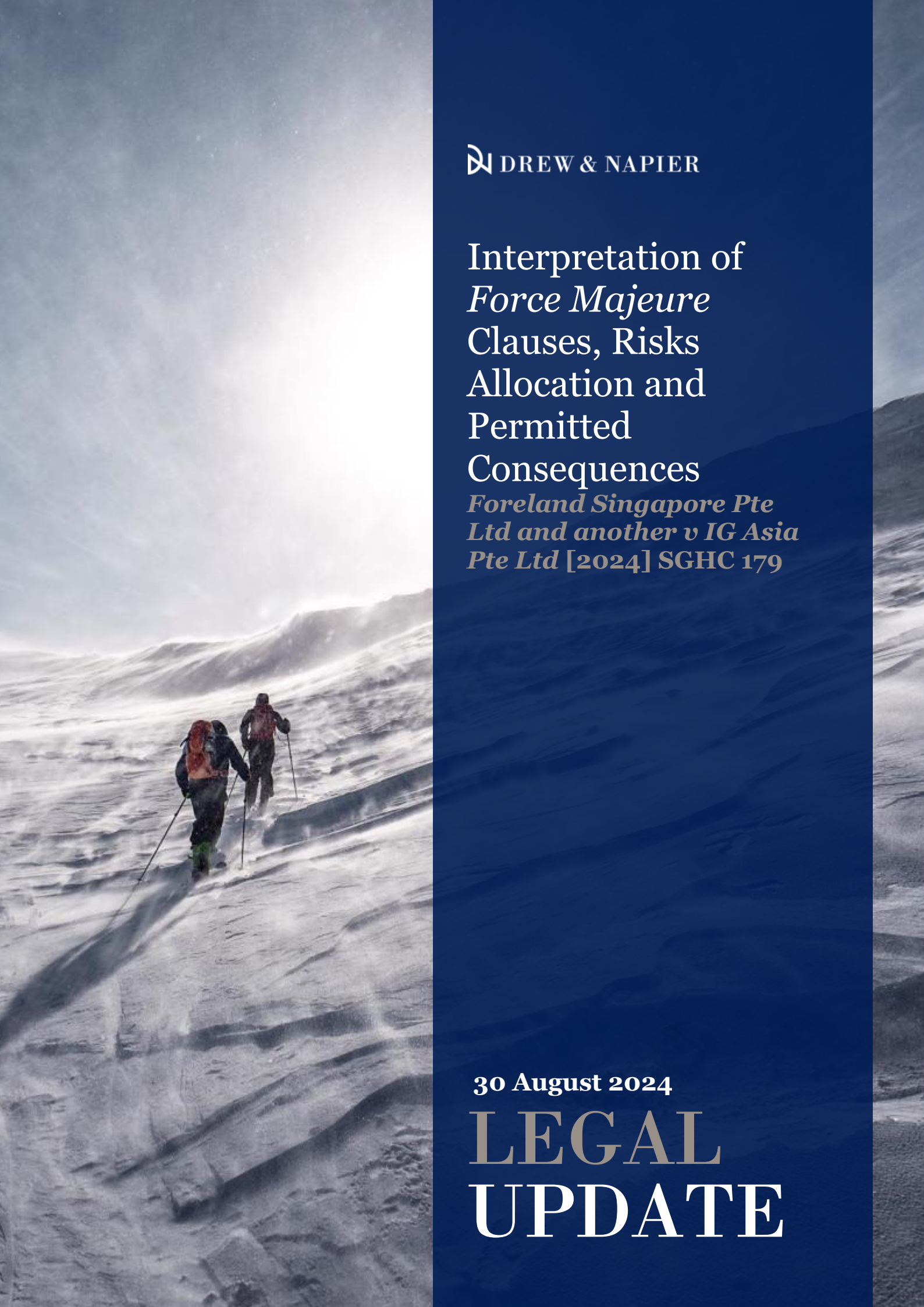




 DREW & NAPIER

Interpretation of
Force Majeure
Clauses, Risks
Allocation and
Permitted
Consequences

