quebec on which case law often relies.[10] Article 1470 comments exclusively on force majeure, and cases under this article interpret legislative intent following the civil law tradition that does not allow judges to state the law but merely to interpret it.[11]

Since there is no common law legislation in Canada equivalent to the CCQ we will simply examine Canadian tort and contract concepts that are said to approximate the civil law force majeure. Case law will be the main source of inspiration for the common law part of our study. This conforms to the Anglo-Saxon tradition of *judge-made law* that Canadian provinces, except Quebec, have followed.[12] Specific common law acts will not be the focus of the present study. Also, contractual force majeure clauses[13] will be mentioned but not examined in detail.

Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, Ontario: Lexis Nexis, 2011) at 539.

9 John Manwaring, "Les Contrats" in Aline Grenon and Louise Bélanger Hardy, ed, *Éléments de Common Law Canadienne: Comparaison avec le Droit Civil Québécois* (Toronto: Thompson Carswell, 2008) 259 at 322 [Grenon and Bélanger Hardy, *Éléments de Common Law*].

10 Sylvio Normand, "An Introduction to Québec Civil Law" in Grenon and Bélanger Hardy, *Elements of Quebec Civil Law*, *supra* note 3, 25 at 48-54. Although the Code is an important repository of the Quebec civil law, it is not the only one. Part of civil law is found in specific legislation; *ibid* at 52.

11 On the role of case law in Quebec see Henri Kélada, *Précis de Droit Québecois*, 7th ed (Montréal: SOQUIJ, 2004) at 46-47. Following the famous words of Montesquieu, "Mais les juges de la nation ne sont, comme nous l'avons dit, que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur."

12 Donald Poirier, "La Common Law: Une Culture, Une Histoire et un Droit Procédural" in Grenon and Bélanger Hardy, *Éléments de Common Law*, *supra* note 9, 25 at 43-58.

13 A force majeure (superior force) clause is a contractual clause which allows a contracting party to terminate its obligations under a contract because of the occurrence of an event therein described. Such clauses may deviate from the legal requirements of institutionalized concepts such as the civil law force majeure or the common law frustration doctrine.

What will be obvious throughout our analysis is the relative weight assigned to doctrinal views (for example, expert scholarly opinion, treatises and case commentary) in Quebec and in Canadian common law provinces. Doctrinal views are not a source of common law even though they appear more often in judgments in recent years.[14] Although it is not clear whether doctrine is a source of Quebec civil law, it is rare that opinions of experts do not appear in Quebec judgments or legal arguments.[15] Also, doctrine played an important role in elaborating the CCQ.[16] In Quebec, the role of doctrine clearly carries more weight than in common law provinces. Our article confirms this since, as we are going to see, doctrinal views are very often reproduced *verbatim* in the Quebec judgments referred to herein, contrary to Canadian common law cases.

The ultimate goal of this article is to seek the Canadian common law equivalent of force majeure as defined in the CCQ. Towards this end, we will examine the conditions of application of the civil law concept and of corresponding common law notions in the areas of contracts and torts, engaging in a comparative study of their constitutive elements. Our intent is to discover the main differences and similarities between the examined concepts. These will prove to what extent convergence between them exists, helping us to achieve our goal. We will not extensively comment on the legal effects of mentioned terms.

In this regard, we align ourselves with the third category of comparative law scholars described by Mehren who do not reject or embrace convergence of different legal systems.[17] They believe that such convergence may or may not occur. Until or unless it takes place, however, they opine that it is the responsibility of comparative law to determine to what degree and the way in which convergence exists or may be occurring, and to provide the analytical tools that enable jurists from different legal cultures to achieve a shared understanding of their respective intents, positions or views. In this way, comparative law scholars map the forest in

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14 Donald Poirier and Anne Françoise Debruche, *Introduction Générale à la Common Law*, 3d ed (Cowansville : Yvon Blais Inc, 2005) at 130-32.

15 L'honorable Pierre J Dalphond, "La doctrine a-t-elle un avenir au Québec?" (2008) 53 RD McGill 517 at 526-27, 532. Quebec cases, however, refer more frequently to judicial than doctrinal sources in their conclusions; see *ibid*. See also John Brierley and Roderick A Macdonald, *Québec Civil Law An Introduction to Québec Private Law* (Toronto: Emond Montgomery Publications Limited, 1993) at 125-26; Kélada, *supra* note 11 at 48-49.

16 Normand, *supra* note 10 at 42-44; Vézina, *supra* note 3 at 332.

17 For what follows in this paragraph, see Arthur T von Mehren, "The Rise of Transnational Legal Practice and the Task of Comparative Law" (2001) 75 Tul L Rev1215 at 1216.

which legal professionals venture and provide concepts and tools of analysis that enable them to find their way in different legal systems.

This is precisely the approach the author adopts. We do not know whether convergence of Canadian common law and civil law legal realities will ever take place. We do not, however, exclude such a development in the long run. Until this occurs, we feel that it is our duty to examine different notions in the two legal traditions in order to identify areas of possible convergence. We hope that this comparative study will shed some light on the rules and reasoning behind the relevant common law and civil law concepts. This will allow jurists from both legal systems to achieve a better understanding of the two legal traditions in Canada and better operate in a world that seeks more and more the interaction, if not the integration, of common law and civil law rules.

Four sections will form the pillars of our analysis. Section 2 analyzes the constitutive elements of the force majeure concept under CCQ article 1470. Section 3 examines the frustration doctrine of common law contracts comparing it to the civil law force majeure. Section 4 focuses on the act of God notion of common law contracts/torts and its comparison to the Quebec force majeure. Section 5 presents the inevitable accident defense in common law torts and compares it to its civil law counterpart.

2. The Constitutive Elements of the Force Majeure Concept under CCQ article 1470

In Quebec, it is article 1470 of the CCQ that focuses on the force majeure concept in the area of civil liability.[18] The English version of the code uses the term "superior force." The article provides:[19]

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[18] Baudouin and Deslauriers, *supra* note 6 at 652, 1140. The term is sometimes referred to in Latin as "*vis major*." In Quebec, the terms *force majeure* and *cas fortuit* are used interchangeably. See *ibid* at 1140; Jean Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les Obligations*, 6th ed. (Cowansville, Québec: Éditions Yvon Blais Inc, 2005) at 938. Sometimes, the term "accident" is also used in this regard even if it is not a legal term and its scope is broader than that of the force majeure concept; see Maurice Tancelin, *Des Obligations en Droit Mixte du Québec*, 7th ed (Montréal, Québec: Wilson & Lafleur Ltée, 2009) at 570.

[19] The French version of the Code provides:

1470 Toute personne peut se dégager de sa responsabilité pour le préjudice causé à autrui si elle prouve que le préjudice résulte d'une force majeure, à moins qu'elle ne se soit engagée à le réparer.

La force majeure est un événement imprévisible et irrésistible; y est assimilée la cause étrangère qui présente ces mêmes caractères.

For the purposes of this article we will use the French term "force majeure" instead of its English translation "superior force."

> A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.
>
> A superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.

The important effects of a force majeure event are noted first in the mentioned provision: such an event effects a discharge from performance of an obligation and a discharge from liability for the debtor (double legal effect).[20] Specifically in contracts, force majeure may suspend performance of the debtor's obligations or even terminate the contract as a whole where there is substantial failure of performance (*inéxecution substantielle)*.[21] Although exceptions to this rule exist, such as contractual assumption of force majeure events by the debtor (article1470),[22] fault of the debtor or specific legal provisions (articles 989 and 2322, for example),[23] the importance of the concept as a general defense is well-established in Quebec.[24]

Events that usually qualify as force majeure under this provision are natural phenomena (for example, flooding, strong winds or ice storms) as well as acts due to human intervention such as third-party actions (for example, strikes, wars, acts of terrorism, embargoes or rebellions) provided they fulfil the conditions of this concept.[25] As we will see, the

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20 See also arts 1693, 1694 of the CCQ and the following cases: *Transport Rosemont Inc v Montréal (Ville de)*, 2008 QCCS 5507 at para 43, 2008 CanLII 5507 (Qc CS) [*Transport Rosemont*]; *Équipements ÉMU ltée v Québec (Ville de)*, 2011 QCCS 1038 at para 292, 2011 CanLII 1038 (Qc CS) [*Équipements ÉMU*]; *Guardian du Canada (Nordique (La), compagnie d'assurances du Canada) v Rimouski (Ville de),* 2008 QCCS 2153 at para 400, 2008 CanLII 2153 (Qc CQ) [*Guardian du Canada*], which quote Baudouin and Deslauriers, *supra* note 6 at 652, 1140, 1149.

21 Didier Luelles and Benoît Moore, *Droit des Obligations*, (Montréal, Québec:Éditions Thémis, 2006) at 1608-10.

22 The concept of force majeure is not "*d'ordre public*" in Québec and can, therefore, be contractually defined; see Vincent Karim, *Les Obligations*, 3rd ed (Montréal: Wilson & Lafleur, 2009) at 1104.

23 Baudouin and Deslauriers, *supra* note 6 at 1149-50.

24 *Ibid* at 652, 1137-40.

25 See art 1470 for third-party actions and also the discussion *infra* at note 50; Baudouin and Deslauriers, *supra* note 6 at 1145-49, 1152, 652; Jean Pineau, Danielle Burman and Serge Gaudet, *Théorie des Obligations*, 4th ed (Montréal, Québec: Éditions Thémis, 2001) at 804-805. Case law in Quebec assimilates the term "act of God" to force majeure; see *Gulf Oil Canada Ltd* v *Canadien Pacifique Ltée (1979), AZ-79022034* (Azimut) at 5, 8 (Qc CS) [*Gulf Oil*]; Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal, Québec: Les Éditions Thémis, 1986) at 53. For some Quebec cases where the two terms are used as synonymous see *Coté v Dussault*, 2002 CanLII 35964 at para 5 (Qc CQ); *Larochelle v Greyhound Canada Transportation*

defendant who seeks to rely on force majeure carries a demanding burden of proof.[26]

To constitute force majeure, an event must be unforeseeable and irresistible, according to paragraph 2 (cumulative conditions) of article 1470.[27]

According to case law, unforeseeability of the event means that the debtor did not foresee it or that he could not reasonably be expected to foresee it.[28] The presence of a reasonably foreseeable event is assessed based on an objective standard (*in abstracto*);[29] if a reasonable debtor (*un*

Corporation, 2008 QCCQ 4722 at para 8 (available on CanLII). The two terms produce the same legal effects; see Michel Bélanger, "Lorsque la Catastrophe Environnementale n'est plus un Cas Fortuit" in Service de la formation permanenete du Barreau du Québec, *Les Catastrophes Naturelles et l'État du Droit* (Cowansville, Québec: Éditions Yvon Blais, 1998) 39 at 53. This article is often referred to in Quebec cases.

26 *Royal & Sun Alliance du Canada v MCT Terminal & Transport Inc*, 2002 CanLII 3784 at para 4 (Qc CQ); *American Homes, Compagnie d'assurances v Inter Tex Transport Inc* (1994), AZ-94011116 (Azimut) at 8 (Qc CA).

If the cause of the loss is not known, the debtor will probably not be able to prove the presence of a force majeure event; see *Larochelle v Hydro Québec*, 2004 CanLII 44510 at para 19 (Qc CQ); Baudouin, Jobin and Vézina, *supra* note 18 at 945-46; Baudouin and Deslauriers, *supra* note 6 at 1150-51, 652. See also Lluelles and Moore, *supra* note 21 at 1606; Tancelin, *supra* note 18 at 571-72 and *Mercerie Gilbert Ltée v CNR* (1970), AZ-70021032(Azimut) (Qc CS) on the difference between proof of absence of fault and proof of the elements of force majeure. In the latter case it was stated:

> Pour savoir s'il y a absence de faute, on doit se demander si une personne avisée se serait comportée comme le défendeur. Pour savoir s'il y a force majeure, on doit se demander si une personne avisée aurait été dans l'impossibilité d'agir autrement que le défendeur. Ainsi, on peut n'avoir commis aucune faute sans qu'il y ait force majeure.

