

Comment

CONTRACT FIXER UPPER: ADDRESSING THE INADEQUACY OF THE FORCE MAJEURE DOCTRINE IN PROVIDING RELIEF FOR NONPERFORMANCE IN THE WAKE OF THE COVID-19 PANDEMIC

AMY SPARROW PHELPS*

I. A NEW INFECTION CHANGES THE WORLD AND THREATENS CONTRACTS EVERYWHERE

In early January 2020, researchers in China announced a new discovery: a mysterious, pneumonialike illness presented through a coronavirus pathogen.¹ At the time, infectious disease experts were not sure how the novel coronavirus might spread or whether its impact would be different from that of other twenty-first century outbreaks.² However, the novel coronavirus, also called SARS-CoV-2 or COVID-19, quickly spread around the world.³ Within a month of the discovery, COVID-19 spread to every province in the People's Republic of China and to twenty other countries, prompting the World Health Organization (WHO) to declare the COVID-19 outbreak a "Public Health Emergency of International Concern."⁴ Just

* J.D. Candidate 2022, Villanova University Charles Widger School of Law; B.A. 2015, Harvard College. This Comment is dedicated to John and Emma Phelps, and to the Sparrow family. Thank you for your tremendous love and support, in law school and always. Thank you also to the staff of *Villanova Law Review* for their thoughtful edits and support in developing this Comment.

1. See Sui-Lee Wee & Donald G. McNeil Jr., *From Jan. 2020: China Identifies New Virus Causing Pneumonialike Illness*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/health/china-pneumonia-outbreak-virus.html> [https://perma.cc/5CPL-7J7P] (reporting news of novel coronavirus).

2. See *id.* (reporting medical analysis at time of initial coronavirus outbreak and comparing to SARS and MERS outbreaks).

3. See Kristian G. Andersen et al., *The Proximal Origin of SARS-CoV-2*, 26 NATURE MED. 450, 450 (2020) (noting "widespread" infection linked to virus strain in March 2020); see also Joshua Berlinger, *Coronavirus Has Now Spread to Every Continent Except Antarctica*, CNN (Feb. 26, 2020), <https://www.cnn.com/2020/02/25/asia/novel-coronavirus-covid-update-us-soldier-intl-hnk/index.html> [https://perma.cc/5FCF-36FW] (reporting COVID-19's spread to every continent except Antarctica).

4. *COVID 19 Public Health Emergency of International Concern (PHEIC)*, WORLD HEALTH ORG. (Feb. 12, 2020), [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum) [https://perma.cc/2QXN-VK75] (announcing the WHO's decision to declare a PHEIC on January 30, 2020 in response to the COVID-19 outbreak).

six weeks later, on March 11, 2020, the WHO declared a global pandemic.⁵

In response to the evolving health crisis, leaders around the world told their citizens to stay at home to prevent the spread of the virus.⁶ Day-to-day activities came to an abrupt stop.⁷ As businesses around the world halted production and distribution, parties to contracts in almost every industry saw their carefully negotiated agreements shattered.⁸ From collapsing economies to astounding death tolls, the dramatic and ongoing effects of COVID-19 are unprecedented.⁹ Indeed, no previously docu-

5. See *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> [https://perma.cc/JT5X-KJS2] (noting the WHO's assessment that COVID-19 should be characterized as a pandemic based on the "alarming levels of spread and severity" of the novel coronavirus).

6. See Neal R. Marder & Ali R. Rabbani, *Event Cancellations Spawn a New Wave of COVID-19 Consumer Class Actions*, 27 No. 05 WESTLAW J. CLASS ACTION 01 (2020) (referencing stay-at-home orders promulgated by state and local jurisdictions in response to surges of cases of COVID-19 in June 2020).

7. See, e.g., Michael Levenson, *Scale of China's Wuhan Shutdown Is Believed to Be Without Precedent*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/world/asia/coronavirus-quarantines-history.html> [https://perma.cc/D2N4-DR56] (detailing China's method of sequestering the population of Wuhan in a novel "shutdown"); Weizhen Tan & Riya Bhattacharjee, *California Governor Issues Statewide Order to 'Stay at Home' as Coronavirus Cases Soar*, CNBC (Mar. 19, 2020), <https://www.cnbc.com/2020/03/19/california-governor-issues-statewide-order-to-stay-at-home-effective-thursday-evening.html> [https://perma.cc/G8H6-2STB] (announcing California governor Gavin Newsom's March announcement to "stay at home" during the coronavirus outbreak); see also Rebecca Wright, *The World's Largest Coronavirus Lockdown Is Having a Dramatic Impact on Pollution in India*, CNN (Apr. 1, 2020), <https://www.cnn.com/2020/03/31/asia/coronavirus-lockdown-impact-pollution-india-intl-hnk/index.html> [https://perma.cc/9JRH-QMLS] (noting India's lockdown order caused all markets, places of worship, public transportation, and construction to cease operations).

