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Note

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I. Introduction

On January 11, 2020, World Health Organization (WHO) received reports about an unusual respiratory virus, which appeared to be linked to a seafood market in Wuhan, China.[1] Three-quarters of the original cases had some association with the market.[2] A cluster of patients presented with pneumonia of unknown etiology in Wuhan city of China was reported to the Chinese Center for Disease Control

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1. *World Health Organization: Novel Coronavirus Situation Report,* World Health Organization (Jan 20, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf.

2. Rogers Lindsay Smith, *Why Confirming the Origins of COVID-19 Matters*, Johns Hopkins Bloomberg School of Public Health (Aug. 15, 2022), https://publichealth.jhu.edu/2022/origins-of-sars-cov-2.

(CDC) on 31, December 2019.[3] This situation bears an eerie similarity to a pandemic in 2003, where original cases were also linked to a seafood market.[4] Subsequently, Wuhan was placed under lockdown.[5]

Later, cases started appearing throughout the world.[6] In March 2020, World Health Organization declared COVID-19 ("COVID") to be a pandemic. However, despite the early shockwaves from the pandemic, governments around the world began to take mitigation efforts in the early months of 2020. One such effort was the lockdowns that have become commonplace in many countries over the last few years. The United States was no exception, as stay-at-home orders around the country were ordered as early as March 2020.

These mitigation efforts, while softening the pandemic's blow, could not quell the shock waves that shattered many industries around the country. As a result of these systemic shocks, many industries had to re-invent the way they do business. The legal industry has been no exception. Some concerns have been regarding corporate governance, transactions, contracts, financing, strategic decisions, labor matters, and others.[7] From a corporate law point of view, businesses were required to move their shareholder annual meetings to a virtual format.[8] Businesses had to re-think employee safety, given the new threat, and how to still be compliant with OSHA regulations.[9] Undoubtedly, one of these areas of rethinking with the most practical outcomes for businesses in the United States came with a reevaluation of their contractual obligation in light of what they may or may not be bound by given the circumstances of the pandemic. Consequently, parties to a transaction, found themselves unable to perform. In legal terms, many businesses found themselves reevaluating their contracts under the guise of force majeure.[10]

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3. BS, Mohan, and Namibiar, *Vinoid COVID-19: An Insight from SARS COV-2 Pandemic Originated at Wuhan in the Hubei Province of China*, ClinMed, https://clinmedjournals.org/articles/jide/journal-of-infectious-diseases-and-epidemiology-jide-6-146.php?jid=jide, Last Accessed: Jan. 6, 2023.

4. *Id.* (Although some suggested that the virus originated in a laboratory, evidence for this claim is scant. Most of the evidence supports that the market was the culprit as three-quarters of the recent case were associated with the seafood market. Tracing the lineage of the virus also supports this theory that the virus was linked to a seafood market.)

5. *See generally A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 21, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020.

6. *Id*.

7. *COVID-19: Legal Issues and Considerations*, White and Case (Mar. 13, 2020), https://www.whitecase.com/insight-alert/covid-19-legal-issues-and-considerations

8. *Id.* (Companies were required to do in order to comply with the lockdown rules.).

9. *Id.*

10. *Id.*

Many looked as to whether their contracts had a force majeure clause that could excuse performance.[11] Broadly, the doctrine of impossibility is relevant when parties are unable to perform due to changes in domestic law, died of illness, or an individual, etc. However, many parties also contain an express term in their contract called a force majeure clause, which excuses non-performance based on language defined in the contract.[12] These clauses typically include events such as acts of God, riots, war, and generally events bigger than the contracting parties. Force Majeure typically exists as a way to allocate risk, and it is generally negotiated if parties take the time to do so.[13] According to one view, before COVID, many commercial parties looked at the force majeure as a laundry list of catastrophes unlikely to happen.[14] With the pandemic, the impact of the force majeure clauses became a crude reality for many and was a point of contention and litigation between parties.[15]

It has been interesting to see the changes to which the doctrine of force majeure, and by extension force majeure clause may undergo because of the pandemic. This paper will explore the way force majeure clauses were interpreted in the wake of the COVID pandemic by the United States courts and internationally, and how they were different from previously unexpected events, such as the September 11th terrorist attacks, as well as previous pandemics. As COVID still disrupts daily life, the study of force majeure clauses is likely not over and it is still evolving. Partly, this is because the emergence of vaccine-resistant variants looms. Nonetheless, as some time has passed since the pandemic started, it is important to see what courts ruled regarding the force majeure clauses and whether there is a circuit split.

It should be noted that although at the time of this writing, the disease has not gone away, some experts would argue that it is endemic.[16] For example, the United States claimed it is over, however, WHO took a more cautious approach to answer that question: particularly that the pandemic was not necessarily over, however, we appear

11. *Id.*

12. *See Generally* Andrew A. Schwartz, *Contracts and COVID-19*, 73 Stan. L. Rev. 48, 48 (July 2020).

13. Bagger M. Paula, *The Importance of Force Majeure Clauses in the COVID-19 era*, American Bar Association (March 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19.

14. *Id.*

15. *Id.*

16. Branswell Helen, *Is COVID-19 pandemic over? The answer is more art than science*, Stat Health (Sep. 19, 2022), https://www.statnews.com/2022/09/19/is-the-covid-19-pandemic-over-the-answer-is-more-art-than-science/.

to see an end in sight.[17] Reaching the end of a pandemic is more subjective and we do not seem to know it until it is in the rearview mirror.[18] Given that it is the first coronavirus pandemic, there are no goalposts that we are following.[19] For example, the 1918 pandemic was characterized by three waves and it is unclear whether this one will follow suit.[20] On the other hand, the 2009 H1N1 pandemic had a single wave.[21]

First, this paper will examine the force majeure clause historically, and look at its significance in settling disputes. Second, case law will be examined to see how force majeure was applied during the pandemic and how it was interpreted prior. Third, the paper will note whether force majeure application by courts was unprecedented or consistent with previous case law. Finally, we will discuss how the force majeure clause has remained unchanged despite the tumultuousness, and unprecedented nature of COVID and its policy implications. It is important to note that although this paper will address consequences after COVID, the assumption is that the exogenous to daily life disrupted by COVID have passed, although there is the possibility of return, and the disease might still exist from a clinical standpoint.

II. Background: Contracts - An Essential Foundation

Contracts are an important foundation of our business and legal world. Some theorists view contracts as an act of self-legislation where parties impose legal rules upon themselves.[22] Contracts are a working document where parties can create legal obligations, they have to one another. Some suggest that contracts are to be viewed as a moral obligation to perform one's promises.[23] In short, contracts are legally enforceable promises.[24]

From a more pragmatic perspective, companies generally like using contracts to ensure one party does not take advantage of the other.[25] Scholars have defended the strict liability of contracts, arguing that it

17. *Id.*

18. See Generally Branswell.

19. *Id.*

20. See Generally Branswell.

21. *Id.*

22. Gregory Klass, *Three Pictures of a Contract: Duty, Power, and Compound Rule,* 83 N.Y.U. L. Rev. 1726, 1727 (2008).

23. *Id.*

24. *Id.*

25. David Frydlinger, Oliver Hart, Kate Visaek, *A new approach to Contracts*, HBR, October 2019

reduces costs.[26] In fact, one of the oldest rules in contract law is to apply a strict liability principle when there is a breach.[27] Generally speaking, strict liability applies when there are exogenous factors beyond the breaching's party control, with very few exceptions.[28] A critique of this form of liability is that courts force parties to perform contracts even when economic inefficiencies arise.[29] Nonetheless, others argue that a court's adherence to strict liability does reduce contracting costs, due to the predictability such an approach provides.[30]

Another possibility relates to the duty to mitigate. This notion of liability is based on two prongs: (1) the promisor is liable to the promisee for the breach and the liability is unaffected by the promisor's exercise of due care or failure to take efficient precautions and (2) the promisor's liability is unaffected by the fact that the promise, before the breach, has failed to take cost-effective precautions to reduce the consequences of non-performance.[31] In other words, contract law is strict liability without a contributory negligence defense.[32] Declining to apply the willful breach doctrine and restricting the promisee to the diminished value is simply inefficient.[33] Although this may seem obvious to those of us who have taken Contracts as a class, such notions may not be readily apparent to unsophisticated businesses that contract without consulting counsel.[34]

Contracts generally include a clause, called the *force majeure* to navigate the landscape when an unforeseeable event happens.[35] Throughout history, floods, wars, and other acts of God have disturbed contractual liabilities.[36] A party is bound by their contractual

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26. Robert Scott, *In (Partial) Defense of Strict Liability in Contracts,* 107 Mich. L. Rev. 1380, 1381 (2009).