27 *Watt & Scott v City of Montréal*, (1920) 60 SCR 523 at 529-31; *Vandry v Québec Railway, Light, Heat and Power Co,* (1916) 53 SCR 72 at 89, 118, 125-26; *Lebrun v Voyages à rabais (9129-2367 Québec inc)*, 2010 QCCQ 1877 at para 36 (available on CanLII).

28 *Bénard* v *Hingston*, (1918) 56 RCS 17 at 18-19 [*Bénard*]; *Groupe CGU Canada ltée v Ste-Marie de Beauce (Ville de)*, 2006 QCCS 2899 at para 126, (available on CanLII); *Biondi v Syndicat des Cols Bleus regroupés de Montréal (SCFP-301)*, 2010 QCCS 4073 at paras 124-28 (available on CanLII) (Qc CS), *Guidi v 9036-8812 Québec Inc*, 2004 CanLII 12637 at para 19 (Qc CQ); *Goulet v Lefebvre*, 2002 CanLII 7091 at para 54 (Qc CQ) [*Goulet*]; *Ébénisterie Claude Coulombe Inc v Toiles BSL Inc*, 2007 QCCQ 1705 at para 6-7 (available on CanLII). The unforeseeability of the harm-causing event is assessed at the time of the conclusion of the contract in the case of contractual liability; see *Laplante v Tour Opérateur Sunquest Vacations-tours maison*, 2010 QCCQ 740 at para 17 (available on CanLII) [*Laplante*].

29 *Laplante*, *ibid* at para 16; *Goulet*, *ibid* at para 54; Baudouin and Deslauriers, *supra* note 6 at 1142. In reality, the standard of assessment of a reasonable person is not

bon père de famille) could not have foreseen the event, the latter is unforeseeable. In this regard, the debtor is not required to predict all types of incidents possible to occur and take extraordinary precautions against them.[30] Nor is he required to prove that the event has never occurred.[31] It has, therefore, been held that the owner of a jewelry shop could not have reasonably foreseen a theft even though thieves had already broken into his business three times, since he had installed an alarm system after these incidents, and had a locked safe, and doors locked with a key.[32]

Such a holding should not imply that courts decide easily on the unforeseeability of a harm-causing event. Thefts have qualified as force majeure only in certain cases,[33] and natural catastrophes such as storms have constituted force majeure only in exceptional circumstances, for example, the 1998 ice storm in eastern Canada.[34] The concept is not, therefore, liberally applied by judges. Judicial subjectivity in delineating

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an entirely objective one. Subjective considerations such as the knowledge, expertise, age, experience, qualifications or lack of qualifications of the debtor are also taken into account; see Baudouin, Jobin and Vézina, *supra* note 18 at 940; *Québec (Commission des normes du travail) v Campeau Corp* (1989), AZ-89011843 (Azimut) (Qc CA).

30 *Goulet*, *ibid* at para 55-58, citing judicial and doctrinal views.

31 *Bénard*, *supra* note 28 at 18-19, quoted in *Nexans Canada inc v Papineau International, sec*, 2008 QCCS 5553 at paras 23-24, (available on CanLII); *Five Star Jewellery Company v Horovitz*, 1991 CanLII 3672 (Qc CA) [*Five Star Jewellery*]. If such was the case, the force majeure concept would be rendered practically inoperative since its unforeseeability element would almost never be met; see Baudouin, Jobin and Vézina, *supra* note 18 at 939-40 and Baudouin and Deslauriers, *supra* note 6 at 1142-43, 652.

32 *Five Star Jewellery, ibid* (Qc CA).

33 *Gariépy v 9057-9673 Québec Inc*, 2008 CanLII 13856 (Qc CQ), at paras 19-22 [*Gariépy*], *Guarantee Company of North America v Phil Larochelle Équipement Inc*, 2009 QCCS 133 at paras 17-19, 2009 CanLII 133 (Qc CS). In transport cases it is quite extraordinary to deem theft as a force majeure event; see *Compagnie d'assurance American Home v Inter-tex Transport Inc*, 1993 CanLII 4394 (Qc CA) [*Inter-tex*] a case often cited since.

34 *Métal Gosselin Ltée v Poupart*, 2002 CanLII 23198 at para 90 (Qc CQ); *Vézina v Crépeau*, 2003 CanLII 460001 at para 45 (Qc CQ) [*Vézina*]. The unforeseeability of ice storms, strong winds, sea perils, earthquakes etc. is assessed based on all circumstances like the recurrence, duration, intensity of the event, its location and time of the year it takes place. For some of these criteria see *Vézina*, *ibid* at paras 48-58; *Équipements ÉMU*, *supra* note 20 at para 381; *Lacasse v La Durantaye (Municipalité de la paroisse de)* (2006), AZ-50398364 (Azimut) at para 133 (Qc CQ); Bélanger, *supra* note 25 at 57. Case law has developed criteria regarding, for instance, the recurrence of a natural phenomenon. It has, therefore, been held that torrential rains that repeat every year or within a period of ten years are foreseeable; see *Lemay v Poirier* (1997), AZ-97036315 (Azimut) at paras 8, 11 (Qc CQ) a case also cited in *Vézina*, *ibid* at para 52. Torrential rains that recur every fifty years may constitute force majeure events; see *Arès v Ville de La Tuque* (1998), AZ-98026696 (Azimut) (QCCS); *Vézina*, *ibid* at para 50 (QCCQ).

the unforeseeability element of force majeure necessarily accompanies the broad terms used by the legislator in article 1470 which are coupled with exceedingly varied factual scenarios in practice.[35]

A force majeure event must also be irresistible, insurmountable in nature.[36] Irresistible means that the debtor's efforts to tackle the event must be useless or futile.[37] In legal terms, irresistibility consists in the impossibility for a reasonable debtor[38] to take reasonable measures to avoid the occurrence (objective standard). Accordingly, the debtor who does not adequately protect his property against thieves or water damage will not satisfy the standard.[39]

Irresistibility also means that the harm-causing event must render absolutely impossible the performance of the debtor's obligations.[40] If performance becomes more onerous, perilous or difficult, the irresistibility

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35 For instance, the above-mentioned criteria on the recurrence of natural phenomena are not absolute; there have been cases where courts have decided that in a country like Canada where climatic conditions often change, even exceptional adverse weather appearing every hundred years is reasonably foreseeable; see *Pouliot v St-Bernard (Municipalité de)*, 2007 QCCQ 7654 at paras 11-15, (available on CanLII); *Guardian du Canada*, *supra* note 20 at paras 405-20; *Vézina*, *ibid* at para 51; Lluelles and Moore, *supra* note 21 at 1603.

36 Some authors opine that this element of the force majeure concept is the determining factor upon which the presence of force majeure is decided in Québec; see e.g. Lluelles and Moore, *ibid* at 1600.

37 *Ouimet v Garage Franke Inc,* 2006 QCCQ 9807 at para 33 (available on CanLII) [*Ouimet*], quoting Baudouin and Deslauriers, *supra* note 6 at 1143, 652. The performance must be rendered impossible for anyone in the place of the debtor and not merely for the debtor himself; see Baudouin and Deslauriers, *ibid* at 1145, and *9074-9508 Québec Inc v Société de gestion Place Laurier Inc*, 2007 QCCS 3299 at para 107 (available on CanLII) citing another case on this point.

38 *Québec Métal Recyclé (FNF) Inc v Transnat Express Inc*, 2005 CanLII 44131 at paras 16, 33 (Qc CS) [*Québec Métal Recyclé*]; *Derouin v Legault*, 2010 CanLII 10001 at para 51 (Qc CQ) [*Legault*]; *Équipements ÉMU*, *supra* note 20 at para 283, citing the doctrinal view of Pineau, Burman and Gaudet, *supra* note 25 at 802-803.

39 *Inter-tex supra* note 33 at paras 24-26 (Qc CA); *Axa Assurances v Di Lorio*, 2003 CanLII 3010 at paras 15-25; *Entreprises Piertrem (1989) Inc v Pomerleau Les Bateaux Inc*, 2007 QCCA 759 at paras 63-65, RJQ 1131 (Qc CA); *Legault*, at paras *ibid* 52-57; *Équipements ÉMU*, *supra* note 20 at paras 394, 396; *Tremblay v Charlevoix-Est (Municipalité régionale de comté de)*, 2008 QCCS 1491 at paras 107-108, (available on CanLII) [*Tremblay*].

40 *Transport Rosemont, supra* note 20 at para 41; *Ouimet*, *supra* note 37 at para 33, citing doctrinal views. If there is partial impossibility the debtor will be excused from performing the part of the obligation that is rendered impossible. He will be held accountable for the rest; see Lluelles and Moore, *supra* note 21 at 1600. In the case of temporary, not permanent, impossibility, performance of the obligation will merely be

element of the force majeure concept is not met.[41] In *Charlevoix-Est (Municipalité régionale de comté de) v Tremblay*, an extra-contractual liability case, the trial court decided that since the defendant could have taken measures to predict, minimize and even avoid the flooding that finally occurred, no force majeure case could be made.[42] On appeal, the defendant argued that the financial cost of the studies that could have been realized and could have formed the basis for a plan of action to try to avoid the flooding were extremely high and, therefore, impossible to assume. The Quebec Court of Appeal held that this argument was not legally convincing.[43] Likewise, in contract cases, it has been held that changes occurring after the contract formation and which were reasonably unforeseeable at the time of contracting, independent of the will of the parties and rendering the performance of the contract extremely onerous, do not fulfill the conditions of the force majeure concept.[44] Despite this

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suspended unless the non-performance is of essence to the obligation, in which case the obligation will be terminated; see Karim, *supra* note 22 at 1117-18; Baudouin and Deslauriers, *supra* note 6 at 1144-45, 652.

If timely delivery of the cargo is essential to a contract of carriage and a road blockage renders it impossible, the carrier can invoke the presence of force majeure for choosing a longer and more costly itinerary; see Lluelles and Moore, *supra* note 21 at 1599-1600. In *Cornellier v Club Voyages Daniel Inc*, 2003 CanLII 19192 at paras 25-26 (Qc CQ), the Court held that the change of itinerary of a cruise ship was not imposed by a force majeure event but by a business decision.

41 *Charlevoix-Est (Municipalité régionale de comté de) v Tremblay* (2010), AZ-50612812 (Azimut) at paras 19-22 (Qc CA) [*Tremblay CA*] (a case that must be read in conjunction with the trial court decision; see *Tremblay*, *supra* note 39 at paras 101-108); *Canada Starch Co v Gill & Dufus (Canada) Ltd* (1990), AZ-90012151 (Azimut) (Qc CA) (a very interesting case addressing this point even though it reasons, for the most part, on a contractual force majeure clause); *Équipements* ÉMU, *supra* note 20 at paras 281-82, 286 (citing doctrinal views and case law). See also *Amélyna inc. v 9026-8863 Québec inc*, 2008 QCCQ 6116 at paras 22-25 (available on CanLII); *Quevillon v Bouffard*, 2007 QCCQ 11182 at paras 29-34 (available on CanLII); *Transport Rosemont*, *supra* note 20 at paras 37-41; Baudouin and Deslauriers, *supra* note 6 at 1144, 652; Lluelles and Moore, *supra* note 21 at 1599.

42 *Tremblay, ibid* at paras 107-108.

43 *Tremblay CA*, *supra* note 41 at paras 19-22.