8. See, e.g., Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48, 48 (2020) (noting that both the pandemic and accompanying government safety measures "ha[ve] prevented countless people, babysitters to basketball players, from fulfilling their contracts"); Lillianna Byington, *Coronavirus Is the Latest Challenge to Face Dairy Industry*, FOOD DIVE (Mar. 18, 2020), <https://www.fooddive.com/news/coronavirus-is-the-latest-challenge-to-face-dairy-industry/574344/> [https://perma.cc/CM23-TRN3] (summarizing halted distribution channels and supply chain disruptions for dairy producers); Leslie Josephs, *Coronavirus Brings Boeing's US Airplane Production to a Halt*, CNBC (Apr. 6, 2020), <https://www.cnbc.com/2020/04/06/boeing-to-suspend-787-production-in-south-carolina-until-further-notice-due-to-coronavirus.html> [https://perma.cc/UJ9X-ATYP] (reporting shuttering of Boeing's production facilities in South Carolina and Seattle in response to the governors' "stay-at-home" orders and coronavirus infections, respectively).

9. See, e.g., Calvin Woodward, *Huge Spending, Near Unprecedented Deaths: The Surreal Stats of the COVID Year*, CHI. TRIB. (Mar. 13, 2021), <https://www.chicagotribune.com/coronavirus/vaccine/ct-aud-nw-covid-19-one-year-stats-20210313-m45nv4lqprfbzmrp5uxdrwpq5y-story.html> [https://perma.cc/DYG6-AKJC] (reporting "numbers beyond ordinary comprehension" one year into the COVID-19 pandemic's presence in the United States). In December 2020, American virologist and then-director of the U.S. Centers for Disease and Prevention Dr.

mented viral outbreak has caused the same degree of economic devastation as COVID-19.¹⁰ However, the modern world has experienced pandemics before, including the 1918 flu pandemic, the global SARS outbreak in 2003, and the 2009 H1N1 pandemic.¹¹ These pandemics, as well as other global health crises, have already prompted careful contemplation and scholarship around how global businesses and contracts could be affected by a modern outbreak.¹² In fact, some scholars had even predicted how force majeure clauses could be invoked if a pandemic brought society to a halt long before COVID-19 was discovered.¹³

Throughout the COVID-19 global pandemic, businesses and consumers continuously faced unfulfilled contracts due to the virus.¹⁴ Some scholars and practitioners have suggested that adding specific language around a “pandemic” should become a part of the boilerplate force majeure clauses in contracts.¹⁵ However, organizations should not ex-

Robert Redfield contextualized COVID-19’s impact, noting it “is the leading cause of death,” and that the upcoming months would be “the most difficult time in the public health history of this nation.” *Id.*; see also Thomas Marcey, *Could COVID-19 Serve as the Grounds for a Force Majeure Defense to Contractual Noncompliance?*, 2020-5 CONSTRUCTION BRIEFINGS NL 1 (2020) (“The general issue of the legal effect on contract performance of extraordinary, unforeseen events has been explored . . . before, but never in the context of a catastrophic, worldwide illness such as covid-19.” (footnote omitted)).

10. See Chelsey Cox, *Fact Check: COVID-19 Is Deadlier than the 1918 Spanish Flu and Seasonal Influenza*, USA TODAY (Aug. 20, 2020), <https://www.usatoday.com/story/news/factcheck/2020/08/20/fact-check-covid-19-deadlier-than-1918-spanish-flu-seasonal-flu/3378208001/> [https://perma.cc/E6WA-NHPE] (explaining COVID-19’s infection mortality ratio, death toll, and rate of spread have lead some scientists to conclude COVID-19 is more deadly than the seasonal flu and the 1918 flu pandemic); Money Morning, *What Are the Economic Impacts of COVID-19?*, MARKETWATCH (Aug. 25, 2020), <https://www.marketwatch.com/story/what-are-the-economic-impacts-of-covid-19-2020-08-25> [https://perma.cc/2UTC-QMXX] (acknowledging that “global markets are seeing trillions of dollars disappear as the economic impact of coronavirus wreaks havoc on economies across the world”).

11. See generally 1918 Pandemic (H1N1 Virus), CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [https://perma.cc/55JE-N6RV] (last visited May 10, 2021) (detailing the 1918-19 influenza pandemic that circulated around the world); *Frequently Asked Questions About SARS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/sars/about/faq.html> [https://perma.cc/V3MS-CZFN] (last visited May 10, 2021) (describing magnitude of the 2003 “global SARS outbreak”); 2009 H1N1 Pandemic Timeline, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html> [https://perma.cc/6QP5-HT3Z] (last visited May 10, 2021) (reporting timeline of events related to the H1N1 pandemic in 2009).

12. For a further discussion of scholars’ predictions, see *infra* notes 123–29 and accompanying text.

13. *See id.*

14. See Schwartz, *supra* note 8, at 48 (listing examples of contracts that have been affected by COVID-19).

15. See, e.g., Andrew Satter, *Force Majeure Clauses Hard to Invoke, Even in Pandemic*, BLOOMBERG L. NEWS (May 4, 2020), <https://www.bloomberg.com/product/blaw/document/X2R6VIJS000000> [https://perma.cc/3Q4Q-GB77] (predicting that “pandemics” will be included in force majeure clauses in the fu-

pand force majeure clauses because existing doctrines do much of the work that could otherwise be achieved through a force majeure clause, and expanding force majeure clauses only causes courts to read clauses even more narrowly.¹⁶ In fact, most jurisdictions that have contemplated COVID-19 as a force majeure event have determined that it *is* a force majeure event; but that isn't enough to succeed in a force majeure claim.¹⁷ The force majeure event must otherwise fulfill the requirements of the force majeure clause and notification requirements required by contract.¹⁸ Instead of jumping to expanding the force majeure clause to include "pandemic" for the next earth-altering global crisis, organizations would be better off relying on a highly specific force majeure clause, or even none at all, to prepare for a future continuously plagued with global crises.¹⁹