27. *Id,* at 1383.

28. *Id.*

29. *Id.*

30. *See generally* Scott, *supra* note 32.

31. *Id,* at 1382.

32. *Id.*

33. *Id,* at 1386. (presumably allowing such defenses would lead to lengthy trials, clog up the court's docket, and may unfairly incentivize one party to defect at the detriment of another party)

34. *See generally* Phillipe Borbeaue (ed) et. al *A Multidisciplinary Approach to Pandemics: COVID-19 and beyond* (Oxford University Press USA 2022). In common law, generally the reason for why one breaches a contract is immaterial; for example, whether one rescinds on a contract due to a medical diagnosis or for reasons such as changing their mind, is not important in the eyes of the law and both constitute a breach. On the other hand, in civil law, reasons for rescission are explored more in depth by the courts and a different standard is used.

35. *Id.*

36. Schwartz, *supra* note 13, at 48.

liability even if enforcing them takes a greater deal of effort on behalf of parties than originally anticipated.[37] After all, they are a legal promise. Nonetheless, when there is an extraordinary event, the doctrine of impossibility applies.[38] Due to the importance of contracts in the business world, the doctrine of impossibility is given a narrow scope.[39]

Force majeure has its roots in English law.[40] However, the term "force majeure" crosses through a multitude of legal disciplines, from municipal law to public international law. In *Taylor v. Caldwell,* an event music hall contracted with a venue owner to have a concert over the summer.[41] The event organizer agreed to pay the owner a specific sum for each day.[42] However, before the event could take place, an accidental fire destroyed the music hall.[43] The court held that the event organizer was not required to pay for the venue since the concert hall was destroyed.[44] The essential purpose of the contract was for the concert to be played at the music venue, and since that could no longer be performed, there was no purpose in the event organizer to pay the money.[45]

Shortly thereafter, the U.S. Supreme Court adopted the same rationale. In *The Tornado*, a sailor had a contract to deliver freight on the eponymous ship. [46] However, the ship caught fire and the sailor had to deliver the freight by different means.[47] The Supreme Court held that if a specific set of circumstances can no longer be performed, then both parties are excused from performance.[48] For frustration of purpose to excuse non-performance, parties will have to establish the following: (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic

37. *Id,* at 49.

38. *Id.*

39. *Id.*

40. Cartee Joshua, Mattes William, *Origins of the Force Majeure Clause and Impossibility of Contractual Performance Defense*, Dinsmore & Sholl LLP (Mar. 2020), https://www.lexology.com/library/detail.aspx?g=4150d305-9064-431f-97e2-21502528234b.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (The ship caught fire before beginning its voyage hence the ship was deemed to be unseaworthy. See *The Tornado,* 108 U.S. 342 (1883). Nonetheless, it should be noted that this principle only applies if force majeure is not included in the contract- essentially only under a specific set of circumstances will courts deem a certain contract to be null and void if the specific set of circumstances will make performance impossible.).

47. *Id.*

48. *Id.*

assumption of the agreement of the parties, and (3) that occurrence made performance impossible.[49]

Today, force majeure clauses are recognized and constructed according to their plain language.[50] One common defense for non-performance of the contract is unforeseeable events, referred to as acts of God. Generally, these events have happened in the past and are expected to happen again.[51] Many of these include phenomena such as floods, fires, earthquakes, hurricanes, etc. To see whether something is an act of God the foreseeability test is applied.[52] Generally, the inclusion of force majeure clauses in a contract, is a result of negotiation.[53] Below is an example of such found in *Kel Kim Corp. vs. Central Markets Inc.*:

> If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.[54]

Courts apply a four-prong test to see whether a clause is a force majeure clause. The test used is: (1) the breach for which the promisor seeks to be excused must be defined; (2) The event defined as force majeure must be defined; (3) there must be a causal connection between the breach and the event; (4) it must define what will happen if performance is excused.[55]

However, even though the test may seem simple there are real nuts and bolts to be examined as far as the enforceability of a force

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49. *Id.* (This test is different than force majeure because force majeure ought to be an express term of the contract).

50. *Considerations when determining whether a crisis like COVID-19 triggers force majeure under English law,* Baker McKenzie (Mar. 5, 2020), https://www.bakermckenzie.com/en/insight/publications/2020/03/when-is-force-majeure-really-force-majeure.

51. Schwartz, supra, at 50. (See Restatement (Second) of Contracts § 261).

52. *Id.*

53. *Id,* at 55. (The plaintiff leased a vacant supermarket. The understanding was that the plaintiff would lease the property as a roller skating rink, even though the lease did not limit use as a roller skating rink only. The lease required the plaintiff to keep a $1,000,000 liability, however the plaintiff stated that no insurer would give a policy in excess of $500,000 to a skating rink. The plaintiffs urge that they should be excused from non-compliance stating that the force majeure clause applies. Court reasons that the plaintiff should have foreseen their inability to obtain $1M in insurance prior to signing the lease. The court states that the force majeure clause only applies to parties' ability to conduct day-to-day operations and not whether they can obtain a certain amount of liability insurance. Ultimately, court rules in favor of the defendant.) See *Kel Kim Corp. v. Central Markets Inc.,* 70 N.Y.2d 900 (1987).

54. *Id.*

55. *Id.*

majeure clause. First, there must be a breach for the force majeure clause to be enforced. In other words, if parties can perform, even if there is a major world event happening, the clause will not be relevant.

Second, the event itself must be defined and contracts generally provide a long list of such events.[56] Others contracts are construed listing a long list of calamities and using catch-all language such as "outside events out of the parties' control."[57] If one has a specific list of events, it is better to be as inclusive as possible, and have events that one thinks have a very low chance of happening, to ensure that they will be covered.[58] For example, if the words of the clause itself, do not include the word pandemic, courts might still cover it as a force majeure event if the clause appears to be open-ended.[59] Third, the breach must be caused by the event in question. Generally, contractual language should prove a causal link.[60]

Finally, the clauses, must mention what will happen, in other words, and what party will bear the risk, in the event of a breach.[61] In other words, parties shall state what will happen at the end of a force majeure clause, and who gets to bear that risk.[62] Although the outcome, may be one-sided and unfair, courts will not pay attention to it, as they assume that the outcome of these clauses being enforced has been previously bargained.

During COVID, force majeure clauses became more relevant. The question of whether health issues or government mandates found many parties "unable" to perform.[63] Courts will generally not construe force majeure, as something fair or unconscionable if one party bears more of a risk because it is assumed to be a clause that parties have been bargaining for.[64] In other words, it will simply be a risk that parties bargained for, and on one extreme, if one party assumes all of the risks contractually, that is how the courts will allocate it.[65]

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56. *Id,* at 3.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id,* at 5.

62. *Id.*

63. Bagger, at 1 (Generally parties found themselves turning to a clause often believed to be boilerplate)

64. *Id.*

65. *Id.*

III. Force Majeure Clause Has Remained Unchanged Despite The Tumultuousness and Unprecedented Nature of COVID

With the COVID pandemic still lingering, it is interesting to examine how courts applied force majeure clauses before the pandemic and during COVID. Overall, the exogenous shocks from the virus appear to have vanished, for the most part. As some have noted, pandemics are both biological and social events.[66] The biological and social aspects of a pandemic might end at different times.[67] The ending point might bring obligations to seek reparations.[68] This section predicts how might force majeure clauses, change if at all, post-pandemic.