44 *Transport Rosemont, supra* note 20 at paras 35-46, 18-35; *Cardinal Construction Inc v Dollard-des-Ormeaux (Ville de)* (1987), AZ-87011304 (Azimut) (Qc CA). Such situations are usually treated under the *theory of imprévision* in contract cases in Quebec rather than the concept of force majeure. Despite fierce doctrinal debate regarding this theory, it is not recognized today in Quebec except in limited circumstances defined by the legislature; see Baudouin and Deslauriers, *supra* note 6 at 1144; Baudouin, Jobin and Vézina, *supra* note 18 at 463-69. The *theory of imprévision* allows the revision or even the termination of a contract when changes occurring after its formation and which were reasonably unforeseeable at the time of contracting and independent of the will of the parties, render the performance of the contract extremely

principle, there are a few cases in Quebec that seem to suggest that an event that makes the performance of an obligation more onerous may lead a court to conclude on the presence of force majeure.[45]

Both the unforeseeability and irresistibility elements of the force majeure concept are based on a reasonableness test; in both cases a reasonable debtor must take reasonable measures to foresee and guard against the harm-causing event. The standard used is an objective one and its assessment is subject to judicial discretion. Court views may differ in deciding the facts of each case as well as in concluding on legal issues.

A case of judicial and doctrinal divergence on legal issues is the compatibility of the concepts of fault and of force majeure. Some Quebec cases and doctrine are to the effect that these two notions cannot coexist: where there is fault on the part of the debtor, force majeure cannot be present; inversely, where there is force majeure, the debtor cannot have been at fault.[46] However, there are also judicial opinions to the effect that fault and force majeure can legally coexist leading, therefore, to shared liability.[47] Some argue that a careful examination of these cases would probably result in holding the debtor completely liable or entirely exonerating him from liability.[48]

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onerous. On this theory, see also the interesting article of Julie Bédard, "Réflexions sur la théorie de l'imprévision en droit québécois" (1997) 42 RD McGill 761.

45 See, for instance, *Boulé v Vacances Esprit*, 2003 CanLII 24307 at paras 3-4 (Qc CQ) where the Court held that the terrorist attack of September 11, 2001 constituted a force majeure event (a rightful qualification) that impeded the defendant from organizing a trip one year later because of the limited number of clients interested in the particular destination. Although the decision is quite laconic, the terrorist attack had rendered more onerous, not impossible, the performance of the contract in this particular case. See also *Madden v Demers*, (1920) BR 505 at 507, 508 (Qc BR).

46 *Québec Métal Recyclé*, *supra* note 38 at para 16. See also *Montréal (Communauté urbaine) v Crédit Commercial de France*, 2001 CanLII 18592 at paras 41, 40-44 (Qc CA), which is cited in *St-Paul Fire & Marine Insurance Co of Canada v Marina Le Nautique St-Jean Inc*, 2004 CanLII 48298 at para 60 (Qc CQ) and by *Gariépy*, *supra* note 33 at para 20, and which reproduces *verbatim* the doctrinal view of Pineau, Burman and Gaudet, *supra* note 25 at 804. See Maurice Tancelin and Daniel Gardner, *Jurisprudence commentée sur les Obligations*, 9th ed (Montréal, Québec: Wilson & Lafleur, 2006) at 630.

47 *Lavoie v Bouchard* (1997), AZ-97036202 (Azimut) at paras 11-22 (Qc CQ); *Saint Martin v Cournoyer*, (1962) CS 42 at 44-45 (Qc CS); *Parker v La Corp du Canton de Hatley*, (1908) 33 CS 520 at 525-26 (Qc CS); *Ethier v Lelarge & Compagnie Limitée* (1968) CS 136 at 139-40 (Qc CS). All these cases concern extra-contractual liability. See Baudouin and Deslauriers, *supra* note 6 at 653, 89-90; Bélanger, *supra* note 25 at 51-52 describing doctrinal views.

48 Baudouin and Deslauriers, *ibid* at 652.

Another question raised by article 1470 is whether, and based on what criterion, a force majeure event constitutes an external cause of damage. First, doctrinal and case law definition of the term "external" is not as clear-cut as one may think. "External" generally means an event outside the sphere of the debtor's activities or control.[49] An obvious example of an external cause of damage is a natural phenomenon (for example, a hurricane or earthquake) or the act of a third-party over whom the debtor has no control[50] (for example wars, embargoes or terrorism), provided that they fulfil the conditions of force majeure. Such events are materially placed outside the debtor's sphere of activities or control. Less obvious examples constitute the strike of the debtor's employees, the debtor's sickness or mechanical problems of the debtor's machinery.[51] These are normally internal causes of damage since they are materially placed within the scope of debtor's activities or control and should not qualify as force majeure events. However, a more psychological approach to the external element of the force majeure concept may be adopted requiring the debtor's non-participation in the occurrence of the event (event independent of his will) rather than an event which is placed outside the scope of the debtor's activities.[52] Under this approach, a strike by the debtor's employees, his sudden and unforeseeable sickness or a sudden machinery failure may be deemed independent of the will of the debtor and constitute cases of force majeure.[53]

Second, there is a question in Quebec as to whether a force majeure event should be external in nature. This requirement is often found in other civil law jurisdictions.[54] Such a condition simply ensures that the

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49 *Boulanger v Hamelin* (1997), AZ-97026144 (Azimut) at para 11-16 (Qc CS); *Bazinet v Tardif*, 2002 QCCQ 18668 at para 18 (available on CanLII) [*Bazinet*]. Case law often reiterates doctrinal views on this point; see Baudouin and Deslauriers, *ibid* at 1141, 652. Baudouin, Jobin and Vézina, *supra* note 18 at 941; Pineau, Burman and Gaudet, *supra* note 25 at 803.

50 CCQ article 1470 assimilates an external cause (*cause étrangère*) to a force majeure event. An external cause within the meaning of this article refers to third-party actions and creditor's actions; see Lluelles and Moore, *supra* note 21 at 1602; Baudouin, Jobin and Vézina, *supra* note 18 at 946-48.

51 Lluelles and Moore, *ibid* at 1600-1601.

52 *Ibid* at 1601. See also *Piquette v Perron*, 2006 CanLII 5570 at para 4 (Qc CQ), which seems to adopt this criterion.

53 Lluelles and Moore, *ibid* at 1601. In this way, the external character of the force majeure concept is linked to its unforeseeability and irresistibility elements; see *ibid* at 1601-1602.

54 Baudouin, Jobin and Vézina, *supra* note 18 at 938; Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (Paris, France: Éditions Dalloz, 2010-2011) at paras 1816-17 on French law.

occurrence under consideration is beyond the reach of the debtor.[55] Article 1470 merely provides that a force majeure event should be unforeseeable and irresistible in nature, not external.[56] Part of Quebec case law and doctrine do not, therefore, require the occurrence to be an external one but merely insist on its unforeseeable and irresistible nature[57] Another part of Quebec doctrine and case law, however, deems that the event must also be external apart from being unforeseeable and irresistible.[58]

Despite the uncertainty, courts in Quebec do not consider the external character of force majeure as a very important condition and often base their holdings on the unforeseeability and the irresistibility of the occurrence.[59] Strikes of the debtor's employees, for instance, have regularly qualified as force majeure events.[60] A sudden and unforeseeable sickness of a driver and the presence of concealed defects in a vehicle have also qualified as force majeure.[61] This practice renders the division of case law and doctrine on the external element of this concept less important.

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55 Lluelles and Moore, *supra* note 21 at 1600.

56 The requirement that it must be an external one as well is not, therefore, legislative in origin; see Patrice Deslauriers, "Part Two : Injury, Causation, and Means of Exoneration" in Grenon and Bélanger Hardy, *Elements of Quebec Civil Law*, *supra* note 3, 384 at 425.

57 See e.g. *Gaucher v Yamatek Extrême Inc,* 2007 QCCQ 13986 at para 6 (available on CanLII); *Bourassa v St-Étienne des Grès (Municipalité de)*, 2006 QCCQ 3129 at paras 12-21, (available on CanLII) (Qc CQ) [*Bourassa*]; *Grenier v St-Étienne des Grès (Municipalité de)*, 2006 QCCQ 4642 at para 14 (available on CanLII) (Qc CQ) [*Grenier*]. See also Baudouin, Jobin and Vézina, *supra* note 18 at 941, 942; it is accepted that even if we adhere to this doctrinal and case law position, it is more difficult for a debtor to convince the court that an internal, as opposed to an external, cause of damage constitutes an unforeseeable and irresistible occurrence (*ibid* at 942).

58 *Belarbi v Sundraramalingam*, 2007 QCCQ 13597 at para 28 (available on CanLII); *Boulanger v Hamelin* (1997), AZ-97026144 (Azimut) at para 15-16 (Qc CS); *Bazinet supra* note 49 at para 18. See Baudouin, Jobin and Vézina, *supra* note 18 at 941 on the division of case law and doctrine; and Lluelles and Moore, *supra* note 21 at 1600-1601 on the divergence of doctrinal opinions.

59 Baudouin, Jobin and Vézina, *ibid* at 941; Baudouin and Deslauriers, *supra* note 6 at 1141, 652, Lluelles and Moore, *ibid* at 1601-1602.

60 See e.g. *Bourassa, supra* note 57 at paras 12-21, where the Court decided that the strike of the debtor's employees constituted an unforeseeable and irresistible event without commenting on its external nature. Other cases concluding in the same way are also mentioned therein. See also *Grenier, supra* note 57 at para 14; Lluelles and Moore, *supra* note 21 at 1602.

61 Concerning sickness, see *Dame Robertson v Penniston*, (1968) BR 826 at 828-30, 832 (Qc CA). Concerning concealed defects, see *Dame Simard v Dame Soucy et autre*, (1972) CA 640 at 649-650, 654 (Qc CA); *Bastien v Beaudet*, (1950) CS 465 at 470-71 (Qc CS); *Gascon v Lecompte*, (1942) CS 220 at 221-22 (Qc CS); Lluelles and Moore, *ibid* at 1605. The legislature may intervene in certain cases putting to rest the uncertainty

Overall, the presence of two, sometimes three, cumulative conditions is necessary to qualify an event as force majeure under article 1470: its unforeseeability, irresistibility and, according to some cases, its external character. The assessment of these elements is left to the discretion of the courts which have developed criteria for their determination. However, divergent judicial views of the facts of each case and of legal issues surrounding this notion have rendered it unpredictable (*aléatoire*) in practice[62] and difficult to prove for the debtor. What is certain is that courts will not easily qualify an event as force majeure. Only exceptional circumstances fall under its scope.

3. The Frustration Doctrine of Common Law Contracts and the CCQ Force Majeure

Common law uses the term "force majeure" (for example, contractual *force majeure* clauses) but ignores the concept as is perceived in civil law jurisdictions.[63] It is the *doctrine of frustration* that is said to be the common law equivalent of the civil law force majeure in the area of contracts.[64] In this section we will briefly present this doctrine and try to compare its elements with those of the civil law notion, identifying their main similarities and differences.

Following leading English cases, Canadian common law courts have concluded that frustration takes place when a supervening event, which occurs without the fault of either contracting party, so significantly changes the nature of the parties' rights or obligations that it would be unjust to hold them to the contract's literal stipulations in the new circumstances.[65] The

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surrounding this element of the force majeure concept. For instance, based on CCQ article 2037, a carrier is liable towards its passengers even where the injury is due to its health, its employees' health or a defect in the vehicle. These causes of damage cannot constitute force majeure events even if they are unforeseeable and irresistible because the legislator excludes the exoneration of the debtor in such cases.

62 Baudouin, Jobin and Vézina, *supra* note 18 at 943.

63 Henry Lesguillons, "Frustration, Force Majeure, Imprévision, Wegfall der geschaftsgrundlage" (1979) Dr Prat Com Int 507 at 518.

64 *Ibid* at 508-509, 518; Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 VUWLR 817 at 824; Peter JM Declercq, "Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 JL & Com 213 at 214; John O'Connor, "Force Majeure, Frustration and Exception Clauses," online: The Association of Maritime Arbitrators of Canada \http://www.amac.ca/8-J_OConnor.pdf\.