This Comment argues that expanding force majeure clauses in response to a global crisis like COVID-19 is not an efficient application of the force majeure doctrine based on the legal outcomes for parties attempting to invoke force majeure for contract nonperformance during the pandemic.²⁰ This Comment does not take issue with the way courts have decided cases when parties attempt to invoke force majeure.²¹ Rather, it compels practitioners to recognize the pattern of not enforcing force majeure clauses and consider other ways to draft contracts that leave more options available for parties when the most unexpected things happen.²²

Part I explores the background of the force majeure doctrine, including the history and purpose of the force majeure clause and how it has

ture); *see also* Bodhisattwa Majumder & Devashish Giri, Article, *Coronavirus & Force Majeure: A Critical Study*, 51 J. MAR. L. & COM. 51, 62–63 (2020) (arguing that government-mandated closures after the pandemic outbreak elevate the COVID-19 virus to a force majeure event); Russell Lewis et al., *COVID-19: Force Majeure to the Rescue?*, 56 TENN. B.J. 20, 21 (2020) (emphasizing excusal of contract breaches due to the COVID-19 pandemic vary depending on court's interpretation of force majeure clause language and effect of COVID-19 on the parties).

16. Consider, for example, the paradoxical effect of including a catchall phrase in a force majeure clause. When a force majeure clause includes a catchall phrase, a court would likely to apply the doctrine of *eiusdem generis*. P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 234 (1995). For a discussion of this limiting effect on relief afforded by a force majeure clause, see *infra* notes 110–17 and accompanying text.

17. For a discussion of holdings in contract disputes from early days of the COVID-19 pandemic, see *infra* notes 130–48 and accompanying text.

18. For a discussion of the notice requirements and other necessary elements to successful invoke force majeure, see *infra* notes 44–57 and accompanying text.

19. For further development of this argument, see *infra* notes 155–58 and accompanying text (compelling practitioners to scrap the force majeure clause for most contracts).

20. *See infra* notes 149–94.

21. *Id.*

22. *See infra* notes 195–207.

been narrowly enforced. In addition, Part I examines three common law excuses for contract nonperformance that are available when parties do not include a force majeure clause: impossibility, frustration of purpose, and commercial practicality. Part II provides a narrative analysis of how legal communities around the country have decided force majeure cases in the wake of previous global crises and in ongoing contract disputes invoking force majeure clauses related to COVID-19. Part III provides a critical analysis of force majeure invocation in the aftermath of COVID-19 and other global crises and posits that force majeure clauses are frequently ineffective and inefficient contractual additions that should be drafted and invoked with great caution. Finally, Part IV offers a hypothesis of what to expect next for force majeure clauses, as well as a brief statement regarding the ongoing impact of force majeure litigation.

I. BUILDING THE FOUNDATION: HISTORY OF THE FORCE MAJEURE DOCTRINE

A force majeure claim is equivalent to an affirmative defense invoked when unforeseeable circumstances prevent one party from fulfilling its contractual duties.²³ There are typical elements of a force majeure clause, but clauses vary greatly in scope and specificity, and state laws and courts nationally and internationally differ somewhat in interpreting them.²⁴ In addition to force majeure, parties can invoke three common law doctrines as affirmative defenses for nonperformance.²⁵ Because contract liability is strict liability, these common law excuses, as well as a force majeure defense, are narrowly enforced by courts and should be successful only in extreme and unusual circumstances.²⁶

23. See Satter, *supra* note 15 (reporting that force majeure is “not easy to invoke”).

24. See THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:61 (3d ed. 2020) (introducing triggering event, necessary effect, effect on contractual obligation, and notice requirement as the four typical elements of a force majeure clause); see also Robert L. Gegios & Lance Duroni, *The Legal Domino Effect: COVID-19 & Contracts*, 93 WIS. LAW. 12, 13 (2020) (advising that businesses may need to consider the laws of other jurisdictions based on which law controls the contract because of differences in interpretation across states and countries).

25. For a discussion of the three common law doctrines that can be invoked as affirmative defenses in cases of nonperformance, see *infra* notes 65–104 and accompanying text (detailing the impossibility, impracticability, and frustration of purpose doctrines).

26. See 77A C.J.S. Sales § 370 (2019) (declaring that a force majeure clause “applies to objective events which directly affect the parties’ ability to perform[,]” and that “subjective impossibility of performing does not relieve a party from the contract unless the contract so states”).

A. *History of the Force Majeure Clause*

The concept of force majeure has a longstanding history, dating back to at least Roman times.²⁷ It was adopted into French civil law during the Napoleonic years.²⁸ The English law concept of force majeure developed out of the common law doctrine of impossibility, and has evolved over time.²⁹ Today, the force majeure doctrine exists in civil law countries, like France, Greece, and Germany, as well as common law countries, like the United States and United Kingdom.³⁰ In the United States, some states have even passed legislation that applies force majeure to certain contracts.³¹

Ideally, a force majeure clause serves a different purpose in the contract than the common law excuses for nonperformance, but in practice it can “overlap” with all, some, or none of them.³² Force majeure clauses in contracts “supersede” common law excuses.³³ In other words, when parties choose to include a force majeure clause in their contract, courts will look to the force majeure clause before considering any of the common law excuses in cases of nonperformance.³⁴

B. *The Purpose of the Force Majeure Doctrine*

Force majeure clauses are intended to help parties avoid liability and potential costly litigation by spelling out explicit events in which performance would be excused.³⁵ By anticipating future events, parties should be

27. See SIMON HENTREI & XIMENA SOLEY, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 151–54 (2011) (noting the similarities between the Roman law concept *ad impossibilia nemo tenetur*, meaning “no one is expected to perform the impossible[,]” and the modern concept of force majeure); *see also* Myanna Dellingler, *Rethinking Force Majeure in Public International Law*, 37 PACE L. REV. 455, 458 (2017) (citing Federica I. Paddeu, *A Genealogy of Force Majeure in International Law*, 82 BRITISH Y.B. INT’L L. 381, 385 (2012)).