Interestingly, and unsurprisingly, force majeure came into conflict when settling contractual disputes during the 1918 Spanish flu pandemic. In *Citrus Soap Co. v. Peet Bros. Mfg. Co*., a seller sold a buyer good quality soap at a specified quantity, the place of delivery was specified and the entire delivery was to be completed before December 31, 1918.[69] Thereby, the terms previously mentioned created a contract. The first shipment arrived as expected, however, the second, third, and fourth shipments arrived after December 31st, due to a factory closure in San Diego. The factory closure was caused by a quarantine.[70] Due to the delay in shipment, the buyer refused to accept the purchase of the later shipments at the price called for in the contract and sought damages for breach of contract from the seller.[71] The lower court ruled in favor of the seller and the buyer subsequently appealed.[72] Although the buyer acknowledged that the factory was closed due to public health restrictions, the buyer argues that the closure was insufficient to excuse the seller from performance.[73] The Appellate court re-affirms the finding of the lower court.[74] Essentially, the seller complied with the delay clause in the contract and the buyer had no reason not to accept the shipment without breaching the contract. The lower court was justified in finding that the notice of delay sufficiently complied with the contractual obligation. In short, the de-

66. See generally Phillipe Borbeaue (ed) et. al *A Multidisciplinary Approach to Pandemics: COVID-19 and beyond* (Oxford University Press USA 2022); see also Padeu and Wibel: 2020.
67. *Id.*
68. Supra, Phillipe
69. *Citrus Soap Co. v. Peet Bros. Mfg. Co.,* 50 Cal. App 246, 247 (Cal. Ct. App. 1920).
70. *Id, at 247-248.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id,* at 250.

lay was specifically caused by the quarantine due to Spanish influenza.[75] Giving notice in writing by the seller, was a key component of the contract and the court found that the seller provided ample notice of its inability to deliver on time due to the restrictions caused by the Spanish flu influenza quarantine.[76] A key takeaway from this is that courts will excuse performance based on the language of the contract. The quarantine itself is unlikely to excuse performance unless the language of the contract *allows* for such excuse.

Courts do not allow the use of force majeure clauses for parties to back out of their contractual obligations when it is no longer profitable to sustain them. As seen in the *Kyocera v Hemlock* case, seller alleges that the depression in solar panel prices caused the contract to become unprofitable.[77] Their Force Majeure clause stated as follows:

> Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party's control, including without limitation: acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage (which is beyond the affected Buyer's or Seller's reasonable control and the affected Buyer or Seller shall promptly use all commercially reasonable efforts to remedy) that prevents Seller's ability to manufacture Product or prevents Buyer's ability to use such Product in Buyer's manufacturing operations for solar applications; or, in the case of Seller only, a default of a Seller supplier beyond Seller's reasonable control (in each case, a "Force Majeure Event")[78]

The seller claimed it was unable to sell solar panels at a profitable price due to the intervention of the Chinese government.[79] Put differently, the force majeure event was the Chinese government providing illegal subsidies to dominate the solar panel market.[80] Due to the acts of the Chinese government, the contract was unprofitable for the seller.[81] However, the Court found that this breach of contract does not constitute a force majeure event.[82] The acts of the Chinese government simply caused economic hardship for the seller and the seller

75. *Supra*, at 247.

76. *Supra,* at 250.

77. *Kyocera Corp. v. Hemlock Semiconductor LLC,* 313 Mich. App. 437, 438 (Mich. Ct. App. 2015).

78. *Id,* at 441 (This issue was due to the Chinese government providing subsidies to the solar panel industry, unfairly lowering the price of some of the raw materials).

79. *Id.*

80. *Id,* at *442-443.*

81. *Id,* at 449.

82. *Id, at 456.*

is still able to perform in all other respects.[83] The Court reasoned that parties assume risks when they enter priced-fixed contracts, and one is not excused by performance due to force majeure simply because the price is no longer profitable or it imposes economic strain.[84]

Causality is also an important factor when it comes to force majeure. Particularly, a force majeure event has to render performance impossible. A historical example of this can be seen in *Aquila Inc. v. C.W. Mining.* Aquila was a public utility company which was supplied with coal by C.W. Mining.[85] The two parties had a contract with a force majeure clause, which excused, among other things, performance if there were labor shortages.[86] Specifically, the clause stated as follows:

> (A) Defined
>
> The term "Force Majeure" as used herein shall mean any and all causes beyond the reasonable control of the party failing to perform, including but not limited to acts of God; . . . labor disputes; boycotts; lockouts; labor and material shortages; . . .; breakdowns of or damage to plants, equipment, or facilities; . . . or other causes of a similar nature which wholly or partly prevent or make unreasonably costly (i) the mining, delivering, or loading of the coal by Seller; or (ii) the receiving, transporting, accepting, or utilizing of the coal by Buyer at the Station. To be considered unreasonable such increased costs must be substantial and sustained so that mining is no longer possible. This Section shall not be construed to require either party to prevent, settle or otherwise avoid or terminate a strike, work slowdown, or other similar labor action.
>
> (B) Effect Hereunder
>
> If, because of any Force Majeure, either party hereto is unable to fulfill any of its obligations under this Agreement, and if such party shall promptly give to the other party concerned written notice of such Force Majeure, . . . with a minimum of delay. Any deficiencies in deliveries or acceptance of coal hereunder caused by Force Majeure shall not be made up except by mutual consent. If a Force Majeure continues for more than six (6) months then either party may terminate this Agreement by giving written notice to the other party without penalty or cost. During an event of partial Force Majeure by either party, a fair and reasonable allocation of deliveries of coal or the ability to consume coal shall be made to mitigate the impact on each party.[87]

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83. *Id* (There were also other issues of the agreement containing an acceleration clause).

84. *Id,* at 451.

85. *Aquila Inc. v. C.W. Mining,* 545 F.3d 1258, 1260 (10th Cir. 2008).

86. *Id,* at 1264.

87. *Id,* at 1261.

Although there was a labor strike at C.W. Mining creating labor shortages, the court ruled that performance was not excused. C.W. Mining downplayed its geological issues and claimed that the reason why it halted operation was that there was not enough staff to fix the geological issues. Additionally, a different issue plagued the mining operation: the conditions were unusually muddy for the area. In turn, these conditions affected the coal quality. C.W. Mining also downplayed its coal problems and led the other party to believe that they would be overcome shortly. C.W. Mining was on the hook for damages.[88]

Aquila brought suit, and C.W. Mining stated the labor dispute defense, therefore the force majeure event impeded the performance of its contract. By reviewing the factual evidence, the court found that the coal mining quality issue played a significant role in C.W. Mining's failure to meet its contractual obligations. In fact, C.W. Mining showed that they only needed three additional workers at one point and did not provide adequate job openings. The evidence showed that the issues which led to non-performance were caused by a geological event, not labor disputes, and thus not provided for in the force majeure clause. Accordingly, C.W. Mining was not excused.[89]

In *Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp*, plaintiff Toyomenka is a California corporation, and the defendant (Hess Oil) is a US Virgin Islands corporation. Hess owned an oil refinery, and it was responsible for delivering oil barrels to the plaintiff. However, Hess was delayed in delivering the oil to Toyomenka. As a result, the plaintiff seller brought a diversity action to recover demurrage for the defendant's delay in taking delivery of cargo under a contract for the sale of crude oil.[90] The parties entered a contract that contained the following force majeure clause:

> Neither seller nor buyer shall be liable for damages or otherwise for any failure or delay in performance of any obligation hereunder other than the obligation to make payment, where such failure or delay is caused by force majeure, being any event, occurrence or circumstance reasonably beyond the control of the party claiming force majeure, including without prejudice to the generality of the foregoing, failure or delay caused by or resulting from acts of God, strikes, labor disputes, fires, floods, wars (whether declared or undeclared), riots, ... The party claiming force majeure shall give written notice thereof to the other party within forty-eight (48)

88. *Id,* at 1269.

89. *Id,* at 1260.

90. *Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp*, 771 F. Supp. 63, 63 (SDNY 1991).

> hours of the occurrence thereof, stating in reasonable detail the cause and the expected duration. The affected party shall use reasonable diligence to remove the force majeure situation as quickly as possible. . . .The time of the seller to make or buyer to receive delivery hereunder shall be extended during any period in which delivery shall be delayed or prevented by reason of any of the foregoing causes, up to a total of thirty (30) days. If any delivery hereunder shall be so delayed or prevented for more than thirty (30) days, either party may terminate this contract with respect to such delivery upon written notice to the other party.[91]

As illustrated in the clause, the buyer's delay in taking delivery is excused if such delay was caused by any "event, occurrence, or circumstance reasonably beyond the control of the party" claiming force majeure.[92] Here, a hurricane caused damage to its terminal and refinery, and the buyer notified the seller that it was unable to take delivery of the oil.[93] Six million barrels of capacity were lost as a result. Given the circumstances, the court concludes that the event was covered by the force majeure clause, and thus, the buyer was not liable.[94]

The plaintiff also raised the issue that the defendant gave inadequate notice, in particular less than 30 days as required by the language of the contract. However, the court rejected this argument, showing that the defendant gave adequate notice. The court stated that the buyer: (1) made an effort to notify the seller as soon as possible (2) the seller alleged no harm or prejudice from the buyer's late notice.[95] Once again, this case shows that the language of the contract matters.