65 For examples of English cases, see *Davis Contractors Ltd v Fareham UDC*, [1956] AC 696 at 729 (HL) [*Davis Contractors Ltd*]; *National Carriers Ltd v Panalpina (Northern) Ltd*, [1981] AC 675 at 700 (HL). The definition of the frustration doctrine contained in English case law has been approved by Canadian courts in numerous instances;

test of the frustration doctrine was neatly summarized by Sigurdson J in *Folia v Trelinski*:

> In order to find that the contract at issue has been frustrated the following criteria would have to be satisfied. The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable. [66]

The term "radical change" is a key concept in the definition of the common law frustration doctrine. A simple variation of contractual obligations as a result of the supervening event is not sufficient to justify its presence. The change must, as this passage says, "totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties." Such a radical change does not occur often and places a demanding burden of proof on the defendant seeking to establish a frustrating event.

Under Canadian common law, the basis of frustration is impossibility of performance.[67] Although cases in this area defy comprehensive

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see e.g. *Peter Kiewit Sons' Co v Eakins Construction Ltd*, [1960] SCR 361 at 368; *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58, [2001] 2 SCR 943 at 967-68; *Folia v Trelinski* (1997), 36 BLR (2d) 108 at paras 18-19 (BCSC) [*Folia*]. For a more detailed definition of the concept see CED (West 3d) Contracts, Title XII, at s 1(a)(i).

66 *Folia*, *ibid* at para 18, a case often mentioned on this point.

67 Gerald HL Fridman, *The Law of Contracts in Canada*, 6th ed (Toronto: Carswell, 2011) at 619; John Manwaring, *Les Contrats* (Cowansville, Québec: Éditions Yvon Blais Inc, 1999) at 100-101 [Manwaring, *Les Contrats*].

This contrasts US law where impracticability of performance also constitutes an excuse for non-performing a contract. Performance may be impracticable because there is extreme and unreasonable difficulty, expense, injury, or loss to one of the parties if he performs the contract. A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover; see "Discharge By Supervening Impracticability," *Restatement (Second) of the Law of Contracts*, (St Paul, Minn: American Law Institute Publishers, 1981) at § 261. See also Melvin A Eisenberg, "Impossibility, Impracticability and Frustration" (2009) 1 J Legal Analysis 207 at 242-44; and Brent A Olson and Lisa C Thompson, "Changed Circumstances: Impracticability and Frustration of Purpose" (2010-2011) 9 Ariz Prac Business Law Deskbook § 7:16 on impracticability.

classification[68] and are often far from being clear, impossibility has been held to exist in cases of physical impossibility (for example, where the subject matter of the contract has been lost or destroyed),[69] supervening illegality,[70] death or sickness of a contracting party in a personal services contract,[71] land transactions (for example, sales or leases of property)[72] and delays in contractual performance due to natural phenomena or acts of third parties (for example, wars, government regulations, strikes).[73]

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[68] Stephen M Waddams, *The Law of Contracts*, 6th ed (Toronto: Canada Law Book Inc, 2010) at 264, 264-72 for the classification that follows. English authors suggest that cases concerning frustration can be classified based on the type of frustrating events or the particular categories of contracts where frustration has been invoked; see Hugh Beale, *Chitty on Contracts*, 30th ed (London: Sweet & Maxwell, 2008) vol 1 at 1490-91. On the following classification see also CED, *supra* note 65 at s 1(a)(i)-(iv), s 1(c)(iv)-(vii) and s 1(d)(v). The type of contracts or circumstances mentioned herein and which may give rise to frustration do not constitute an exhaustive list.

[69] *Marine Const Ltd v Metro Enrg & Const Ltd* (1978), 20 Nfld & PEIR 504 at para 25 (Nfld SC(TD)); *Vancouver Milling and Grain Co v CC Ranch Co*, [1924] SCR 671 at 676-77; *Summers Transport Ltd v GM Smith Ltd* (1990), 82 Nfld & PEIR 1 at para 45 (Nfld SC(TD)).

[70] *Cassidy v Canada Publishing Corporation* (1989), 41 BLR 223 at 238-39 (BCSC). On expropriation see *Oxford Realty Ltd* v *Annette* (1961), 29 DLR (2d) 299 at 300-301 (Ont CoCt) (case law on ship requisitions as examples of frustration is cited at 301). We find similar case law in Quebec on the concept of force majeure; see *Bazinet*, *supra* note 49 at paras 15-19.

[71] *McBride Estate v Johnson* [1962] SCR 202 at 210-11. It is not always easy to determine whether a contract is a personal services one; see *Chisholm v Chisholm* (1912), 46 NSR 27 (NSCA); *Witwicki v Midgley* (1976), 6 WWR 471 at 472-74 (Man QB). Whether sickness of a contracting party will frustrate a personal services contract depends on the nature of the contract and the type of illness; see Fridman, *supra* note 66 at 626, referring to English case law. We find similar case law in Quebec on the concept of force majeure; see *9180-8923 Québec Inc (Balcon Café-théâtre) v Productions Mike Bross Inc*, 2011 QCCQ 486 at para 7 (available on CanLII).

[72] *Capital Quality Homes Ltd v Colwyn Construction Ltd* (1975), 9 OR (2d) 617 (CA); *KBK No 138 Ventures Ltd v Canada Safeway Ltd,* 2000 BCCA 295, [2000] 5 WWR 588 [*KBK*]; *Victoria Wood Development Corp v Ondrey* (1978), 22 OR (2d) 1 (CA) [*Victoria Wood*].

[73] Although Canadian courts are not eager to frustrate a contract due to such delays, when the latter radically change contractual obligations the contract will be frustrated; see *O'Connell v Harkema Express Lines Ltd* (1982), 141 DLR (3d) 291 at 304 (Ont Co Ct) [*Harkema*]; CED, *supra* note 65 at s 1(b)(iii). See the sources cited *supra* note 40 for similar civil law reasoning.

Frustration also exists when performance of the contract has become purposeless (what we would call *frustration of purpose* under English law). In such a case, contractual obligations can still be fulfilled but the *raison d'être* of the contract is absent; see Manwaring, *Les Contrats, supra* note 67 at 101. In no Canadian decision has anything like *frustration of purpose*, as it emerged in the English coronation cases (see e.g. *Krell v Henry*, (1903) 2 KB 740 (CA)), been involved; see Fridman, *supra* note 67 at 629-30.

This classification of case law reveals a subtle difference between the common law approach which consists in enumerating circumstances where frustration takes place and the civil law approach which defines force majeure in an abstract manner.[74] In effect, there is no Quebec equivalent to the common law classification of frustration cases. Rather, the CCQ defines the constitutive elements of the civil law notion and courts give them effect without classifying case law in any particular way.

On the other hand, the judicial discretion and subjectivity that characterize the force majeure concept are also traits of the frustration doctrine. Every case of frustration raises a question of contract interpretation, consideration of its context and surrounding circumstances[75] that different judges may assess differently given the facts of each case.

In order to determine impossibility, Canadian common law cases examine all circumstances surrounding the contract including reasonable measures taken or that should have been taken to foresee (unforeseeability requirement) and guard against (irresistibility requirement) the event. In *Vancouver Milling and Grain Co v CC Ranch Co*[76] the Court concluded there was a frustrating event and stated that the defendant contracting party had exhausted every reasonable means in dealing with the occurrence (irresistibility of the event – objective standard). Inversely, it has been held that in the presence of fault of the contracting party invoking this defense the doctrine will not apply. In *George Eddy Co v Noble Corey and Son*[77] the Court stated that although forest fires and railway strikes delayed a manufacturing contract, it was the defendant's lack of respect of his contractual obligations that constituted the true reason for his failure to perform.[78] Moreover, if at the time of contracting a reasonable person could have reasonably foreseen the event (objective standard) frustration

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74 Lesguillons, *supra* note 63 at 510.

75 John Swan, *Canadian Contract Law*, 1st ed (Markham, Ontario: Lexis Nexis Canada Inc, 2006) at 611. An English example is found in *Davis Contractors*, *supra* note 65 at 720-21; see *KBK*, *supra* note 72 at para 591 referring to the *Davis* holding.

76 *Supra* note 69 at 673, 681. When the frustrating event is a natural phenomenon such as an act of God – a concept we will examine later – the irresistibility element is also considered; see text at 94-96 below.

77 (1951), 4 DLR 90 at 99-101 (NBCA); see also *Church of Scientology of British Columbia v Ahmed* (1983), 44 BCLR 297 at paras 35-36 (SC); *Chiligan v Island Lake Indian Band No 161*(1994), 119 Sask R 195 at para 36 (QB) relying on English case law; CED, *supra* note 65 at s 1(b)(ii).

78 These holdings conform to the definition of the frustration doctrine that excludes the presence of fault on the part of either contracting party; see discussion, *supra* at 83. See also *A & BB Ric Inc v Wigmore Farms Ltd*, 2005 CarswellOnt 7316 (WL Can) at para 41 (Ont Sup Ct); *Robbins v Wilson & Cabeldu Ltd*, 1944 CarswellBC 78 (WL Can) at para 12 (BCCA).

will not take place.[79] In such a case, the contracting parties should have provided for the occurrence in their contract.[80] In *Cobbold v Time Canada Ltd*,[81] the Court held that the defendant publisher could not rely on the doctrine of frustration based on a change in the law that terminated the Canadian edition of his magazine. Even though the change was abnormal and extraordinary, it was reasonably foreseeable at the time of the subscription agreement.

This line of cases reminds us of the irresistibility and unforeseeability elements of the Quebec force majeure concept that are also based on a reasonableness standard leaving judges a wide range of discretion.[82] If, for instance, judges in both legal systems determine that the harm-causing event was reasonably foreseeable at the time of contracting, they will not decide on the presence of frustration or force majeure. In such a case, the parties must have provided for such an eventuality in their contract by inserting a force majeure clause or simply refuse to enter into an agreement. Moreover, judges in both legal systems take into account the experience of the contracting parties. The more sophisticated contracting parties are, the less judges view favorably a frustration or force majeure claim on their part, especially in commercial matters.[83] These parties should be able to include a force majeure clause in their contract. Likewise, we have seen that where the harm-causing event can be guarded against or is attributed

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79 *Folia*, *supra* note 65 at para 18; *KBK*, *supra* note 72 at paras 14, 27; *St John v TNT Canada Inc* (1991) 56 BCLR (2d) 311 (BC SC) [*TNT Canada*]; *Ballenas Project Management Ltd v PSD Enterprises Ltd*, 2007 BCCA 166 at paras 27-29, 241 BCAC 215 (BCCA); Fridman, *supra* note 67 at 620; CED, *supra* note 65 at s.1(b)(i). In this regard, Canadian case law often refers to the mentioned English case *Davis Contractors Ltd*, *supra* note 65.

80 More than a mere question of fact, the common law treats unforeseeability of the frustrating event within the sphere of risk allocation; where the parties actually foresee the occurrence by providing for it in the contract, they thereby allocate the risk. Where a promissor actually contemplates an event that will make performance onerous or impossible but nevertheless undertakes in absolute terms to perform, it is ordinarily fair to conclude that the promissor takes the risk of occurrence of the event and, in that case, enforcement seems justified; see Swan, *supra* note 75 at 610; see Waddams, *supra* note 68 at 273-74.

81 (1980) 28 OR (2d) 326 (HCJ). When the frustrating event is a natural phenomenon such as an act of God – a concept we will examine later – the intensity and recurrence of the event are among the factors common law courts will consider to conclude on its foreseeability; see *infra* note 114 and accompanying text.