28. See J. Denison Smith, *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, 45 YALE L.J. 452, 452 (1936) (citing 24 C. DEMOLOMBE, COURS DE CODE NAPOLEON, no. 553 (1877)).

29. See Declercq, *supra* note 16, at 214 (defining force majeure “as a contractual synonym for the general common law doctrine of . . . impossibility”).

30. See Jocelyn L. Knoll & Shannon L. Bjorklund, *Force Majeure and Climate Change: What is the New Normal?*, 8 AM. C. CONSTR. L.J. 29, 31–33 (2014) (noting the robust history of the force majeure doctrine and its application across the globe).

31. See *id.* at 38–39 (explaining which states have identified force majeure events in their statutes).

32. See *id.* at 32–33 (noting the potential for a force majeure event to “overlap” with the common law doctrines of impossibility, frustration of purpose, or commercial impracticability—or none of them at all).

33. See Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 855 (N.D. Ill. 1990) (noting that force majeure clauses “supersede” the common law doctrine of impossibility).

34. See *id.*

35. See Declercq, *supra* note 16, at 213 (listing the purpose of the force majeure doctrine). Along with other “excuse” doctrines, force majeure clauses “play an important role in protecting contracting parties” by “excusing perform-

able to avoid litigating whether a specific event should suspend or excuse performance.³⁶ Ideally, force majeure clauses provide greater certainty and understanding between contracting parties.³⁷

Today, force majeure clauses are used in contracts all over the world to define circumstances that would excuse contractual obligations under a contract.³⁸ In fact, force majeure clauses have become so common in business contracts that the International Chamber of Commerce (ICC) developed a model force majeure clause in 1985.³⁹ However, force majeure clauses only provide an excuse for nonperformance of contractual obligations in extreme and unusual circumstances.⁴⁰

C. *Scaffolding: Elements of a Force Majeure Clause*

A well-drafted force majeure clause “detail[s] the triggering events and the necessary effects of these events on performance itself and on the broader contractual obligations of both parties, while also providing a procedure for notification of a force majeure event.”⁴¹ The four elements that should be included in a force majeure clause, and which must be demonstrated for a party to successfully invoke force majeure, are “(1) triggering events; (2) necessary effect of the triggering event on performance; (3) effect on contractual obligations; and (4) a notice require-

ance under a contract.” Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, 12 UNIFORM L. REV. 101, 101 (2007).

36. See VIRGINIA FORMS § 3.01 (2020) (summarizing the purpose of a force majeure clause and the ways the doctrine is meant to prevent additional litigation between parties).

37. See Declercq, *supra* note 16, at 213–14 (offering a list of questions that a force majeure clause should address). “What happens when the circumstances on which a contract was concluded change dramatically during the life-span of the contract? Who bears the risk of these changes? How can parties deal with such a situation in a contract?” *Id.*

38. See Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA L. REV. 551, 554 (2007).

39. See *General Considerations: Force Majeure Clauses in Commercial Contracts*, INT'L CHAMBER OF COM., <https://iccwbo.org/content/uploads/sites/3/2020/03/2020-force-majeure-commcontracts.pdf> [<https://perma.cc/ML4P-PKM6>] (last visited Aug. 14, 2020) (describing current ICC model force majeure clause); *Introductory Note and Commentary: ICC Force Majeure and Hardship Clauses 2020*, INT'L CHAMBER OF COM., <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-force-majeure-introductory-note.pdf> [<https://perma.cc/U6A9-ZY7Y>] (last visited May 19, 2021) (describing history of the model force majeure and hardship clauses from 1985 to 2020).

40. See 77A C.J.S. Sales § 370 (2019) (“A force majeure clause applies to objective events which directly affect the parties’ ability to perform; subjective impossibility of performing does not relieve a party from the contract unless the contract so states.”).

41. Selz et al., *supra* note 24, § 9.60 (listing four elements of a viable force majeure clause).

ment.”⁴² The “types of events that constitute *force majeure* depend on the specific language included in the clause itself.”⁴³ Historically, a force majeure event was synonymous with an extraordinary natural disaster, or an “act of God.”⁴⁴ But in modern use, the clause encompasses “acts of God” (such as volcanic eruptions, hurricanes and floods, and other natural disasters), as well as man-made and man-caused events (such as terrorist attacks, computer hacking, market shifts, and labor strikes).⁴⁵

Most force majeure clauses contain a list of specific events that would excuse a party’s nonperformance, along with a general “catchall provision.”⁴⁶ Events that are often listed as force majeure events include weather-related events, economic crises, governmental actions, breaks in supply sources, and strikes.⁴⁷ Usually, a generic or catchall phrase like “and other events beyond the reasonable control of the parties” will end the list of events in a force majeure clause.⁴⁸ A catchall provision in a force majeure clause is limited to things of the same kind and nature as the specific events listed in the clause.⁴⁹

42. *Id.* (recommending parts of a force majeure clause that should be included in a contract); *see also* Declercq, *supra* note 16, at 230 (detailing four steps of analyzing a force majeure clause).

43. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2020) (describing the importance of the exact language of the force majeure contract, and the contract in general).

44. *See* Sniffen, *supra* note 38, at 555 (“An act of God excuses events beyond the control of mere human agency and occurs when there is an intervention of an ‘extraordinary, violent, and destructive agent,’ . . .” (footnote omitted) (quoting *Louisville & N.R. Co. v. Finlay*, 185 So. 904, 905 (Ala. 1939))); *see also* Selz et al., *supra* note 24, § 9.60; *Act of God*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “act of God” as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado” and noting that “[t]he definition has been statutorily broadened to include all natural phenomena . . . which could not be prevented or avoided by the exercise of due care or foresight.”).

45. *See* Selz et al., *supra* note 24, § 9:60 (describing progression of courts’ construal of force majeure); *see also* Knoll & Bjorklund, *supra* note 30, at 33 (providing examples to illustrate the broad range of circumstances in which force majeure operates, including tort liability, noncompliance with applicable laws, and nonperformance of a contract); Sniffen, *supra* note 38, at 555 (noting that courts “have also recognized that force majeure is a more expansive concept” than an act of God).

46. *See* Declercq, *supra* note 16, at 232 (noting the commonality of a catchall provision). An example of a catchall provision would be “‘other similar causes beyond the control’ of the parties.” *Morgantown Crossing, L.P. v. Mfrs. & Traders Tr. Co.*, No. 03-CV-4707, 2004 U.S. Dist. LEXIS 22949, at *14 (E.D. Pa. Nov. 10, 2004) (emphasis omitted).

47. *See generally* Jay D. Kelley, *So What’s Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 106–11 (2007) (detailing myriad scenarios that could lead parties to invoke force majeure).

48. *Id.* at 98.

49. This approach reflects the doctrine of *eiusdem generis*. For a discussion on this doctrine and its effect on interpreting force majeure clauses, *see infra* notes 114–17 and accompanying text.

A force majeure clause should also detail the necessary “*effect* the triggering event must have on performance.”⁵⁰ Specifically, the force majeure clause should indicate whether the party could be excused only if performance became physically impossible, or if a party could be excused if performance were merely impractical.⁵¹ Nonperformance caused by economic hardship is not enough to fall within a force majeure provision.⁵² Even if a contract would involve greater expense than the parties anticipated at the time of drafting, increased expense alone is not a great enough effect to excuse performance.⁵³

Third, a force majeure clause should detail whether the contract will be fully terminated or merely suspended or modified in response to a triggering event.⁵⁴ The clearest force majeure clauses will indicate an appropriate window of time after an event during which a party could invoke force majeure, so when a party chooses to invoke the force majeure clause, they can more clearly demonstrate compliance with the actual terms of their contract.⁵⁵ Finally, a well-drafted force majeure clause typically has a notice requirement with which the parties must comply when invoking force majeure.⁵⁶ For example, the force majeure clause may require that the party provides notice of the force majeure event to a specific individual, within a specific amount of time after the event occurs.⁵⁷

50. Seltz et al., *supra* note 24, § 9:63 (emphasis added) (noting a “force majeure provision should specifically discuss what effect the triggering event must have on performance.”).

51. *See id.*

52. *See* Stand Energy Corp. v. Cinergy Servs., Inc., 760 N.E.2d 453, 458 (Ohio Ct. App. 2001) (affirming trial court’s holding that unseasonably hot temperatures and the subsequent record demand for power and high hourly prices for electric power did not excuse defendant’s inability to deliver power required under the contract’s force majeure clause).

53. *See* OWBR LLC v. Clear Channel Commc’ns, Inc., 266 F. Supp. 2d 1214, 1215, 1223–25 (D. Haw. 2003) (holding that parties were bound by their contract for a conference event in Hawaii in February 2002, even though terrorist attacks on 9/11 made travel less appealing and less lucrative).

54. *See* Selz et al., *supra* note 24, § 9:63 (listing provisions parties should include to address the necessary effect of a force majeure event in a force majeure clause).

55. *See, e.g.*, OWBR LLC, 266 F. Supp. 2d at 1224 (declaring that excusing performance under a force majeure “ad infinitum” after a terrorist attack would “render contracts meaningless in the present age” because terrorism could pose a threat “for the foreseeable future”); Warner Bros. Pictures, Inc. v. Bumgarner, 197 Cal. App. 2d 331, 342 (Cal. Ct. App. 1961) (highlighting the eight-week limit on suspension due to a force majeure event before the contract could be terminated).

56. *See* Sean M. McChristian, *Force Majeure: Hurricane Harvey Made Performance Impossible—Now What?*, 81 TEX. B.J. 236, 236 (2018) (noting the notice requirements are a “condition precedent” to invoking a force majeure clause).