Another example of an unforeseeable event, in our recent collective memory, is September 11. Immeasurable pain was inflicted on our nation when more than 2,600 people died at the World Trade Center, 125 died at the Pentagon, and 256 died on the four planes[96] by nineteen extremist terrorist.[97] Although the World Trade Center has been the subject of numerous terrorist attempts, the way this was executed was unexpected. These particular terrorist attacks were unforeseen, shook the world to its core, and disrupted numerous industries.

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id,* at 64.

96. *The 9-11 Commission report*, https://govinfo.library.unt.edu/911/report/911Report_Exec.htm#:~:text=we%20have%20come%20together%20with,The%20nation%20was%20unprepared, Last Accessed: Jan. 6, 2023.

97. *Id.*

Accordingly, force majeure clauses were interpreted differently in the wake of the September 11 attacks.

For example, *OWBR LLC* vs. *Clear Channels* examined whether September 11 constituted a force majeure event in the context of their contract. In this case, the plaintiffs, OWBR, sued the defendant, Clear Channels, for breach of contract.[98] The defendant argued that in the wake of the September 11 attacks, it was not advisable to travel or hold events in Hawaii.[99] Conversely, the plaintiff believed that the only reason why the defendant canceled was due to the economic downturn.[100] Their contract had a force majeure clause which stated:

> The parties' performance under this Agreement is subject to acts of God, war, government regulation, *terrorism*, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement. Either party may cancel this Agreement for any one or more of such reasons upon written notice to the other. *[emp. added].*[101]

The plaintiffs argued that some time has passed since the terrorist events and they did not necessarily make travel inadvisable.[102] The Court re-affirmed the idea that increased cost alone does not excuse non-performance.[103] The force majeure clause does not contain language that excuses performance based on poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants.[104]

More, the Court reasoned that to excuse a party's performance under a force majeure clause ad infintum when an act of terrorism affects the American populace would render contracts meaningless in the present age, where terrorism could conceivably threaten our nation for the foreseeable future.[105] There was no specific terror threat for air travel to Maui or to Maui itself.[106] Although the court recognizes that September 11 was an extreme, unforeseeable occurrence that is of the magnitude to trigger a force majeure clause, it does not

98. *OWBR LLC v. Clear Channel Communs. Inc.,* 266 F. Supp. 2d 1214, 1215 (Second. Dist. 2003).

99. *Id,* at 1221.

100. *Id,* at 1221.

101. *Id,* at 1226.

102. *Id,* at 1233.

103. *Id.*

104. *Id,* at 1236.

105. *Id.*

106. *Id.*

absolve Defendants of performance under their agreement.[107] Defendants claimed that they did not hold the event due to people's fear of air travel, however, that is purely subjective and speculative and not enough to excuse performance under this agreement.[108] Summary judgment was granted for the plaintiff on the force majeure clause.[109]

Arguably, both COVID and September 11 are similar as they both defined a generation.[110] Accordingly, the COVID pandemic invokes the force majeure clause in many contractual disputes. The pandemic was unforeseen and caused disruption in a wide variety of industries. It is important to interpret how courts ruled during COVID to see whether it was truly unprecedented, or if there was some degree of predictability in the force majeure clause. For pragmatic purposes, it is useful to have some predictability of how courts will behave if there will be another exogenous shock in the near future.

Additionally, its interpretation by the courts has affected some economic sectors more than others. It is critical to observe how courts have behaved for stare decisis purposes. The pain of COVID has been felt from dire health outcomes to disturbed economic conditions, to unsustainable government spending.

A particular industry largely impacted by the COVID crisis was the collapse of international travel.[111] International tourist arrivals declined by 73 percent in 2020.[112] Such a shock put hundreds of millions of tourist jobs in jeopardy.[113] This led to massive losses for tourist-dependent economies.[114] As a result, many of the economies that were so heavily dependent on tourism, are now forced to borrow money from abroad.[115] Undeniably, this impacted some countries more than others on a macroeconomic level, in accordance with the percentage that tourism is as part of their GDP. Many other factors also affected countries such as the stringency of the lockdowns and

107. *Id.*

108. *Id.*

109. *Id,* at 1242.

110. Stark Alexandra, *COVID-19 is this generation's 9/11. Let's make sure we apply the right lessons,* New America, https://www.newamerica.org/political-reform/reports/politics-policymaking/covid-19-is-this-generations-911-lets-make-sure-we-apply-the-right-lessons/, Last Accessed: Jan. 6, 2023.

111. Milesi-Ferretti Gian Maria, *The COVID-19 travel shock hit tourism-dependent economies hard,* Brookings, https://www.brookings.edu/research/the-covid-19-travel-shock-hit-tourism-dependent-economies-hard/#:~:text=the%20COVID%20crisis%20has%20led,120%20million%20direct%20tourism%20jobs, Last Accessed: Jan. 6, 2023.

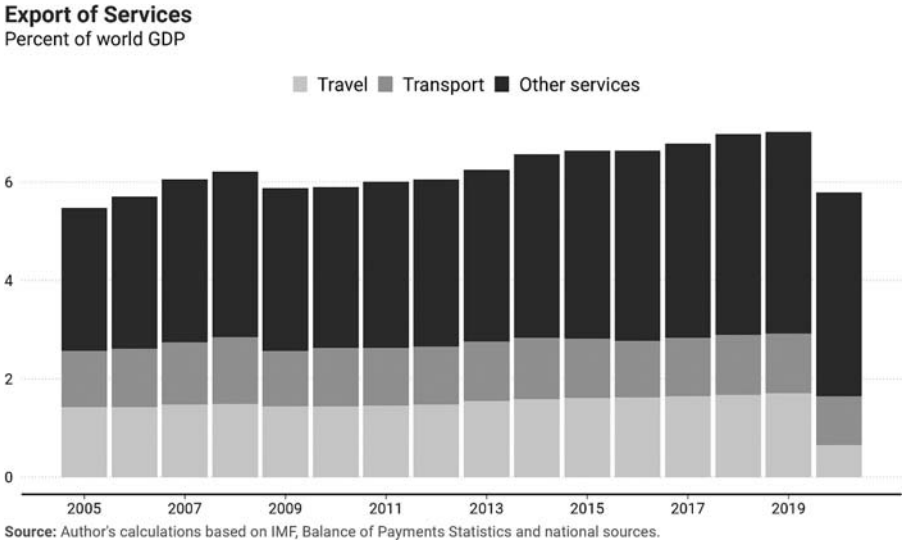
112. I*d.*

113. *Id* (see generally Milesi-Ferretti).

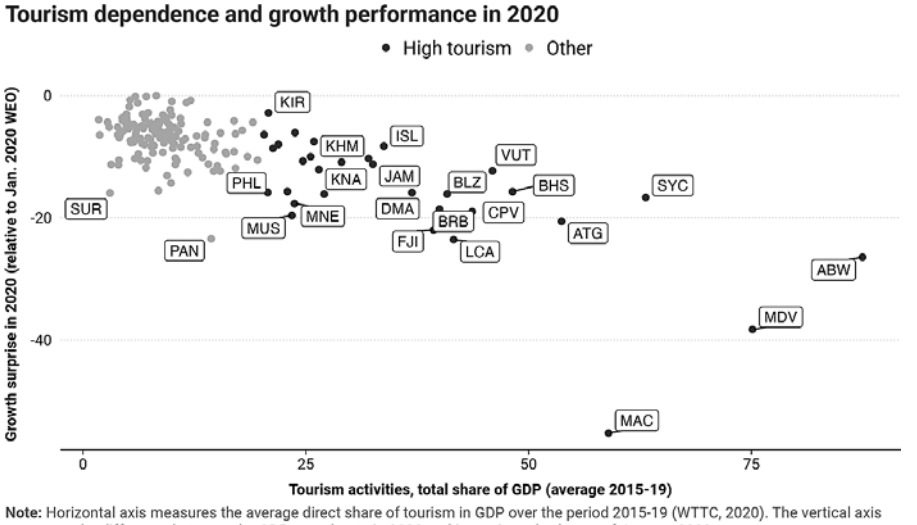
114. *Id.*

115. *Id.*

how deep of an impact the pandemic had.[116] Nonetheless, as shown below, it is without a doubt that the travel industry greatly suffered from COVID.



Source: Author's calculations based on IMF, Balance of Payments Statistics and national sources.