82 See discussion of Quebec law *supra* at 76-80.

83 For the civil law position, see *Laidley v Kovalik*, 1994 CanLII 5878 (Qc CA). For common law, see *TNT Canada*, *supra* note 79. See also the interesting holding of *Petrogas Processing Ltd v Westcoast Transmission Co*, [1988] 4 WWR 699 (Alta QB) which decided that the contract was frustrated.

to the fault of the party invoking it,[84] courts will not decide on the presence of frustration or force majeure.

The irresistibility and unforeseeability elements of the Quebec force majeure are, therefore, not absent from the common law frustration doctrine even though they are not as conspicuously stated in common law as in the CCQ. In effect, it is only through the study of common law cases that we discover how similar the conditions of application of the two concepts are. On the contrary, the CCQ clearly states the general requirements of force majeure, leaving to judges the task of their interpretation. The different approach adopted to elicit the components of the two concepts is justified by the fact that common law is judge-made law contrary to civil law where the legislature plays an important role in stating the applicable rule which is later interpreted by courts.[85]

In this way, the importance of comparative case law study is revealed. In order to determine to what extent convergence between common law and civil law exists regarding the force majeure and the frustration doctrines, an examination of respective cases is necessary. This approach, which forms the basis of the present study, has allowed us to establish to what extent the unforeseeability and irresistibility requirements of the force majeure concept are present within the common law frustration doctrine. This approach will also help us discover other similarities and differences of the notions under examination.

Even though the term "radical change" of a contractual obligation is broad enough to include the loss of an economic advantage, hardship, financial inconvenience or unprofitability of a transaction for one or both contracting parties, Canadian common law cases have rejected such a broad interpretation. If the contractual obligations can still be fulfilled, the fact that the supervening event has rendered them more onerous will not lead to frustration.[86] The Quebec force majeure concept follows the same

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84 What seems to be different between the two concepts is that the common law doctrine excludes the coexistence of frustration and defendant's fault as well as the possibility of shared liability between the two contrary to part of Quebec case law; see *supra* at 80. We should note, however, that this liability sharing has been noted mostly in extra- contractual cases in Quebec; see sources cited *supra* note 47.

85 See discussion *supra* at 71-72.

86 *Folia*, *supra* note 65; *Victoria Wood*, *supra* note 72 at para 13 where the Court stated that disappointed expectations do not lead to frustration; *3081169 Nova Scotia Ltd v Lunar Fishing (New Brunswick) Inc*, 2010 NSSC 147 at para 94, 290 NSR (2d) 260; CED, *supra* note 65 at s.1(a)(v-vi); Fridman, *supra* note 67 at 630. In this regard, Canadian cases are very hesitant to sanction the English doctrine of *frustration of purpose* when applied to hardship or inconvenience following a supervening event; see Fridman, *ibid* at 631.

principle on this point.[87] What we are looking for in both cases is the impossibility to perform an obligation and not a less demanding standard. This is understandable considering that allowing parties to avoid their contractual obligations simply because they are no longer profitable would put in jeopardy the sanctity of contracts.

Although Canadian common law cases often describe a frustrating event as an external one, they do so in the sense that the supervening occurrence must be beyond the control of the parties, not attributed to them (for example, an act of a third-party or a natural phenomenon rather than an event due to the default of a contracting party).[88] Contrary to Quebec case law and doctrine, common law courts do not dwell on what constitutes an external cause of damage and its effect on the doctrine of frustration.[89] Events such as a strike of the debtor's employees or the debtor's sickness which may give rise to discussions in Quebec as to whether they constitute force majeure because of their internal character, will lead to frustration in common law provinces if all the conditions of the frustration doctrine are present.[90] The difference of treatment of this element in the two Canadian legal systems is attenuated by the fact that, overall, Quebec courts do not consider the external character of the force majeure concept as important as its unforeseeability and irresistibility elements and tend to decide cases based on the latter two conditions.

A more substantial difference between the two terms lies in their basis for relief and effects. A frustrating event so radically changes contractual obligations that the agreement turns out to be totally different from what the parties had envisioned. The values favouring enforcement of the contract are thus outweighed by these unusual circumstances.[91] As a result, either contracting party can invoke the doctrine and terminate the contract in which case both parties are discharged from further performance and resulting liability.[92] By contrast, the civil law concept does not affect the

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87 See discussion of Quebec position *supra* at 78-79.

88 *Temlas Apartments Inc v Desloges* (1980), 29 OR (2d) 30 at para 11 (Div Ct); *Markborough Properties Inc v 841202 Ontario Inc* (1996), 28 CLR (2d) 77 at para 60 (Ont Ct J (Gen Div)); *Gordon v McDonald*, 2005 Carswell BC 225 (WL Can) at para 26 (BCSC).

89 See *supra* at 80-82 for Quebec case law and doctrine.

90 *Harkema, supra* note 73 at 303-304 (Ont CoCt);*TNT Canada*, *supra* note 79; *Wightman Estate v 2774046 Canada Inc*, 2006 BCCA 424 at paras 2-4, 9, 19, 231 BCAC 75(CA).

91 Waddams, *supra* note 68 at 264.

92 *Bauhaus v Nadon*, (available on Carswell); *McDonald Aviation Co v Queen Charlotte Airlines Ltd*, [1951] 1 DLR 195 at 202 (BCSC); CED, *supra* note 65 at s 1(a)(i). Frustration may affect only part of the contract in certain cases; see CED, *supra* note 65 at s 1(a)(vii).

whole contract but rather the obligations of a contracting party who, following the force majeure event, is discharged from performance and from liability resulting there from.[93] A party's contractual obligations may merely be suspended following a force majeure event. It is only in cases of substantial failure of performance (*inéxecution substantielle*) that the civil law concept may, depending on the specific circumstances of each case, lead to contract termination.

On this point, the two concepts are fundamentally different.[94] The frustration doctrine terminates the contract because it radically changes obligations therein contained. As such, it affects the common intent of the parties which, following the frustrating event, cannot be sustained. In contrast, force majeure puts emphasis on the fact that a debtor is under the impossibility to perform his obligations following the supervening event. It does not affect the common intent of the parties, the foundation of the contract itself but rather the obligations of a contracting party.

The common law frustration doctrine appears, therefore, much more restrictive in its approach than the civil law force majeure. The former affects the common intent of the parties justifying termination of the contract, whereas the latter affects the obligations of a contracting party and may not have such a radical effect on contractual obligations. The *raison d'être* of the different perspective may be due to the fact that the common law doctrine targets specifically contractual obligations contrary to the civil law force majeure which also applies to extra-contractual cases. As such, the latter concept needs to be more flexible in its approach since it is not possible to reason on the basis of a contract and its termination when treating extra-contractual obligations.

The different approach also suggests that if contracting parties wish to avoid domestic laws governing frustration and force majeure, it is better for them to provide for a force majeure clause in their contract. Such a clause is contractually defined and determines the nature, conditions of application and effects of force majeure events. In practice, parties have often recourse to force majeure clauses. These clauses are strictly construed by Canadian courts.[95]

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93 See *supra* at 74-75 on the effects of the force majeure concept and article 1693 of the CCQ. See also Nicholas Barry, "Rules and Terms Civil Law and Common Law" (1974) 48 Tul L Rev 946 at 956, quoted in Pejovic, *supra* note 64 at 824; Emmanuel S Darankoum, "L'application des Principes d'UNIDROIT par les arbitres internationaux et par les juges étatiques" (2002) 36 RJT 421 at 454-55; Lesguillons, *supra* note 63 at 512 on the comparison of the two concepts on this point.

94 For what follows see Lesguillons, *ibid* at 512.

95 Fridman, *supra* note 67 at 621. On force majeure clauses see *supra* note 13.

Overall, both the doctrine of frustration and the Quebec force majeure concept as applied to contracts present common characteristics: they both refer to supervening events arising after the contract formation and rendering its performance impossible, not merely onerous. Both require unforeseeable occurrences. Both hold the debtor to a reasonableness standard regarding their constitutive elements and both exclude the presence of negligence on his part. Both carry a demanding burden of proof and are subject to judicial discretion. Notable differences are also present between the two notions, however. First, force majeure covers contractual and extra-contractual obligations whereas the frustration doctrine merely applies to the former. Second, the CCQ establishes the elements of the force majeure concept while case law and doctrine interpret legislative intent without classifying the cases in any particular way. In contrast, Canadian common law courts establish the elements of frustration and, along with doctrine, classify cases based on the nature of the contract or the type of event involved. Third, the external character of a frustrating event has not attracted lengthy judicial or doctrinal commentary contrary to its Quebec counterpart. Fourth, frustration affects the common intent of the contracting parties and leads to termination of the contract whereas the Quebec civil law concept merely affects the obligations of a contracting party and may not put an end to the contract.

From the above mentioned analysis, we can conclude that the common law frustration doctrine sometimes approximates and sometimes distances itself from the civil law force majeure.[96] It is not surprising, therefore, that the former is not recognised or applied today in Quebec.[97] It cannot, therefore, be affirmed that frustration constitutes the equivalent of the CCQ force majeure.

4. The Act of God Notion of Common Law Contracts/Torts and the CCQ Force Majeure

Another term that presents an interest for this article is the common law contract and tort concept of act of God. It is often referred to as the common law equivalent of the civil law force majeure notion[98] not merely in the areas of torts and contracts but also in other legal fields. Since we have limited the present analysis to the former two topics, we will first locate the term within them before examining its conditions of application and comparing it with the CCQ force majeure, identifying their main similarities and differences.

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96 Lesguillons, *supra* note 63 at 508-509.

97 Baudouin and Deslauriers, *supra* note 6 at 1144.

98 Michael D Hodges, "The Rights and Responsibilities of using an International Waterway" (1995) 4 J Int'l L & Prac 375 at 386.

In the common law of contract, an act of God constitutes a type of frustrating event (for example, the physical destruction of the object of the contract may result from an act of God).[99] Provided all the conditions of the frustration doctrine are present, such an event will frustrate a contract. Within the common law area of torts, an act of God constitutes a defense in strict liability and negligence cases.[100] In negligence cases it is classified under the broader category of inevitable accident, a concept we will examine later.[101] In strict liability cases, it is a defense following the leading

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[99] *Rinn v Parent Seeds Ltd*, 2001 MBCA 90 at paras 1, 14, 156 Man R (2d) 191 [*Rinn*]; *Delta Food Processors Ltd v East Pacific Enterprises Ltd* (1979) 16 BCLR 13 at 15, 18-19 (SC); *Singh v Rea International Inc (Atlas Fluid Systems)*, [2010] OLRB Rep November/December 794 at para 63 (Ont LRB); *Falk Enterprises Ltd v McLaine*, 1994 CarswellPEI 38 (WL Can) at paras 4-10 (PEI SC), leave to appeal denied (1996) 139 Nfld & PEIR 89 (PEI SC(AD)) [*Falk Enterprises*]. Some of these cases often use the term "force majeure" or *vis major* to describe an act of God. Since we have already commented on the frustration doctrine, this section will rely more heavily – albeit not exclusively – on common law torts case law regarding the acts of God defense.

[100] CED (West 3d) Negligence, Title III, at s 2 CED (West 3d) Strict Liability, Title II, at s 5(c) (v).

Strict liability is a basis of responsibility which is not founded on negligent or intentional acts and which is quite distinct from no fault liability regimes. Under its umbrella we find well-defined causes of actions created by the legislator or the courts which require proof of specific elements by the plaintiff. The scope of this type of liability is narrow and relatively rare in Canada where the fault theory continues to thrive; see Bélanger Hardy and Boivin, *supra* note 8 at 853-54; Linden and Feldthusen, *supra* note 8 at 539.

[101] Canadian cases often refer to the *Halsbury's Laws of England*, 3rd ed (Toronto: Butterworths, 1979) (the same passage is found in earlier editions), which provides the following:

> Meaning of inevitable accident. An accident is, for present purposes, inevitable if it could not have been obviated by any ordinary care, caution, and skill on the part of the party charged. Where an inevitable is due, directly and exclusively and without human intervention, to natural causes against which no human foresight could provide, it is termed an act of God.