*Foreland Singapore Pte
Ltd and another v IG Asia
Pte Ltd [2024] SGHC 179*

30 August 2024

LEGAL
UPDATE

In this Update

In *Foreland Singapore Pte Ltd and another v IG Asia Pte Ltd* [2024] SGHC 179, the Court interpreted the permitted consequences of a *force majeure* clause with reference to its language and alongside other relevant terms in the parties' agreement. On a contractual interpretation of the *force majeure* clause in question, the Court held that the Defendant was entitled to refuse to pay out profits made on closing trades due to a *force majeure* event, but was not entitled to reverse those trades. This case is an important reminder that *force majeure* clauses should be drafted carefully in every agreement, customised to reflect parties' intentions.

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INTRODUCTION

In *Foreland Singapore Pte Ltd and another v IG Asia Pte Ltd* [2024] SGHC 179, the Court interpreted the permitted consequences of a *force majeure* clause with reference to its language and alongside other relevant terms in the parties' agreement. On a contractual interpretation of the *force majeure* clause in question, the Court held that the Defendant was entitled to refuse to pay out profits made on closing trades due to a *force majeure* event, but was not entitled to reverse those trades.

BACKGROUND

The Plaintiffs are Foreland Singapore Pte Ltd and Foreland Holdings Co Ltd, incorporated in Japan. The Defendant is IG Asia Pte Ltd, a company that provides a platform for its clients to trade in over-the counter ("**OTC**") derivatives contracts. The Plaintiffs held margin trading accounts with the Defendant and among other trades, conducted trades in nickel on an OTC basis. OTC trading is executed directly with the client and the platform, with pricing provided by the platform.

Following an extraordinary surge in nickel prices on the London Market Exchange ("**LME**"), the LME issued written notices to suspend nickel trading and cancelled all nickel trades executed on or after 00:00 am UK time on 8 March 2022 ("**Suspension and Reversal**"). On 8 March 2022, the Plaintiffs instructed the Defendant to close all their open nickel positions ("**Closing Trades**"). The Plaintiffs then issued further instructions to withdraw moneys in their trading accounts ("**Accounts**"), including profits resulting from the Closing Trades.

On the basis that the Suspension and Reversal constituted a *force majeure* event under the Margin Trading Customer Agreement ("**MTCA**") between the Plaintiffs and the Defendant, the Defendant refused to make payment to the Plaintiffs on the basis that the Closing Trades could not be sustained due to the Suspension and Reversal. The Defendant then reversed the Closing Trades to reinstate the Accounts to the position before 8 March 2022.

The Plaintiffs sued the Defendant for refusing to pay the profits made on the Closing Trades, and for reversing the Closing Trades, arguing that the Suspension and Reversal was not a *force majeure* event under the MTCA.

DECISION OF THE GENERAL DIVISION OF THE HIGH COURT

The Court held that the Suspension and Reversal qualified as a *force majeure* event under Term 23(1)(b) of the MTCA and that the Defendant was entitled under Term 23(2)(c) to "suspend or modify the application of all or any of the Terms of this Agreement to the extent that the Force Majeure

Event makes it impossible or impracticable for the Defendant to comply with the Term or Terms in question". Therefore, the Defendant was entitled to suspend or modify its obligations under Terms 7(13) and 7(14) of the MTCA to pay the Plaintiffs in relation to the Closing Trades, as it had become "impossible or impracticable" for the Defendant to comply with those obligations.

The Court held, however, that the Defendant was not entitled to reverse the Closing Trades. The Defendant's argument that it was entitled to modify Term 4(7) of the MTCA to reverse the Closing Trades was not tenable as Term 4(7) did not apply. The Plaintiffs were entitled to claim for losses suffered from a reversal of the Closing Trades. The Court held that the Plaintiffs had not proved any losses and was entitled only to nominal damages for the Defendant's breach of the MTCA.