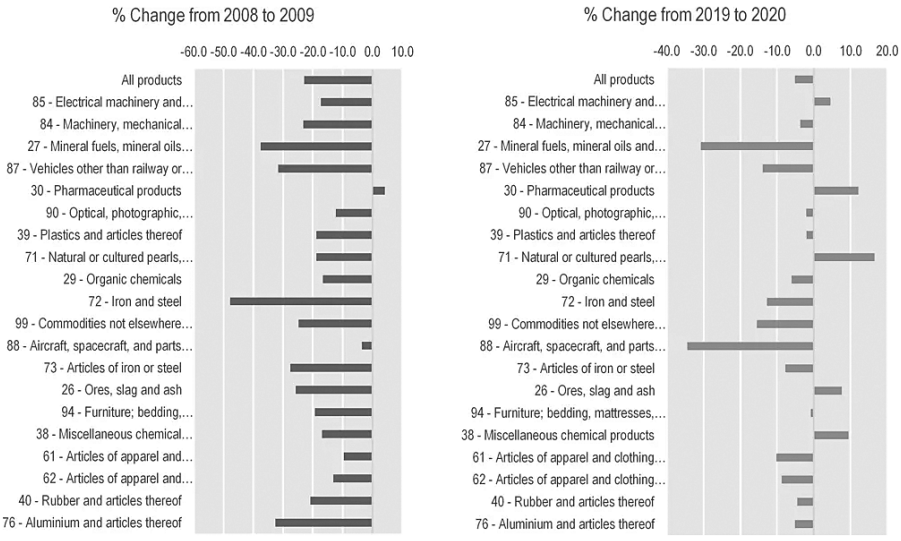
Note: Horizontal axis measures the average direct share of tourism in GDP over the period 2015-19 (WTTC, 2020). The vertical axis measures the difference between the GDP growth rate in 2020 and its projected value as of January 2020.

International trade has been impacted due to government shutdowns or lack of manufacturing capabilities due to supply chain disruptions. The World Trade Organization expects the volume of world

116. *Id*

merchandise trade to fall by 9.2 percent.[117] Undoubtedly, COVID has had a significant impact on international trade. International trade plunged in 2020 but recovered sharply in 2021.[118] The below figure shows the specific impact it had on certain economic sectors, compared to the 2008 Great Recession.[119]

Changes in trade of 20 most traded products



The world is particularly globalized, especially as seen through supply chains. Undoubtedly, COVID's disproportionate impact on various regions, as well as governmental shutdowns in exclusive areas had to lead to a great deal of unprecedented coordination.[120] Arguably, supply chain trends and patterns may change because of COVID and there might be a push away from single-source supply chains.[121] As

117. Andre Janssen, Christian Johannes Wahnscaffe, *COVID-19 and International Sales Contracts: Unprecedented Grounds for Exemption or Business as Usual, 25* Uniform L. Rev. 466, 466 (2020).

118. Arriola Christine et. al, *International trade during Covid big shifts and uncertainty: OECD Policy Responses during COVID-19*, OECD: Better Policies for Better Lives (Jun, 10,2022), https://www.oecd.org/coronavirus/policy-responses/international-trade-during-the-covid-19-pandemic-big-shifts-and-uncertainty-d1131663/.

119. Changes in trade COVID-19 vs The Great Recession (illustration), https://www.oecd.org/coronavirus/policy-responses/international-trade-during-the-covid-19-pandemic-big-shifts-and-uncertainty-d1131663/

120. Janssen, at 467,

121. Nelson, Mark, *The Great Globalization Shift: 4 Supply Chain Trends Accelerated by the COVID-19*, Mark Nelson (Jun. 24, 2020), https://www.marksnelsoncpa.com/blog/post/the-great-globalization-shift-4-supply-chain-trends-accelerated-by-covid-19.

the world has become increasingly globalized over the last several decades, some wonder whether there will be a de-globalization shift after COVID.

Contracting internationally poses special challenges due to varying cultural norms and different legal traditions.[122] On an international scale, contractual liability has been provided by United Nations Convention on Contracts for the International Sale of Goods (CISG).[123] Generally, these contracts favor strict liability.[124] However, under special exceptions, such as found in found in Article 79 of the CISG, contractual provisions will be triggered where the parties are not at fault for performance.[125] On a global scale, the practical effects of the COVID's impact on commerce can be especially seen with global vessels that need to be quarantined.[126] Such quarantine restrictions clearly impeded the delivery of goods in a timely manner. Moreover, the contractual provision has to pass the test of foreseeability. Many would argue that such has been the case with COVID, because many scientists predicted a pandemic for some time.[127] Conversely, epidemics are recurring events as shown with the Spanish flu.[128] Nonetheless, no one was able to determine the next pandemic with great specificity, thus claiming that COVID was foreseeable is fairly controversial.

According to medical publications, it would be almost certain that an epidemic such as COVID would occur in the near future.[129] Furthermore, numerous states limited international travel.[130] Nonetheless, a rational market participant could not have foreseen COVID as responses to it were so unprecedented.[131] A US District ruled that while the freezing of ports is a usual occurrence, freezing one particular port may still be unexpected and unprecedented.[132] The COVID pandemic may be parallel to that line of thinking used by the US District Court.

Undoubtedly, governments engaged in swift action once they realized the threat and magnitude of the virus. Strong sovereign actions to

122. See Karla C. Shippey, *Short Course on International Contracts: Drafting the International Sales Contract,* (World Trade Press, 3rd ed., 2008).
123. Janssen, 466.
124. *Id.*
125. *Id.*
126. *Id,* at 470.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. See *Raw Materials Inc. v. Manfred Forberich,* Case Numbqer 696.

combat COVID came to be expected once the virus ravaged Northern Italy.[133] The event would need to be highly exceptional and impede performance, e.g., have a causality component. Moreover, the non-performance would need to pass the test of unavoidability.[134] Some jurisdictions require parties to submit a force majeure certificate to excuse performance.[135] Overall, it may be decided more on a case-by-case basis.[136] On an international level, the question of enforceability will center on the unavoidability of each operational measure as well as subject to strict requirements.[137]

Due to the global nature of the world, the COVID pandemic has also specifically led to unprecedented disruptions in the supply chain.[138] The shortfall of suppliers alone cannot constitute grounds for exemption.[139] The freight business has also reported significant cutbacks.[140]

Another repercussion, on a global scale, that COVID may cause is illiquidity from the buyers.[141] The illiquidity will be another hurdle that will need to be overcome to fulfill contractual obligations. Nonetheless, the lack of financial capacity would need to be caused by the force majeure event itself.[142] However, illiquidity will generally be frowned upon as caused by force majeure.[143] The buyers will have a great burden of proof to show that the force majeure itself caused the financial impact. It is generally hard to prove causality with such an event. Historically, the CISG (Contract for the International Sales of Goods) has left hardship out of the force majeure clauses.[144] Leaving out hardship clauses is also consistent with US courts. Generally, it is hard and subjective to establish the threshold for hardship.[145] If the force majeure clause is enforced, then there will be an exemption of liability.[146] Nonetheless, providing notifications is still recommended which is consistent with the duty to mitigate.[147]

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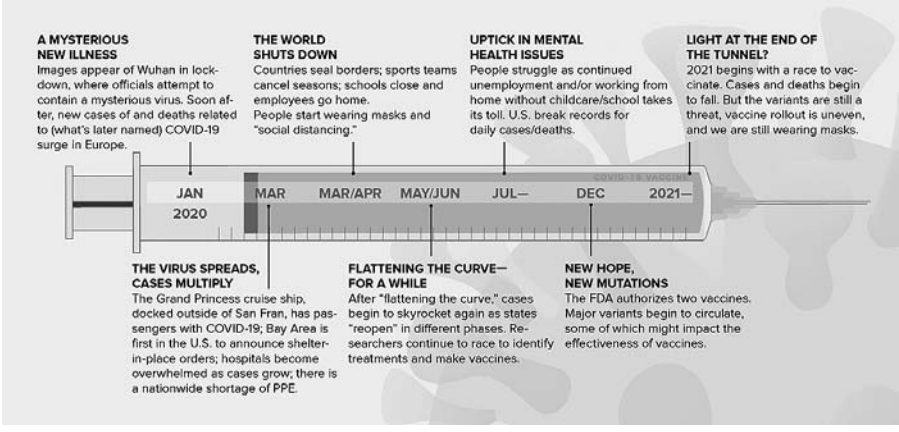
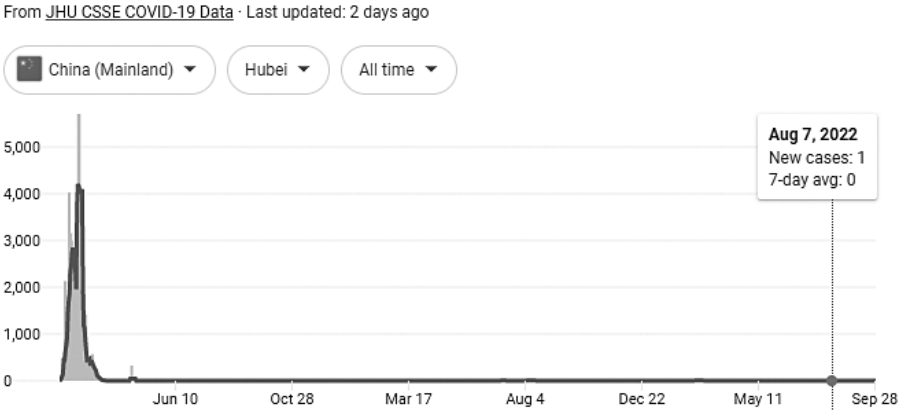
133. *Id,* at 473.
134. *Id,* at 474.
135. *Id,* at 475.
136. *Id.*
137. *Id,* at 476.
138. *Id.*
139. *Id.*
140. *Id,* at 478.
141. *Id.*
142. *Id.*
143. *Id,* at 479.
144. *Id,* at 480.
145. *Id,* at 483.
146. *Id.*
147. *Id.*