Canadian cases that have mentioned the *Halsbury's Laws of England* on this point include *Levesque v Day & Ross Ltd* (1976), 15 NBR (2d) 500 at para 17 (SC (AD)); *Martin v Melanson* (1992), 130 NBR (2d) 253 at para 8 (QB); *Blackman v Andrews* (1971), 18 DLR (3d) 484 at 490-91 (Sask QB); *Lazarenko v Winnipeg Electric Co*, [1942] 2 WWR 28 at 29-30 (Man KB). See also *Burrard Terminals Ltd v Straits Towing Ltd*, (1965), 50 DLR (2d) 41 at 44-46, [1966] ExCR 34 (ExCR), commenting on the distinctive features of the act of God defense. In practice, case law may refer to an act of God without mentioning the term "inevitable accident." The current edition of the *Halsbury's Laws of England* (5th ed) maintains the act of God defense but not the inevitable accident one (vol 97, paras 469, 468). The Canadian case *Boutcher v. Stewart*, (1989) 99 NBR (2d) 30 (NBCA) [*Boutcher*] noted this change and still qualified inevitable accident as a liability defense. On the latter under Canadian law see below at Section 4.

English case *Rylands v Fletcher*[102] which is adhered to by Canadian courts. When an act of God occurs in the field of torts, it constitutes a complete defense for the defendant.[103] Courts, however, have limited the importance of this defense which, if broadly interpreted, could threaten the existence of the liability regimes to which it pertains and be unjust to the victim who, after all, should not bear the loss of an abnormal risk that he has not created.[104] This does not only mean that an act of God is hard to establish before the courts. It also means that common law case law and doctrine attribute a relatively limited importance to this concept, especially in the area of tort law. This contrasts the civil law force majeure concept which is omnipresent in the CCQ and largely commented upon in Quebec by case law and doctrine.

We have already noted that Quebec civil liability (contractual and extra-contractual) may be fault-based (subjective) – a category that includes negligent and intentional wrongdoing – or risk-based (objective, strict liability). Common law has also established a distinction between fault-based and risk-based liability.[105] We have also mentioned that in Quebec the force majeure concept incorporates acts of God and constitutes a defense in all cases of civil liability.[106] In contrast, common law has established a clear separation between the fields of contracts and torts regarding an act of God: the latter may be part of the contracts frustration doctrine or the inevitable accident negligence concept in torts or even constitute a separate defense in strict liability (torts). The different treatment of this term within the common law areas of contracts and torts demonstrates that the conceptual unity underlying the Quebec general theory of obligations has no equivalent in common law.[107]

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102 (1861-1873) All ER Rep 1, LR 3 HL; affg (1866), LR 1 Ex 265. The case imposes responsibility where there is a non-natural use of land and an escape of a product that results from it and which causes damage. Such actions are not often encountered in practice. Although there have been attempts to broaden the scope of application of the *Rylands* case, it is uncertain that Canadian courts will follow such a trend; see Bélanger Hardy and Boivin, *supra* note 8 at 865, 871-73.

103 For strict liability see Bélanger Hardy and Boivin, *ibid* at 875. For inevitable accidents see *infra* at 103. For the effects of acts of God as part of the contracts frustration doctrine see the effects of the doctrine *supra* at 89, and *supra* note 84.

104 On strict liability see *Springhill Farms v United Food and Commercial Workers' Union Local 832* (2002), 113 LAC (4th) 193 at para 32 (Man Grievance Arb) [*Springhill Farms*]citing doctrinal opinion; Bélanger Hardy and Boivin, *ibid* at 876; Linden and Feldthusen, *supra* note 8 at 558-59. For negligence (inevitable accidents) see *infra* at 98. Regarding the contracts frustration doctrine we have seen, *supra* at 84, that a frustrating event does not occur often and that it is hard to establish.

105 See *supra* at 71.

106 *Ibid* and *supra* note 25 and accompanying text.

107 See *supra* at 69-70.

Despite the classification differences, one cannot but wonder how the common law act of God concept compares to the Quebec force majeure.

Let us start by defining the term. In both the areas of contracts and torts, Canadian common law defines an act of God based on English cases. The leading English case *Nugent* v *Smith*[108] has often been cited on this point:

> A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him.

Following this case, for an act of God to exist there must be: (1) unforeseeability: if the occurrence could have been foreseen then the defense does not apply; (2) irresistibility: the person seeking to benefit from this defense must have taken reasonable measures to guard against the event; and (3) the forces of nature involved must act without any human contribution.[109] These are cumulative conditions assessed based on factual evidence, leaving a large margin of discretion to judges.[110] In all cases, the harm causing event must be something overwhelming and not merely an ordinary event which could have been foreseen or guarded against.[111]

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[108] (1876), LR 1 CPD 423, 444 [*Nugent*]. Canadian cases of interest citing this case include *McQuillan v Ryan*, [1921] OJ No 213 (QL) at paras 22, 28, 29 (Ont SC(AD)) [*McQuillan*], mentioned in *Kenlee Lands Inc v Northumberland Construction Ltd* (1973), 4 Nfld & PEIR 101 at para 7 (PEI SC); *Carney v Caraquet Railway*, 1890 CarswellNB 22 (WL Can) (NBSC); *Wilson v The Canadian Development Company, Limited* (1902), 9 BCR 82 (YTerr Ct). For reference to this English case in order to define acts of God in the torts area in Canada, see also Gerald HL Fridman, *The Law of Torts in Canada*, 2nd ed (Toronto: Carswell, 2002) at 239-40 [Fridman 2d ed].

Canadian common law cases have also recourse to doctrinal or dictionary definitions of the term act of God: *Springhill Farms*, *supra* note 104 at paras 28-31; *JM Schneider Inc (Re),* [1999] MGAD No 13 (QL) at para 42 (Man Grievance Arb); *Falk Enterprises*, *supra* note 99 at para 4. These do not substantially differ from the one herein mentioned The last case, as well as many others, refers to the *Halsbury's Laws of England* which contain a similar definition to the one advanced by the *Nugent v Smith* case.

[109] For these conditions see *Albert & McCaffrey Ltd v Arrow Transportation Systems Inc* (1984), 54 BCLR 339 at 341-42 (Co Ct) [*Albert & McCaffrey*] citing English law on the issue; *R v Syncrude Canada Ltd,* 2010 ABPC 229 at para 134, 30 Alta LR 97 (Prov Ct) [*Syncrude*] (torts) based on doctrinal views. See also *Canadian Pacific Express Ltd v Schooten* (1991) 113 AR 291 at paras 34-40 (QB).

[110] *Frache v Lethbridge (City)* 1954 CarswellAlta (WL Can) 61 at paras 25-26, 13 WWR (NS) 609 (Alta SC) [*Frache*] following Canadian and English case law.

[111] Linden and Feldthusen, *supra* note 8 at 558.

Canadian torts and contracts cases have followed English judgments[112] to define the elements of this defense. It has therefore been held that an occurrence which is reasonably foreseeable by a reasonable person (objective standard) cannot qualify as an act of God; for example, flooding in June is not an unusual or unforeseeable occurrence in Canada.[113] Although judicial discretion exists in determining the unforeseeability of the harm-causing event, several common law cases have decided that an event with a recurrence of a hundred years may be reasonably foreseeable.[114]

The same objective standard is also used to determine the irresistibility of the harm-causing event; an act of God cannot be guarded against by a reasonable person exercising reasonable care.[115] Also, where the cause of the damage is attributed to the defendant's act, this defense will not be available.[116] An act of God negates, therefore, the presence of negligence

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112 Important English cases in this area are *Nichols v Marsland,* (1876), LR 2 Ex D 1 (CA); *Nugent*, *supra* note 108; *Greenock Corporation v Caledonian Railway Co*, [1917] AC 556 [*Greenock*]. See also the interesting article of CG Hall, "An Unsearchable Providence:The Lawyer's Concept of Act of God" (1993) 13:2 Oxford J Legal Stud. 227.

113 For examples of tort cases, see *Nashwaak Pulp & Paper Co v Wade* (1918), 43 DLR 141 at 152-53 (NBCA) [*Nashwaak*]; *Seneka v Leduc* (1985), 59 AR 284 at paras 16-25 (Alta QB) [*Seneka*]; *Syncrude, supra* note 109 at paras 138-40; *Frache*, *supra* note 110 at paras 25-26; *McQuillan*, *supra* note 108 at para 52; CED, *supra* note 100 at s 2. For contracts cases reasoning on the acts of God foreseeability element within the context of frustration see *Falk Enterprises*, *supra* note 99 at paras 4-10; *Rinn*, *supra* note 99 at para 14.

114 *Eagle Forest Products Inc v Whitehorn Investments Ltd* (1992), 12 MPLR (2d) 18 at para 33 (Ont Ct J (Gen Div)); *Albert & McCaffrey*, *supra* note 109 at paras 9-10. See also *Tomchak v Ste-Anne (Rural Municipality)* (1962), 33 DLR (2d) 481 at 489-91 (Man CA), and *Seneka*, *ibid* at para 22 on the general reasoning to be followed. This seems to be a stricter standard than the one applied following the Quebec force majeure concept; see *supra* note 34. In determining foreseeability, judges will also consider the intensity of the event among other factors; see *Low v Canadian Pacific Railway*, [1949] 2 WWR 433 at 453-54 (Alta SC).

115 For torts examples, see *McQuillan*, *supra* note 108 at paras 42, 52; *Syncrude*, *supra* note 109 at paras 141-42; *Nashwaak*, *supra* note 113 at 153-54, referring to English case law; *Seneka*, *ibid* at paras 16-25, referring to Canadian and English case law; CED, *supra* note 100 at s 2. For a contracts case reasoning on this element of the acts of God concept within the frustration doctrine see *Falk Enterprises*, *supra* note 99 at paras 4-10. If performance of contractual obligations is rendered more onerous, not impossible, because of a frustrating event such as an act of God, frustration of the contract will not take place; see *Mechano Construction Ltd v Mushuau Innu Band Council* 2007 NLTD 123 at para 83, 63 CLR (3d) 14 (NLTD), citing doctrinal views, and text above at 87-88 on frustration in general.

116 *Kelley v Canadian Northern Railway Co*, 1950 CarswellBC 31 (WL Can) at paras 39-44 (BCCA); *Seneka*, *supra* note 113 at paras 16-25, following the English case *Greenock*, *supra* note 112; *Glover v Gander (Town)*, (1988) 28 CLR 215 (Nfld TD).

not only because of its irresistibility element but also because it requires absence of human contribution.

These two elements follow the general principles of unforeseeability and irresistibility of the Quebec force majeure. In effect, in both systems the harm-causing event must be unforeseeable and irresistible. The presence of both these elements is assessed based on a reasonableness standard. Both notions require proof of absence of negligence by the debtor, are subject to judicial discretion and share a demanding burden of proof. The only difference we would note between the two terms is that part of Quebec case law accepts liability sharing between the negligent debtor and the force majeure event contrary to the common law act of God which constitutes a complete defense for the defendant in torts and follows the regime of the frustration doctrine in contracts.[117]

It is the third element of the common law act of God that carries more weight when compared to the Quebec force majeure: the absence of human intervention. Only natural causes of damage (for example, winds, earthquakes, hurricanes, storms or rains) that fulfill the conditions of this concept may qualify as acts of God. Even though the term "external cause" is not often used in common law cases regarding this defense, in civil law terms, natural phenomena usually amount to external causes of damage since they are placed outside the sphere of the debtor's activities and control. In contrast, acts due to human intervention (for example, acts of third parties such as wars, embargos, terrorist acts, strikes or riots) do not qualify as acts of God in common law.[118] This contradicts the Quebec force majeure which includes the latter category of events within its scope.[119] In this way, an act of God in common law may amount to force majeure in Quebec, but the reverse hypothesis is not true since the force

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[117] For Quebec law see *supra* at 80. For acts of God at common law see *supra* note 103 and accompanying text.