57. *See id.*

D. *Process of Invoking Force Majeure and Using Unforeseeability as a Gap Filler*

A party can invoke a force majeure clause when an event stipulated in the contract does in fact occur, then in fact prevents performance.⁵⁸ A party that wishes to invoke the force majeure as a defense for nonperformance must be prepared to establish all four elements of the force majeure clause.⁵⁹ In addition to proving these four elements, a party that invokes force majeure must also prove they were not negligent and—often—that the force majeure event was not *foreseeable*.⁶⁰ This is particularly true when a party relies on a catchall provision, rather than a specifically enumerated event, to invoke force majeure.⁶¹ As the Texas Court of Appeals reasoned in *Sun Operating Limited Partnership v. Holt*,⁶² when an alleged force majeure event is *not* specifically listed and falls within the general terms of the catchall provision, it is unclear whether a party actually contemplated and voluntarily assumed the event as a risk.⁶³ Therefore, the *Sun Operating* court determined it is appropriate to use unforesightability to ‘fill the gaps’ in a contract that has a force majeure clause and when the alleged force majeure event is not specifically listed in the clause.⁶⁴

E. *If Not for Force Majeure: Three Common Law Excuses for Nonperformance*

In the absence of a force majeure clause in a contract, parties may invoke default defenses for nonperformance, including the common law excuses of physical impossibility, frustration of purpose, and commercial impracticability.⁶⁵ These excuses apply to contracts when a force majeure clause has been left out of the contract and, although they are more com-

58. See Sniffen, *supra* note 38, at 554.

59. See *id.* at 554, 557 (describing how party endeavoring to call upon force majeure provision has burden of proof of four elements).

60. See *OWBR LLC*, 266 F. Supp. 2d at 1222 (defining negligence standard that is applied to force majeure interpretation and noting that proving lack of foreseeability was not required for the specific force majeure clause at issue); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (defining foreseeable standard that is applied to force majeure interpretation).

61. See *Kelley*, *supra* note 47, at 104 (describing a court’s approach to interpreting a catchall phrase when the catchall definition and a “beyond all reasonable control” requirement followed a list of specified force majeure events).

62. 984 S.W.2d 277 (Tex. App. 1998).

63. See *id.* at 290 (holding force majeure clause could not be invoked when appellants could not prove that the force majeure event was the *sole* cause of nonperformance).

64. See *id.* at 288 (“[B]efore any event can be successfully invoked as force majeure by the . . . [p]arties, it must be outside their reasonable control.”).

65. See generally *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 909 P.2d 408 (Ariz. Ct. App. 1995) (demonstrating that other defenses, such as impossibility, impracticability, and frustration of purpose may be available when a contract is silent as to a force majeure clause); see also *Declercq*, *supra* note 16, at 215. Declercq notes that although these three doctrines have their own definitions and legal standards, all three fit into the overall category of “contractual frustration.” *Id.* at 216.

monly applied than the force majeure doctrine, they are narrowly applied to excuse nonperformance.⁶⁶ Unlike unforecastability, which primarily fills gaps *within* force majeure clauses, the common law doctrines of physical impossibility, frustration of purpose, and commercial impracticability serve to primarily fill gaps in contracts when the event clearly falls *outside* the scope of the force majeure clauses, or the contracts do not have a force majeure clause at all.⁶⁷

1. *Physical Impossibility*

Physical impossibility is a common law excuse with its roots in nineteenth-century English courts.⁶⁸ Since it was first applied in *Taylor v. Caldwell*,⁶⁹ the doctrine of impossibility relied on physical destruction to make performance impossible.⁷⁰ Parties relying on defense of impossibility to avoid liability for nonperformance must establish: “(1) the unexpected occurrence of intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) the occurrence made performance impracticable.”⁷¹

Common law courts have been slow to accept the doctrine of impossibility as an argument for excuse from a contractual obligation.⁷² Al-

66. See, e.g., TIMOTHY MURRAY, CORBIN ON CONTRACTS: FORCE MAJEURE AND IMPOSSIBILITY COVID-19 § 2.01 (2020) [hereinafter Murray, CORBIN ON CONTRACTS] (“Courts have been reluctant to excuse promisors from their contractual duties In general, the case law indicates the doctrines of impossibility, impracticability, or frustration of purpose only rarely succeed in excusing promisors’ duties.”).

67. See *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020) (“Force majeure clauses in contracts supersede the common law doctrine of impossibility.”). These doctrines are also called “extra-contractual” bases to excuse nonperformance because they are applied to contracts even when they are not expressed in the contract. Murray, CORBIN ON CONTRACTS, *supra* note 66, § 1.02 (2020); see also Andrew A. Schwartz, *A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. REV. 789, 794 (2010). “[A] primary function of contract law is to establish ‘default’ or background terms that apply in the absence of an express term on point But if the parties so desire . . . they may vary from (contract around) any given default term, and courts will give effect to their derogation.” *Id.*

68. See Declercq, *supra* note 16, at 216 (citing *Taylor v. Caldwell*, 3 B. & S. 826, 32 L.J. Q.B. 164 (1863) and its departure from absolute liability in contracts). In *Taylor v. Caldwell*, the court determined that the parties were excused from performance for an event contract when the event space, a music hall, was burned to the ground a week before performances were scheduled to begin. *See id.*

69. 3 B. & S. 826.

70. See Selz et al., *supra* note 24, § 9:60 n.5 (noting that there is no “‘clear precedent’ for the modern permutations of force majeure because most force majeure clauses are limited to events that would make it either ‘illegal’ or ‘impossible’” (citation omitted)); see also Kel Kim Corp. v. Cent. Mkts., 519 N.E.2d 295, 296 (N.Y. 1987) (describing the impossibility doctrine).