Enforcing the force majeure clause is still not a free-for-all and the duration and extent of the nonperformance shall be specified.[148] In light of meticulous real-time reporting of COVID, the assumption of the pandemic and the business environment distruption may already be a belief by the parties when forming these contracts.[149] In some cases, the obligation to notify may no longer be required if oblige is already aware of the impediment's existence.[150] This should be viewed on a case-by-case basis, as the pandemic's impacts may be unique depending on the industry and other contractual obligations.[151] Moreover, when examining contracts at the international level, the impacts of the COVID pandemic are unique.[152] For example, as Europe was going through its first peak in March 2020, 98 percent of companies in China were open and operating.[153] The figure below depicts a timeline of the pandemic in 2020, in the United States from a US-centric perspective:[154]



Comparatively, Wuhan cases have peaked in the beginning and have flattened, afterward:[155]

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id,* at 484.
153. *Id,* at 486.
154. COVID-19 Timeline (illustration), in Katella, Kathy *Our Pandemic Year: COVID-19 a Timeline.* https://www.yalemedicine.org/news/covid-timeline
155. COVID-19 cases in Mainland China curve (graph) (https://www.google.com/search?q=covid19=cases=mainland©hina&sxsrf=AliCzsaHkrEFr_Ge9eJkmI1rzs9Cj0ygGw%3A1665936770909&source=hp&ei=gi1MY_uJNeHk0PEPkfq3iAQ&iflsig=ajiK0e8AAAAAY0w7krFWs9LrXw3khzNsBun0qNzO2yja&ved=0ahUKEwj70siLkuX6AhVhMjQIHRH9DUEQ4dUDCAk&uact=5&oq=Covid19=cases=mainland=china&gs_lcp=Cgdnd3Mtd2l6EAM6BAgjECc6BQguEJECOhEILhCABBCxAx



These charts show that countries had to be mindful as while some may be going through a peak, others may have flattened their curve, and cases were scant. Particularly, international actors had to be aware of epidemiological trends throughout different regions, especially ones which they were doing business with. In some cases, the impediment of doing business was solely temporary.[156] Allowing a fundamental breach in contract was only allowed under exceptional circumstances.[157] As seen with the lockdowns and waves, most parties to a contract would have to be mindful that the restrictions impeding performance are generally temporary and once mitigations are lifted or cases decrease, they may perform as previously in their contracts.[158]

As noted above, one of the first industries to be sharply impacted was the airline industry with the COVID lockdowns. In fact, passenger traffic in April 2020 was 96 percent lower than in April 2019.[159] In *Rudolph v. United Airlines Holdings*, Jacob Rudolph and other plaintiffs, sought refunds from United for travel plans that were unfulfilled

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gAFziAGKFJIBBDIzLjWYAQCgAQE&sclient=GWs-wiz)

156. Supra *Raw Materials Inc.*

157. *Id*.

158. *Id*, at 487.

159. *COVID-19 Pandemic: Observations of the Ongoing Recovery of the Aviation Industry,* US Government Accountability Office (Oct. 21, 2021), https://www.gao.gov/products/gao-22-104429#:~:text=the%20COVID%2D19%20pandemic%20had,shops%2C%20and%20the%20supply%20chain.

but were instead provided with vouchers.[160] According to United's contract of carriage, if United cancels a flight due to a force majeure event, ticketed passengers are not entitled to a refund.[161] The plaintiffs argued that United canceled its flights due to reduced demand.[162] In fact, United made quite a few statements in public filings with the SEC regarding adjustments to its flight schedule due to reduced demand.[163] If United canceled its flights for purely economic reasons, United would be responsible for refunding the passengers' tickets. Alternatively, if United canceled its flight due to force majeure events, then United is not responsible for refunding the ticket price. Here, the dispute was whether United canceled the flights due to reduced demand or the force majeure event. The force majeure clause of this contract stated:

> a. Any condition beyond [United's] control including, but not limited to, meteorological or geological conditions, acts of God, riots, terrorist activities, civil commotions, embargoes, wars, hostilities, disturbances, or unsettled international conditions, either actual, anticipated, threatened or reported, or any delay, demand, circumstances, or requirement due directly or indirectly to such condition;
> b. Any strike, work stoppage, slowdown, lockout, or any other labor-related dispute involving or affecting [United's] services;
> c. Any governmental regulation, demand or requirement;
> d. Any shortage of labor, fuel, or facilities of UA or others;
> e. Damage to [United's] Aircraft or equipment caused by another party;
> f. Any emergency situation requiring immediate care or protection for a person or property; or
> g. Any event not reasonably foreseen, anticipated, or predicted by [United].[164]

The court found it reasonable that the government shutdowns fall within the scope of force majeure events.[165] Specifically, some countries that parties were traveling to had a shutdown due to COVID.[166] The court concluded that no reasonable carrier would transport passengers to a country with shutdowns.[167] As a result, the cancellation of tickets falls under the scope of a force majeure event.[168]

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160. *Rudolph v. United Airlines Holdings,* 519 Supp. 3d 438, 438 (N.D. Ill. 2021).
161. *Id*.
162. *Id,* at 445.
163. *Id*.
164. *Id.*
165. *Id,* at 445.
166. *Id,* at 451.
167. *Id.*
168. *Id.*

Education has been disrupted at its core by COVID. When COVID was declared a pandemic, schools were closed to stop the spread of the virus.[169] Many leaders grappled with balancing stopping the spread of the virus with helping children achieve their educational goals.[170] As a result of the school closures, many students experienced learning losses and an increase in inequality.[171] Remote education has also disrupted parents' lives, as in some cases, their work schedules required to have been changed.

In *Gibson v. Lynn Univ., Inc*, a student brought a lawsuit against his school under the claim that the school was unjustly enriching itself by charging the same tuition amount while forcing its students to be remote.[172] The student was upset as the school's tuition amount remained unchanged while the school could no longer provide daytime classes.[173] As a result of the COVID pandemic, the school was forced to provide remote instruction. In defense, the school invoked the force majeure clause. However, the plaintiff claims that it does not apply as the event did not cause the school to stop providing education, it simply caused its education provided to be remote.[174]Specifically, the force majeure clause provided as follows:

> [t]here will be no refund of tuition, [or] fees . . . in the event the operation of the University is suspended at any time as a result of an act of God, strike, riot, disruption, or for any other reasons beyond the control of the University.[175]

The Court recognized that schools create an implied contractual obligation by providing students with educational brochures.[176] Thus, the Court held that COVID fell within the provisions of the force majeure clause and summary judgment could not be granted.[177] This case illus-

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169. *See generally* Kuhfield Meghan et. al, *How is COVID-19 affecting student learning,* Brookings (Dec. 3, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/12/03/how-is-covid-19-affecting-student-learning/.

170. *Id.*

171. *See generally* Donelly Robin et. al, *The Impact of COVID-19 on Education- Recommendation and Opportunities for Ukraine* (Apr. 2,2021), https://www.worldbank.org/en/news/opinion/2021/04/02/the-impact-of-covid-19-on-education-recommendations-and-opportunities-for-ukraine.

172. *Gibson v. Lynn Univ., Inc,* 504 F. Supp. 3d 1335, 1336 (S.D. Fla. 2020).