[118] *Seneka*, *supra* note 113 at paras 18-22; *Canadian National Railway v Harris*, [1946] SCR 352 at 391, mentioning common law. Any act of God involves natural, not human, causes; see Fridman 2d ed, *supra* note 108 at 240. For a contracts case on this point see *Falk Enterprises*, *supra* note 99 at paras 4-6. See also Don Greenfield and Bob Rooney, "Aspects of International Petroleum Agreements" (1999) 37 Alta L Rev 352 at 375-76, regarding force majeure clauses and acts of God.

[119] *Gulf Oil, supra* note 25 at 5, 8; *Côté v Canada (Sécurité nationale),* 1997 CanLII 9997 (Qc CA). This is one of the issues Bastarache J of the Supreme Court of Canada has addressed in one of his speeches; see Michel Bastarache, "Bijuralism in Canada," Lunch and Learn Workshop on Bijuralism and the Judicial Function, delivered at the Canadian Department of Justice, February 4, 2000) online:<http://www.justice.gc.ca/fra/min-dept/pub/hlf-hfl/f1-b1/bf1g.html>. See also Michael Beaupré, "La Traduction Juridique: Introduction" (1987) 28 Les Cahiers de Droit 733, 742-743; *supra* at 75 on civil law.

majeure concept has a broader scope of application by also including acts due to human intervention that fulfill its requirements.

This is an important difference between the two notions which is often mentioned by doctrine and case law.

Based on our comparative analysis in this part of our study we can conclude that the act of God concept in the common law of contracts and torts presents common characteristics with the Quebec force majeure. Both concern unforeseeable and irresistible events. The assessment of these two elements is based on similar criteria in both legal systems. Both require proof of absence of negligence by the debtor. Both refer to natural phenomena as causes of damage. Both place a demanding burden of proof on the defendant and both are subject to judicial discretion.

Differences between the two terms exist, however. First, force majeure is a defense in the area of civil liability whereas an act of God qualifies as a frustrating event in contracts, an inevitable accident in negligence actions (torts) and a separate defense in strict liability cases (torts). This represents quite a fragmented common law legal reality compared to the conceptual unity that underlines civil liability in Quebec. Second, the importance assigned by the CCQ, case law and doctrine to the civil law concept of force majeure is not shared by the common law regarding acts of God, a defense rather limited in importance, especially in torts. Third, the Quebec concept has a broader scope of application than its common law counterpart by including events resulting from human intervention – such as third-party actions – and not merely natural phenomena.

As with the frustration doctrine we cannot, therefore, conclude that an act of God in common law and the Quebec force majeure concepts are equivalent ones. Apart from other differences, frustration terminates the contract because it radically changes obligations therein contained, something that force majeure may not always involve. In turn, an act of God does not include events due to human intervention contrary to the civil law notion. Thus, both common law terms examined so far are conceptually different from the civil law force majeure concept.

5. The Inevitable Accident Defense in Common Law Torts and the CCQ Force Majeure

The last common law torts concept that draws our attention is the inevitable accident defense to negligence actions.[120] Although the terms

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[120] Historically, inevitable accident has been a defense in trespass cases; see *Smith v Hartson* (1993), 108 Nfld & PEIR 147 at paras 22-23 (Nfld SC(TD)) [*Smith*]; *Bell*

"accident" and "inevitable accident" seem broader in scope than the Quebec "force majeure," common law has assigned to this torts notion specific characteristics that have qualified it as the equivalent to the civil law concept.[121] In the present section we will briefly present this common law defense before comparing its conditions of application to force majeure in civil law, identifying their main similarities and differences.

To successfully plead inevitable accident in negligence cases, the defendant has to prove either the cause of the accident and the inevitability of its result, or all the possible causes of the accident and the inevitability of the result of each.[122] If, for example, the cause of the damage is a car's mechanical failure, the defendant has to establish: 1) the failure; 2) that he could not have discovered the defect by the exercise of reasonable care (such as a car inspection); and 3) that, notwithstanding such mechanical failure, he could still not avoid the accident by the exercise of reasonable care.[123] This burden of proof is more demanding than denying negligence

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Canada v COPE (Sarnia) Ltd (1980), 11 CCLT 170 at para 30 (Ont HCJ). In modern times, it is more linked to negligence cases; see *Smith*, *ibid* at para 23.

[121] For the different definitions of the terms "accident'" and "inevitable accident," see Stephen Gilles, "Inevitable Accident in Classical English Tort Law" (1994) 43 Emory LJ 575 at 585, 592-593. In Quebec, it is only occasionally that the term "accident" is used to describe the force majeure concept; see *supra* note 17. On the approximation of the two concepts see William Fraiberg, "Brazeau Transport Ltee v Canadian Pacific Railway" (1965) 11 McGill LJ 378 at 380.

[122] See the English case of "*Merchant Prince" (The)*, [1892] P 179 at 188-89 (CA). See also *Rintoul v X-Ray & Radium Industries Ltd*, [1956] SCR 674 at 678 [*Rintoul*]; *Canadian Pacific Ltd v Jones Estate*, 1989 CarswellBC 1260 (WL Can) at para 50 (BC SC) [*Jones Estate*]; *McDonald v Nguyen* (1991), 3 Alta LR (3d) 27 at paras 35 (QB) [*McDonald*]; *Wolverine Motor Works Shipyard LLC v Canadian Naval Memorial Trust*, 2011 NSSC 308 at para 48, 306 NSR (3d) 260 (SC); Linden and Feldthusen, *supra* note 8 at 283; CED (West 3d) Negligence, Title III, at s.1. The latter source further states: "The defense of inevitable accident holds that where an accident is purely inevitable, and not caused by the fault of either party, the loss lies where it falls."

[123] *Chiasson v Caissie* (1978), 23 NBR (2d) 7 at para 5 (SC); Fridman 2d ed, *supra* note 108 at 446.

In all cases, the cause of the accident has to be proven: for, if it is not, how can the defendant establish that the cause was one the result of which it could not avoid? See "*Merchant Prince" (The)*, *supra* note 122 at 188; *Tom MacDonald Trucking Ltd v Avery Estate*, 2010 NLTD 20 at para 45, (2010), 294 Nfld & PEIR 280 (NLTD); *Laichkwiltach Enterprises Ltd v F/V Pacific Faith (Ship)*, 2007 BCSC 1852 at para 14, 2007 CanLII 1852 (BCSC) [*Laichkwiltach*]. Similar reasoning applies with respect to the Quebec force majeure concept, see *supra* note 25.

so that defendants find it easier to discard the tort defense.[124] As a result, the latter is rarely used in practice.[125]

Further, there are judicial decisions and authors that contend that since the plea of inevitable accident is akin to saying that the defendant was not at fault, it is not so much a defense as a denial of one of the main elements of liability.[126] Such a view further limits the significance of this common law defense to which case law and doctrine already give little attention. It also contrasts the importance of the civil law force majeure concept which is omnipresent in the CCQ and constitutes a fully-fledged doctrine and defense to civil liability claims.

The defendant's standard of care required by this common law concept is not one of perfection: what he needs to prove is that the accident could not have been avoided even if reasonable care had been taken.[127] To satisfy this criterion the accident must have been[128] 1) impossible to foresee even

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124 Linden and Feldthusen, *supra* note 8 at 283; Bélanger Hardy and Boivin, *supra* note 8 at 797; Fridman 2d ed, *supra* note 108 at 445-46; CED, *supra* note 122 at s 1; *Boutcher*, *supra* note 101; *Graham v Hodgkinson* (1983) 40 OR (2d) 697 at 702-704 (CA); *Hackman v Vecchio* (1969), 4 DLR (3d) 444 at 446 (BCCA) [*Hackman*]. See also the interesting article of Robert D Kligman, "Inevitable Accident and the Infirm Driver : What You Do Know Can Kill You" (1987) 8:3 Advocates' Q 311 at 319. Parallel reasoning is used when comparing the Quebec force majeure with absence of fault; see *supra* note 26.

125 See e.g. *Boutcher*, *ibid* at para 17; *Jones Estate*, *supra* note 122 at paras 51-52; Linden and Feldthusen, *supra* note 8 at 283; Bélanger Hardy and Boivin, *supra* note 8 at 797. We have also seen that the civil law force majeure is a defense that is hard for the defendant to establish before the court.; see *supra* at 75, 82.

126 Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed (Oxford: Oxford University Press, 2007) at 926. *Canadian Eductor Sales & Service Co v Horyn Holdings Ltd*, 1986 CanLII 1885 at para 124 (Alta QB) and *David Spencer Ltd v Field*, [1939] SCR 36 at 39 seem to follow this reasoning in citing case law stating that the defendant needs to establish "inevitable accident, in other words, absence of negligence on his part." To this we should add that the current edition of the *Halsbury's Laws of England* does not even consider inevitable accidents as a separate defense to liability; see *supra* note 101.

127 See *"Merchant Prince" (The)*, *supra* note 122 at 188-89; *Rintoul*, *supra* note 122 at 678-79; *Goveia v Lalonde* (1977), 1 CCLT 273 at paras 4-8 (Ont CA); *Laichkwiltach*, *supra* note 123 at para 9; *"Jessie Mac" (The) v "Sea Lion" (The)* (1920), 20 ExCR 137 at paras 8-16, 25 (ExCR); CED, *supra* note 122 at s 1. Regarding this defense as applied to maritime cases, see CED (West 3d) Shipping, Title VII, at s 12; *A/S Ornen v "Duteous" (The)*, [1987] 1 FC 270 at 280 (TD); *Bell Telephone Co v "Mar-Tirenno" (The)*, [1974] 1 FC 294 at 305-306 (TD). The favorite field of action of this defense is land and sea transportation cases.

128 On these two requirements see also Louise Bélanger Hardy, "Les Délits" in Grenon and Bélanger Hardy, *Éléments de common law*, *supra* note 9, 347 at 413.

by the exercise of reasonable care (unforeseeability element-objective standard);[129] and 2) impossible to guard against by the exercise of reasonable care (irresistibility element-objective standard).[130] In all cases, the accident cannot be attributed to defendant's negligence.[131]

Judges balance all circumstances to determine the presence of an inevitable accident. For instance, the recurrence of the event and its intensity are factors courts consider to determine its unforeseeability. It has, therefore, been held that the defendant cannot plead inevitable accident in a car collision case where he blacked out while driving the car if he had suffered a dizzy spell several minutes before the accident and had developed similar symptoms months earlier.[132] Moreover, a natural phenomenon may not qualify as an act of God – a category of inevitable accidents in tort cases – if it repeats every hundred years: such an event may be deemed foreseeable.[133]

Where the driver can reasonably foresee the dangerous state of the road, he does not act reasonably in driving at a speed which makes it impossible to control the vehicle or when he engages in negligent driving (irresistibility element).[134] In such cases, the tort defense will be of no

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[129] On the unforeseeability requirement see *Telfer v Wright*, 1979 CarswellOnt 723 (WL Can), 23 OR (2d) 117 at 118 (Ont CA)[*Telfer*]; *Perry v Banno* (1993), 80 BCLR (2d) 351 at paras 19, 30-35 (SC) [*Perry*]; *Pacific Stages Ltd v Jones* (1927), 38 BCR 520 at para 23 (CA) [*Pacific Stages*]; *McDonald*, *supra* note 122 at paras 61-63;*Conn v Conn* (1992), 14 CCLI (2d) 264 at para 7 (BCSC); *Cameron v Gambling*, 1988 CarswellBC 1186 (WL Can) at para 13 (BCSC) [*Cameron*].