71. *Opera Co. of Bos., Inc. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987).

72. See Mark B. Baker, “*A Hard Rain’s A-Gonna Fall*”—Terrorism and Excused Contractual Performance in a Post September 11th World, 17 TRANSNAT’L L. 1, 14 (2004)

though the common law courts had treated parties arguing impossibility harshly, they had allowed for three exceptions to the ruling that impossibility will not excuse contractual obligations: (1) supervening illegality, (2) death or disability, and (3) destruction.⁷³ As with other defenses for non-performance, physical impossibility is given a narrow scope and rarely applied because it “undermines the very nature of a contract as a legally enforceable promise.”⁷⁴

One scholar contemplated the applicability of the impossibility doctrine as a defense for nonperformance of a contract for childcare:

[I]f a babysitter promised to look after your children once a week for \$50, she is bound to the contract regardless of car trouble, the kids misbehaving, or other hardships. If the going gets tough and the babysitter gives up, that is a breach of contract and she is legally liable to you. This is what makes her contract a contract, and not an idle promise to give it a try. But if the babysitter failed to show up because the COVID-19 pandemic made it physically dangerous for her to enter your house, the [i]mpossibility doctrine will come to her aid. Because the COVID-19 pandemic is . . . so radically different from the ordinary risks and challenges of babysitting, and because it makes her performance so much more difficult and dangerous than expected, the law will excuse her nonperformance pursuant to the doctrine of [i]mpossibility.⁷⁵

(explaining courts’ deference for the contract as complete and resistance to applying the doctrine of impossibility).

73. *See* *Abbot of Westminster v. Clerke*, 73 Eng. Rep. 59, 63 (K.B. 1536) (holding that a seller is excused from his contractual obligation to deliver wheat on a given day in another country if the delivery is made statutorily illegal before the delivery date). Centuries later, the Supreme Court of the United States held that if contractual performance is prohibited or made impossible by governmental authority, a party may be excused from the contract. *Louisville & Nat'l R.R. Co. v. Mottley*, 219 U.S. 467, 485–86 (1911) (holding that an agreement by the defendant to issue free railroad passes for life to the plaintiff was excused when a law that made it illegal took effect); *see also* *RESTATEMENT (SECOND) OF CONTRACTS* § 263 (Am. Law Inst. 1981) (“If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.”); *Baker*, *supra* note 72, at 15 (noting that death can be grounds for discharge from a contract, except when the breaching party could have delegating the contractual duty to another person).

74. Schwartz, *supra* note 8, at 49–50 (citing *Kel Kim Corp.*, 519 N.E.2d at 296). In *Kel Kim*, the court observed that impossibility is rarely used as a defense because of “judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.” *Id.*

75. Schwartz, *supra* note 8, at 52 (illustrating how impossibility doctrine could come into consideration for millions of families responding to the COVID-19 pandemic and related government shutdown orders).

Early COVID-19 litigation shows that courts are willing to apply the impossibility doctrine to excuse nonperformance.⁷⁶ In *In re Cinemax USA Real Estate Holdings, Inc.*⁷⁷, a Florida bankruptcy court determined that a movie theater operator was not obligated to pay rent to its landlord while government shutdown orders were in place due to the COVID-19 pandemic because it was “impossible for the movie theater to be opened.”⁷⁸

Cases like *Martorella v. Rapp*⁷⁹ have served as a warning to parties that make their contracts overly complicated such that they contract around the default excuse available through the impossibility doctrine.⁸⁰ In *Martorella*, Christopher Martorella purchased a property at a public auction.⁸¹ A closing date was set, and per the agreement, Martorella made an initial deposit on the property.⁸² The agreement provided that if he failed to fulfill his contractual obligations, he would lose the deposit as liquidated damages.⁸³ As the closing date neared, however, Martorella’s wife ended up admitted to the hospital, battling for her life against the COVID-19 virus.⁸⁴ He claimed that her illness, and the pandemic in general, made closing on the property on the scheduled date impossible.⁸⁵ The court rejected Martorella’s argument, though, because the agreement specified that Martorella expressly assumed the risk of financing the full purchase on the original closing date.⁸⁶ The court acknowledged that the result was “harsh,” but that the specific language of the contract itself left no option for the court to apply the impossibility doctrine to excuse performance.⁸⁷ Essentially, *Martorella* leaves contracting parties with a choice:

76. See, e.g., *In re Cinemax USA Real Estate Holdings, Inc.*, No. 20-14695-BKC-LMI, 2021 Bankr. LEXIS 200, at *1, 16 (Bankr. S.D. Fla. 2021) (holding a movie theater operator in the midst of bankruptcy is excused from paying rent for the time government shutdown orders prevented the operator from conducting business). Early litigation based on contract interruptions due to COVID-19 seems to indicate that courts will be most likely to consider the impossibility doctrine as an excuse for nonperformance. While very few briefs or cases filed before January 2021 contemplate the applicability of the frustration of purpose or impracticability doctrine, several courts have already analyzed COVID-19 government shutdown orders as impossibility defenses.

77. 2021 B.R. LEXIS 200.

78. *Id.* at *1 (Bankr. S.D. Fla. 2021) (emphasis added).

79. 28 LCR 306 (Mass. Land Ct. 2020).

80. *See id.* (holding that impossibility was not a defense available to a man who was unable to finance a purchase after his wife became critically ill with COVID-19 virus in Massachusetts in April 2020).