173. *See generally Gibson v. Lynn* (Specifically the student's frustration stems from the fact that they were expecting to be part of the Day Division as indicated in the school's advertising brochures. Student enrolled under the belief that they would be enrolled into daytime classes, also the school touted its facilities and resources provided to on-campus students).

174. *Id,* at 1342.

175. *Id,* at 1338-1339.

176. *Id,* at 1342.

177. *Id,* at 1344.

trates the rough waters courts navigated regarding contractual interpretation while ensuring compliance with governmental orders.[178]

As seen in *JN Contemporary Art LLC*, simple sales transactions were left incomplete due to the pandemic. Parties entered two agreements concerning the auctioning of two paintings.[179] As the 2020 pandemic swept through New York, the auction had to be postponed.[180] The termination provision in the agreement, which accounted for a force majeure event, stated:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.[181]

Although neither pandemics nor quarantine restrictions are specifically listed, both fall within the meaning of "postponed for circumstances beyond our or your reasonable control."[182] Furthermore, per the court, it cannot be disputed that the pandemic is a natural disaster.[183] In fact, New York Governor's Cuomo Executive order calls it a "State Disaster Emergency."[184] As it was within the rights of the parties to terminate, given the force majeure clause language, the court dismissed the complaint.[185] Overall, this case shows that courts may interpret the force majeure clause in a broad manner. Moreover, the word pandemic does not have to explicitly be stated for force majeure to be triggered.

The hotel industry has also been disrupted as noted in the *Lampo Grp* case. Ramsey Solution hosts numerous seminars across the country.[186] Under an agreement with Marriott, it reserved a certain number of guest rooms for the duration of a five-night event.[187] In turn,

178. It appears that this case was subsequently settled out of court (see 2021 U.S. Dist. Lexis 83621).

179. *JN Contemporary Art LLC v. Phillips Auctioneers LLC,* 507 F. Supp. 3d 490, 490 (S.D.N.Y. 2020)

180. *Id,* at 494-95 (Phillips terminated the agreement to auction the Stingel Painting and refused to pay JN the minimum price it guaranteed in connection with the auction. JN now seeks an order compelling Phillips to auction the Stingel Painting and pay it in accordance with the terms of the parties' agreement. Phillips has moved for dismissal of this motion).

181. *Id,* at 496.

182. *Id,* at 500.

183. *Id*.

184. *Id,* at 497.

185. *Id,* at 495.

186. *Lampo Grp. LLC v. Marriott Hotel Servs.,* 2021 WL 3490063, 3-4.

187. *Id, at 3.*

Marriott guaranteed a price range at a fixed rate.[188] Ramsey Solutions alleges that beginning in May 2020, Marriott started making unilateral changes including social distancing guidelines.[189] Ramsey Solutions alleges that beginning May 2020, Marriott started making unilateral changes including social distancing guidelines.[190] Furthermore, Marriott instituted mandatory masks in public areas.[191] As a result, Ramsey opted to term innate under the Force Majeure clause.[192] Although the Notice of Termination did not invoke the Force Majeure Clause of the Agreement, it referred to "impossibility."[193] Particularly the Force Majeure Clause in this Agreement, stated as follows:

> Either party may be excused from performance without liability if circumstances beyond its reasonable control, such as acts of God, war, acts of domestic terrorism, strikes, or similar circumstances, make it illegal or impossible to provide or use the Hotel facilities.[194]

In *Lampo Group v. Marriott Hotel Serv*., Ramsey claimed that it could terminate the agreement because the pandemic falls under force majeure.[195] However, the basis for terminating the agreement does not appear to be the pandemic itself.[196] Instead, it appears to be the restrictions on social gatherings, limitations on the provision of self-service food and beverage, the mask mandates, and other rippling effects of the pandemic, which changed the way of life.[197] The Court stated that now the question is whether the circumstances surrounding pandemic mitigations made performance by either party, illegal or impossible.[198] The court found that the hotel restrictions did not make the contract impossible nor illegal.[199] It is simply a question of fact whether those amenities are part of the "Hotel facilities" as that term is used in the Force Majeure clause.[200] Overall, this case exemplifies how parties should carefully draft their force majeure clause to ensure coverage of events such as social distancing, or perhaps include causality.

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188. *Id,* at 3.
189. *Id.*
190. *Id,* at 5.
191. *Id*.
192. *Id,* at 4.
193. *Id.*
194. *Id,* at 7.
195. *Id,* at 10
196. *Id,* at 8.
197. *Id.*
198. *Id*.
199. *Id,* at 10.
200. *Id.*

At times, the force majeure defense rises due to a party simply not being able to pay.[201] This defense rarely succeeds. In *1600 N. Walnut v. Cole Haan Co*, a global footwear company, Cole Haan, entered into a lease agreement with 1600 N. Walnut.[202] Cole Haan was later sued due to their inability to pay. The force majeure clause that both parties entered into stated as follows:

> If either party is delayed, hindered, or prevented from the performance of an obligation because of strikes, lockouts, labor troubles, the inability to procure materials, power failure, restrictive governmental laws or regulations, riots, insurrection, war or another reason not the fault of or beyond the reasonable control of the party delayed (collectively, "Force Majeure"), then performance of the act shall be excused for the period of the delay; provided, however, the foregoing shall not: (A) relieve Tenant from the obligation to pay Rent, except to the extent Force Majeure delays the Commencement Date; and (B) be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds. [203]

Cole Haan vacated the premises in March 2020 and has not paid rent since that time. Subsequently, 1600 Walnut brought a lawsuit against Cole Haan to recover payment for rent including Arrearages.[204]

The court noted that COVID is a recognizable force majeure event under the clause.[205] However, the defendant, Cole Haan, bears the burden of the risk as stated in the force majeure clause.[206] Notably, the force majeure in this contract was as follows:

> Strikes, lockouts, labor troubles, the inability to procure materials, power failure, restrictive governmental laws or regulations, riots, insurrection, war, or another reason nor the fault of or beyond the reasonable control of the party cause delayed, hindered, or prevented performance, Cole Haan is not relieved of its obligation to pay rent.[207]

In other instances, parties found themselves unable to perform due to the lack of foot traffic the lockdown caused. For example, in *Shops*

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201. Rainey Simons, *Litigation Contracts and Force Majeure,* Quadrant Chambers, https://www.mondaq.com/uk/litigation-contracts-and-force-majeure/1010878/using-force-majeure-clauses-in-relation-to-inability-to-pay-a-forlorn-hope-, Last Accessed: Jan. 6, 2023 (generally, financing agreements do not include force majeure clauses moreover force majeure is typically used when it comes to performing as payment is seen as a different component).

202. *1600 Walnut Corp. v. Cole Haan Co*., 530 F. Supp 555, 557 (East. Penn. 2021).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id,* at 558.

207. *Id* (Court rules against the defendant, stating that the defendant is on the hook for paying rent).

& Garage at Canal Place v. Place, the dispute was regarding paying rent, and whether the inability to pay rent falls under the force majeure clause. The Plaintiff, Garage, leased a parking garage at the Canal Place Complex, as what used to be once a bustling shopping area- mostly filled with tourists-is now empty.[208] In this case, the plaintiff, alleged that the Lease included a force majeure clause that protects the tenant from paying the minimum rent until the event triggering the force majeure clause has subsided.[209] The question here was more of an inquiry as to whether the event was still happening rather than the language of the force majeure clause.

It was indisputable that the plaintiff *Garage* suffered an injury due to COVID. However, the question at issue is whether the plaintiff would pay reduced rent. The court rules that even though it is September 2021, the plaintiff is still affected, and the force majeure clause is still invoked.[210] The effects of the pandemic are still reeling the nation and the City of New Orleans.[211]

As of today, even though the pandemic appears to be more endemic, the initial shock seems to be gone. Thus, one can explore how courts behaved and whether it was within the expected parameters.

IV. Analysis of Force Majeure during COVID: The Four Corners Still Stands

Although the pandemic was shocking and unprecedented in many ways, courts have been relatively predictable in interpreting force majeure clauses. No different patterns of interpretation were observed when interpreting force majeure clauses pre- and post-pandemic. Overall, the court seems to adopt a view of "life goes on" similar to the post-September 11 attacks. Contracts have still been interpreted per their language, as some points, including the word "pandemic," has been included as an unforeseen event. The contracts must still be interpreted per the precedent, and the force majeure clause goes where risk is allocated. Commonly, a level of risk is accepted in contractual performance, hence why strict liability is adopted.[212] However, when a once-in-a-lifetime pandemic happens, such risk is not considered to be assumed in drafting a contract. Some parties may have erroneously believed that the unprecedented pandemic might

208. *Shops & Garage at Canal Place v. Place,* 2021 WL 3621891 (E.D. La. Oct. 2020).
209. *Id.*
210. *Id,* at 5.
211. *Id,* at 11,12.
212. *Id.*

have absolved them of contractual obligations, however as seen in case law such belief was erroneous.