KEYPOINT

Force majeure clauses show parties' intentions as to the allocation of risks upon the occurrence of a force majeure event and the scope of permitted consequences is a matter of contractual interpretation

COMMENTARY

Force majeure clauses and the allocation of risks

The Court held that the Suspension and Reversal qualified as a *force majeure* event under Term 23(1)(b) of the MTCA which states that a *force majeure* event includes "the suspension or closure of any market or the abandonment or failure of any event on which we base, or to which we in any way relate, our quote, or the imposition of limits or special or unusual terms on the trading in any such market or on any such event". The Court rejected the Plaintiffs contention that the pricing of OTC products was not based on the underlying market, and held that the Defendant's business model was premised on its ability to hedge its position in the underlying market. On an interpretation of the MTCA, the Court found that Term 12(4)(c) which states that the Plaintiffs are "not dealing on the Underlying Market" merely meant that the OTC trades were made directly with the Defendant but the prices traded remained derived from LME.

Since the Suspension and Reversal was a *force majeure* event under the MTCA, the Court held that the Defendant was entitled under Term 23(2)(c) to "suspend or modify the application of all or any of the Terms of this Agreement to the extent that the Force Majeure Event makes it impossible or impracticable for the Defendant to comply with the Term or Terms in question". Therefore, the Defendant was entitled to suspend or modify its obligations under Terms 7(13) and 7(14) of the MTCA to pay the Plaintiffs in relation to the Closing Trades, as it had become "impossible or impracticable" for the Defendant to comply with those obligations.

In that regard, the Court held that it did not need to have become *literally* impossible for the Defendant to make payment under those obligations. The Court found that the allocation of risks in the *force majeure* clause meant that the parties intended for the Plaintiffs to assume the systemic risk as stipulated in Term 23(1)(b) that it may become impossible or impracticable for the Defendant to comply with the MTCA if there were market suspensions or closures. “The presence of the Force Majeure Clause shows that the “risk exposure of an exceptional underlying market event lies squarely with the client” (at [95]).

Contractual interpretation of permitted consequences

The Court held, however, that the Defendant was not entitled to reverse the Closing Trades. The Defendant’s argument that it was entitled to modify Term 4(7) of the MTCA to reverse the Closing Trades was not tenable. The Court referred to Term 23(2)(c) of the MTCA which permits the Defendant to suspend or modify the *application* of Terms in the MTCA, placing emphasis on the word “application”. The Court held that the Defendant was entitled to suspend or modify only Terms in the MTCA that *applied* as result of the *force majeure* event.

Term 4(7) of the MTCA permitted the Defendant to regard a transaction as void, and to close the transaction, if the circumstance in Term 4(8) were not satisfied when the transaction was executed. Term 4(8)(k) provided that a *force majeure* event must not have occurred at the time of the transaction. The Court held that Term 4(7) was a permissive Term that did not become “impossible or impracticable” to comply with due to the Suspension and Reversal, and was not applicable in relation to the Closing Trades. On that basis, the Court held that the Defendant was not entitled to modify Term 4(7) to enable it to reverse the Closing Trades.

The Plaintiffs were entitled to claim for losses suffered from a reversal of the Closing Trades. The Court held that the Plaintiffs had not proved any losses and were entitled only to nominal damages for the Defendant’s breach of the MTCA.

Concluding remarks

In *Foreland Singapore Pte Ltd and another v IG Asia Pte Ltd* [2024] SGHC 179 is an important reminder that *force majeure* clauses are only as good as the parties intended them to be. Just like every other term of agreement, the scope of a *force majeure* clause is based on contractual interpretation.

Force majeure clauses should be drafted carefully in every agreement, customised to reflect parties’ intentions on risks allocation and permitted consequences.

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