[130] On this requirement see *McIntosh v Bell,* [1932] OR 179 at 185-88 (CA); *Sinclair v Maillett,* [1951] 3 DLR 216 at 229-31 (NBSC); *Kornberger v Provan*, [1938] 2 WWR 446 at 451-53 (Alta SC) [*Kornberger*]; *Perry*, *ibid* at paras 19, 30-35; *Chiu (Guardian ad Litem of) v Chiu*, 1999 CanLII 5633 at para 16 (BCSC) [*Chiu*]; *Hackman*, *supra* note 124 at paras 6,7,10; *Watkins v Goode* (1995), 29 Alta LR (3d) 90 at paras 16-19 (QB); *Holloway Estate v Giles* (2001), 201 Nfld & PEIR 181 at paras 63-64 (NLSC(TD)); "*Merchant Prince" (The)*, *supra* note 122 at 188-89; *Rintoul*, *supra* note 122 at 678-79; *MacLean (Litigation Guardian of) v Thomson* (1999), 171 Nfld & PEIR 98 at para 73 (PEISC); *Cameron*, *ibid* at para 13.

[131] In *Pacific Stages*, *supra* note 129 at para 23 the Court stated: "The defense of inevitable accident is available only where the accident was one that could not reasonably have been foreseen and where it has occurred without the slightest particle of negligence."

[132] *Telfer supra* note 129 at 119-20; see also *Penney v Rickert* (1982), 37 Nfld & PEIR 389 at para 2 (Nfld SC).

[133] *Supra* notes 114 and accompanying text. This seems to be a stricter standard than the one applied following the Quebec force majeure concept; see *supra* note 34. On acts of God as part of the inevitable accident defense see *supra* note 101 and accompanying text.

[134] *Kornberger*, *supra* note 130 at 452-54; *Chiu*, *supra* note 130 at para 16.

avail to the defendant. Conversely, it has been held that where there is no proper notification of a street hazard and no reasonable steps could have been taken to avoid it, the defense of inevitable accident will stand.[135]

Both the unforeseeability and irresistibility elements of the inevitable accident concept are contained in the Quebec force majeure. In both systems they are assessed based on a reasonableness test which leaves judges a large margin of discretion in their determination. Both common law and civil law notions require proof of absence of negligence by the defendant. It is true that the constitutive elements of the inevitable accident defense are not as clearly stated in common law as in civil law. It is only through the study of common law cases that we learn that the unforeseeability and irresistibility of the accident are an integral part of this defense. On the contrary, the CCQ clearly states the two conditions of application of the force majeure concept, leaving to judges the task of their interpretation. Once again, the different approach adopted to elicit the components of the two terms is justified by the fact that common law is judge-made law contrary to civil law where the legislature plays a primordial role in stating the applicable rule. Moreover, one cannot lose sight of the fact that the inevitable accident defense draws little judicial and doctrinal attention. As we have stated, some do not even consider it to be a tort defense. Consequently, its constitutive elements are not always easy to detect in case law. This contrasts the civil law force majeure concept on which legislative, judicial and doctrinal commentary abound rendering much easier the task of eliciting its elements.

When an inevitable accident occurs, it may be qualified as internal (for example, defendant's sickness, strike of defendant's employees, car's mechanical failure) or external (for example, a natural phenomenon) to the defendant. Common law cases do not dwell on what constitutes an internal or an external cause of damage. Both may justify the presence of an inevitable accident if they cannot have been prevented through the exercise of reasonable care.[136] Cases note, however, that where the defendant is seeking to benefit from this defense exclusively because of internal factors

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135 *Basra v Gill* (1994), 50 BCAC 37 at paras 10-12,16, 19, 21 (CA); *Wallis v Carew* (1981), 31 Nfld & PEIR 234 at paras 20-23 (Nfld Dist Ct); see also *Tabaka v Greyhound Lines of Canada Ltd,* 1999 ABQB 894 at para 25, 252 AR 373 (QB). Regarding acts of God as part of the inevitable accident defense and their irresistibility see *supra* at 94-95.

136 *Perry*, *supra* note 129 at para 19, cited on this point by numerous cases such as *Whitmore v Arens*, 1999 CanLII 7028 at paras 21-39 (BCSC); *Barron v Barron*, 2003 NSSC 90 at paras 36-37, 214 NSR (2d) 76 (SC); *Mclaren v Rice*, 2009 BCSC 1457 at para 39 (available on CanLII) (BCSC). See also *Watt v Miller*,1950 CarswellBC 123 (WL Can) at para 4 (BCSC) [*Watt*].

(for example, unconsciousness or sickness), he has a heavier burden of proving that he could not have prevented the event by the exercise of reasonable care.[137]

The common law stance contrasts, in principle, with Quebec case law and doctrine that are more divided on the issue of what constitutes an external cause of damage and whether or not an internal cause is part of the force majeure concept.[138] The difference of treatment is attenuated by the fact that Quebec courts do not deem the external character of the force majeure concept as important as its unforeseeability and irresistibility elements and often decide their cases based merely on these two criteria. Moreover, as with common law provinces, it is believed in Quebec that when internal causes of damage are invoked by the debtor, his burden of proof in establishing force majeure is heavier than when he relies on external causes. Despite their different perspective, therefore, an approximation may be noted between the two concepts on this element as well.

The different common law and civil law approaches to the external or internal character of the harm causing event merit additional commentary. Even when we reasoned on the basis of the frustration doctrine and the act of God concept we concluded that, contrary to civil law reasoning, common law courts worry less about the external or internal nature of the harm causing event and more about the overall control the defendant has over it, for example, if the occurrence is unforeseeable and irresistible. In this way, the stance of common law courts is more practical and pragmatic than the civil law perspective which tends to thoroughly analyze and debate every aspect of the force majeure concept.[139]

In the Canadian bijural context the two approaches may further clarify and solidify the elements of the terms under examination. In effect, civil law reasoning may find additional support in the lack of importance assigned by common law courts to the external or internal nature of the harm causing event when it concludes that the external element of the force majeure concept is not as important as its unforeseeability and irresistibility

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137 *Watt, ibid*.

138 For what follows in this paragraph see text above at 80-82, and *supra* note 57.

139 Authors talk about the characteristic casuistry of the common law and the characteristic conceptualization and concision of the civil law; see Celia Wasserstein Fassberg, "Language and Style in a Mixed System" (2003) 78 Tul L Rev 151 at 167-68. They also talk about the civil law orientation toward abstraction, systemization, and classification, contrasting it to the common law orientation toward pragmatism and concreteness; see Edward J Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) 1997 Utah L Rev 963 at 974, n 45.

components. Inversely, common law reasoning may refer to the judicial and doctrinal civil law debate over this element of force majeure when it places a heavier burden of proof on the defendant in the presence of internal causes of damages rather than external ones. We believe that such an interaction between the two Canadian legal traditions does not compromise their respective approaches and is desirable at the domestic level.

Adding to the similarity between the two terms we have seen that both force majeure and inevitable accident share a demanding burden of proof and are, therefore, hard to establish. The cause(s) of damage or loss need(s) to be proven in both cases. This (these) cause(s) of damage usually constitute natural phenomena (for example, flooding, winds, earthquakes) or acts due to human intervention such as third-party actions (for example, wars, embargoes, riots).[140] The common law concept is not, therefore, restricted to the former category of events like the previously studied act of God notion. Further, both civil law and common law defenses produce similar legal effects: force majeure exonerates the debtor from (extra-contractual) liability and from performance whereas an inevitable accident, if successfully pleaded, constitutes a complete defense to negligence for the defendant.[141] A difference that can be noted between the two concepts on this point is that even though part of Quebec case law sanctions liability sharing between a negligent debtor and the force majeure event, inevitable accident excludes such a possibility since it qualifies as a complete defense.[142]

Overall, considering the substantive elements of the common law inevitable accident and the Quebec force majeure notions one cannot overlook their similarities. Both concepts place a demanding burden of proof on the defendant that includes establishing the cause of the damage or loss and the unforeseeability and irresistibility of the harm causing event which are assessed based on a reasonableness standard. Both require proof of absence of negligence by the debtor. Both leave judges a large margin of discretion to decide their cases. Both refer to natural phenomena or acts due to human intervention, for example, third-party actions (contrary to acts of God). Both may apply to external or internal causes of damage. Both produce similar legal effects except that part of Quebec case law allows liability sharing between the force majeure event and the debtor's fault contrary to its common law counterpart.

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140 For the common law, see *supra* note 101. For the civil law see text above at 75.

141 For civil law, see text above at 74-75. For common law, see *Wallis*, *supra* note 135 at paras 22-24; *Roque v Bane* (2002), 309 AR 186 at paras 13-14 (QB); Bélanger Hardy, *supra* note 128 at 408, 413.

142 See text above at 80 for Quebec law.

We have also noted differences between the two concepts, however. First, the conditions of application of the Quebec force majeure are conspicuously stated in the CCQ whereas those of inevitable accident have to be elicited through case law study. Second, although we have noted that both civil law and common law concepts may apply to internal and external causes of damage, there is doctrinal and judicial debate in Quebec on the external character of force majeure (its meaning and importance) which is absent in common law provinces. Third, force majeure is a defense in civil liability cases (contractual and extra-contractual) whereas inevitable accident applies merely to cases of negligence, not contracts. Within the torts area, it is only an act of God – a type of inevitable accident- that also constitutes a defense in strict liability cases. This split of common law defenses by field of concentration is unknown to the Quebec force majeure. Due to this fact, the latter term is invoked and debated much more often before Quebec courts compared to the inevitable accident defense in common law. Fourth, even within the field of concentration of each concept we observe that the civil law force majeure constitutes a fully-fledged doctrine which is omnipresent in the CCQ, case law and commentary. On the contrary, the inevitable accident defense is of a rather limited importance in the area of common law torts.

Although the mentioned differences are not negligible, they do not concern so much the constitutive elements of the inevitable accident and the force majeure defenses but, mostly, their importance. At the conceptual level the approximation of the two notions is obvious since, as we have seen, their conditions of application are very similar. The same cannot be ascertained with respect to the frustration doctrine and the act of God terms which, conceptually, distance themselves more from the civil law force majeure. Acts of God exclude from their scope third-party actions whereas frustration affects the common intent of the contracting parties leading, in this way, to contract termination. On the contrary, an inevitable accident does not exclude third-party actions from its scope and produces similar effects to the force majeure concept. It does not reason on the basis of a termination of a contract since it intervenes in the field of torts. This does not mean that inevitable accident and force majeure are synonymous terms. They derive from different legal systems and follow their reasoning, have distinct areas of focus and are assigned different importance within their respective fields of action. They are equivalent, not synonymous concepts.

6. Conclusion

In the present analysis we have tried to identify the main similarities and differences of applicable concepts in seeking the Canadian common law

equivalent to the Quebec force majeure in the areas of torts and contracts. Based on CCQ article 1470, common law and civil law cases and doctrinal views we have concluded that the concept that approximates more, without being a synonym to, the civil law force majeure is the common law negligence defense of inevitable accident. The common law notion of act of God and the contracts doctrine of frustration distance themselves more substantially from the Quebec force majeure concept.

The notions herein examined also reflect the main differences of the two legal traditions they represent [for example, judge-made law (common law) v written law (civil law), conceptual unity of the theory of obligations and great value assigned to doctrinal views by civil law which find no equivalent in common law]. As a result, even though both Canadian legal systems share the same concerns and goals regarding the exoneration of the debtor in the areas of contacts and torts/civil liability, the tools they use to achieve these goals do not necessarily display the same degree of likeness. Despite their differences, common ground between the terms under examination exists and has been identified in this article. We hope that our analysis has shed some light on the torts and contracts/civil liability concepts reviewed, their main similarities and differences, helping the reader to better position himself in a comparative legal reality present at the domestic level.