Arguably, COVID is no longer unforeseeable.[213] Since 2021, COVID has become the new normal, and accordingly, parties should contract around it.[214] For those who still want to claim force majeure as a contractual defense, it might be more of an uphill battle.[215] Contractual language always governs.[216] Thus, one should scrutinize their facts to determine whether force majeure applies to their particular circumstances. As force majeure clauses are difficult to invoke, courts will look at whether parties anticipated the COVID pandemic when deciding if force majeure appropriately applies to the parties' circumstances.[217]

Although force majeure can give parties some relief, it is often limited.[218] For example, many leases will include a clause stating that the lease is still due even in the case of a force majeure event.[219] Consequently, invoking force majeure and dealing with litigation costs may not necessarily be worth it as the party will still have to pay. Listing an event such as a pandemic or endemic may also be a double-edged sword.[220] If the event were to be listed, it may make it easier for some parties to invoke force majeure. On the other hand, courts may not give parties the needed relief if the non-performance is due to a government shutdown or to an effect of the pandemic, rather than the pandemic itself.

A. *Proper Risk Allocation Protects Against "Once-in-a-Lifetime" Events*

Despite unprecedented measures, courts overwhelmingly follow precedents when interpreting contracts and force majeure clauses. Overall, the notion that parties need to expect unexpected and unforeseeable events when drafting contracts is reinforced. Well-versed lawyers must properly allocate for risks in their contracts, since a multitude of unforeseen events may arise. Given the fact that a pandemic may occur, parties may want to address specifically what will happen

213. Webb, Erin, *Analysis: No Longer Unforeseeable? Force Majeure and COVID-19*, Bloomberg (Nov. 1, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-no-longer-unforeseeable-force-majeure-and-covid-19.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

in their contracts in the event of another pandemic. Moreover, since European peace has recently been shattered, parties would do well to address what would happen in the event of a war. Perhaps, the force majeure provision ought to have language that is sufficiently broad to encompass various unforeseeable events. Due to the globalized nature of the world, one ought to realize that performance shocks might occur, even if contracts are performed locally.[221]

Force Majeure lists also have exclusions; thus parties may choose to exclude pandemics from the list of covered events. It is also unlikely that a second wave of COVID would fall under force majeure as that is likely now anticipated.[222] As a result, parties may want to revisit and re-draft their force majeure clauses.

B. *Smart Supply Chain Allocation With Risk Diversification Would Initially Prevent Contract Nonperformance*

Although supply chain allocation is not necessarily within the legal realm, efficient supply chain allocation would prevent numerous disputes from arising in the first place. Perhaps companies realized that diversifying their supply chain would help them in the long run. Sourcing domestically and moving operations in-house is a smart move for most companies. As noted above, by contractually addressing events that might cause supply chain shortages, parties can optimally allocate risk. By having options and not being too reliant on one supplier, parties can diversify their risk. Arguably, it would be more efficient for parties to have some predictability and control regarding how to allocate their risk rather than be at the mercy of the court's interpretation.

Companies should carefully consider the effects of the crisis on the supply chain and identify causes and solutions.[223] In particular, companies should consider performing a deep dive into their supply chain and note whether they can meet their contractual obligations. In some cases, they may need to go several levels down the supply chain to help their suppliers accordingly.[224]

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221. Macroeconomic events and shocks to the financial system have far-reaching effects that send shock waves throughout the system regardless of how insulated the parties may appear in the first place. As seen with the COVID-19 pandemic, an epidemic that initially started in Wuhan, China disrupted operations in almost every industry.

222. *COVID-19 and beyond: drafting for future pandemics and dealing with the fallout from this one*, Ashurt (Jun. 15, 2020), https://www.ashurst.com/en/news-and-insights/insights/covid-19-and-beyond-drafting-for-future-pandemics-and-dealing-with-the-fallout-from-this-one/.

223. *Managing Supply Chain Disruptions,* American Bar Association (Jan. 20, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/january-2022/managing-supply-chain-disruptions-crisis/.

224. See generally (Managing Supply Chain Disruptions).

Stakeholders also ought to evaluate whether force majeure is triggered if their contract allows for such a clause. Also, if companies are on the receiving end of a force majeure clause they should not necessarily accept it at face value but see how it fits in with the contract and the circumstances surrounding the claim.[225]

V. Impact on Drafting and the Legal Profession

It is interesting to note that per some practitioners' accounts, many parties chose to settle their force majeure disputes through settlements rather than in court.[226] Particularly, hotels that were affected to a great degree by the pandemic were weary of litigation due to its reputational harm.[227] Perhaps another paper could explore whether government intervention through the CARES Act (Coronavirus Aid Relief and Economic Security Act) has prevented potential litigation from manifesting. In a world where litigation was viewed in less of a negative light, and with fewer government loans available, more litigation would be present on the force majeure clause.

Sadly, many parties likely found themselves unable to access justice during the time of COVID.[228] Although this might not be as important for more resourceful parties, presumably parties might have been more eager to work out disputes against them, anticipating that the court docket might be clogged up. Studies found that cases were more likely to be dragged across a longer time ever since the pandemic started.[229] However, the number of cases filed seems to at least initially, have gone down.[230]

Overall COVID did not seem to have a major impact on how courts interpreted the force majeure clause. Such findings suggest that if another disruptive event were to happen courts would still behave predictably when interpreting contracts. Many parties found themselves

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225. *Id.*

226. Toutant Charles, *Settlements Abound as Few Look to 'Test the Waters' on Force Majeure Litigation* (Jun. 18, 2021), https://www.globest.com/2021/06/18/settlements-abound-as-few-look-to-test-the-waters-on-force-majeure-litigation-296-228329/ (Although this article makes this assertion, it is mostly speculative at this point. A quantitative analysis of 2020-2021 litigation compared with previous years litigation would show how litigation rates compared during COVID and if parties exhibited greater tendency to settle).

227. *Id,* at 4.

228. Access to Justice in the Age of COVID-19: A roundtable report., https://www.justice.gov/media/1173811/dl?inline=#:~:text=the%20coronavirus%20disease%202019%20(COVID,access%20or%20other%20safe%20alternatives, Last Accessed: January 5, 2023.

229. Gleaves, Jane *By the Numbers: The effect of COVID-19 on Litigation,* American Bar Association (May 20, 2021), https://www.americanbar.org/groups/litigation/committees/young-advocates/articles/2021/spring2021-by-the-numbers-the-effect-of-covid-19-on-litigation/.

230. *Id.*

at the mercy of force majeure boilerplate language to see who would be stuck with the risk in terms of non-performance. As one can see, with the world becoming increasingly globalized, one shock for one country can easily translate into a shock for all. Thus, parties ought to allocate these types of risks when contracting. They should also realize, that as seen with the COVID pandemic courts will still apply their regular interpretation of contracts and parties will not necessarily be excused from their performance. Certainly, it will be a matter of facts and circumstances.

VI. Conclusion: Where to Next?

Going forward the word "pandemic" might be encountered more often in force majeure clauses. After the September 11 terrorist attacks, the words "terrorist attack" became much more prevalent in force majeure clauses. As some time has passed, it will be interesting to see the percentage of parties that could not keep up with their contractual duties and whether it affected some parties more than others.

This paper proposes that courts have stuck to precedent and the four corners of the contract rule. Despite the word unprecedented being part of the popular lexicon, courts have not behaved in such a manner since the beginning of the pandemic. Across the various circuits, courts have carefully observed the language of the parties when looking at the contracts. As seen throughout the cases shown in this paper, and many others, force majeure clauses have been what courts interpreted in the wake of the pandemic. Consistent with the beginning hypothesis of this paper, courts have behaved predictably. As the legal institution is often known for venerating tradition, interpreting force majeure clauses in the wake of the pandemic were consistent with how courts previously behaved. The court's reasoning in these cases was sensible and predictable. By being predictable, courts have been able to allow parties to properly allocate risk in the event of the next unforeseen event. Overall, force majeure and contract drafting are imperative concerning how parties wish to allocate risk: the next worldwide catastrophe may be just around the corner.[231]

231. Some would even say that governments are "sleepwalking" into the next new pandemic. *Sleepwalking into the next pandemic.* Nat Med 28, 1325 (2022).