81. *Id.* at 307 (describing purchase arrangement between Martorella and Stuart Rapp).

82. *Id.* Martorella’s deposit was ten percent of the full purchase price. *Id.*

83. *Id.*

84. *Id.* at 307–08 (detailing Martorella’s wife’s illness timeline).

85. *Id.* at 306 (summarizing Martorella’s legal argument for applying the doctrine of impossibility).

86. *Id.* at 310 (acknowledging financing arrangements in the agreement as “undisputed”).

87. *Id.* at 311.

attempt to formulate a highly detailed force majeure clause that might include “pandemic” as an enumerated force majeure event and potentially exclude the availability of the impossibility doctrine, or formulate a much simpler force majeure clause that would not protect the parties in a pandemic but would leave the opportunity open for a court to apply the impossibility doctrine.⁸⁸

In other cases, like *Lantino v. Clay LLC*,⁸⁹ courts have denied considering the impossibility doctrine altogether, emphasizing that it should be narrowly applied.⁹⁰ In *Lantino*, the defendants tried to raise the impossibility doctrine to excuse defaulting on a settlement payment arranged in a previous dispute.⁹¹ In response to the plaintiffs’ motion for summary judgment, the defendants argued that the COVID-19 pandemic and the New York executive orders to shut down businesses in April 2020 made it economically impossible to keep up with settlement payments.⁹² The court rejected the defendants’ defense and granted summary judgment, explaining that “where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.”⁹³

2. *Frustration of Purpose*

“Frustration of purpose” evolved as a defense in order to excuse a party from performance under a contract when an intervening or supervening condition substantially frustrated the main purpose for the contract.⁹⁴ For the doctrine of frustration of purpose to apply, the parties, in making a contract, must have been operating under a basic assumption that the intervening or supervening event would not occur.⁹⁵ The frustra-

88. For further discussion of *Martorella*, see *supra* notes 79–87 and accompanying text.

89. No. 1:18-cv-12247 (SDA), 2020 U.S. Dist. LEXIS 81474 (S.D.N.Y. 2020).

90. *Id.* at *7 (analyzing New York’s impossibility standards).

91. *Id.* at *4–6 (summarizing previous dispute and settlement agreement).

92. *Id.* at *6 (reporting defendants’ argument for applying the impossibility doctrine to their case).

93. *Id.* at *7 (quoting *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968)).

94. See *Tri-Town Constr. Co., Inc. v. Commerce Park Assocs. 12, LLC*, 139 A.3d 467, 474 (R.I. 2016) (explaining that frustration of purpose doctrine excuses a party from performance “on the occurrence of an intervening or supervening condition that substantially frustrates the main purpose for which the parties entered into the contract in the first place”).

95. See *RESTATEMENT (SECOND) OF CONTRACTS* § 265 cmt. a (Am. Law Inst. 1981). The Restatement further notes, for the doctrine of frustration of purpose to apply, “the purpose that is frustrated must have been a principal purpose of that party in making the contract” and “[i]t is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.” *Id.*

tion of purpose defense has three elements: (1) “the event giving rise to claim must be totally unexpected and unforeseeable;” (2) “the risk of the event must not be provided for, either by the language of the charter party or by custom;” and (3) “the performance of the contract must be impossible or commercially impracticable.”⁹⁶ “Frustration may be complete or partial.”⁹⁷ But when only part of a performance is frustrated, it’s less likely that a court will excuse nonperformance.⁹⁸

As with other defenses for nonperformance, frustration of purpose is applied narrowly.⁹⁹ A Florida bankruptcy court considered COVID-19 as frustration of purpose along with the impossibility doctrine in *In re Cinemex USA Real Estate Holdings, Inc.*¹⁰⁰ Even though the court did find that the government shutdown provided the movie theater operator with an impossibility defense for nonpayment of the lease, the court declined to apply frustration of purpose for missed lease payments after the mandatory shutdown ceased because the movie theater opted to stay closed for economic reasons.¹⁰¹

3. *Impracticability*

The doctrine of commercial impracticability is the newest of the three common law excuses for contract nonperformance.¹⁰² A party can invoke

96. *Hilton Oil Transp. v. Oil Transp. Co.*, S.A., 659 So. 2d 1141, 1147 (Fla. Dist. Ct. App. 1995) (citation omitted) (presenting the three elements of the doctrine of frustration of purpose).

97. Murray, *CORBIN ON CONTRACTS*, *supra* note 66, § 5.06.

98. *See id.*

99. *See, e.g., IMAX Corp. v. Capital Ctr.*, 156 F. Supp. 3d 569, 576 (M.D. Pa. 2016) (“The doctrine of frustration of purpose is to be applied sparingly.”); *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (“The doctrine of frustration of purpose is ‘a narrow one which does not apply unless the frustration is substantial.’”); *see also Tri-Town Constr. Co., Inc.*, 139 A.3d at 475 (R.I. 2016) (reiterating that “frustration must be so severe that it is not fairly to be regarded as within the risks that [the parties] assumed under the contract”).

100. No. 20-14695-BKC-LMI, 2021 B.R. LEXIS 200, at *14 (Bankr. S.D. Fla. 2021) (distinguishing impossibility excuse for nonperformance from frustration of purpose excuse and applying them to the case).

101. *Id.* at *14–16.

There is no question that the COVID-19 pandemic was completely unforeseeable (although a slow down in audience attendance or a dearth of new releases is not), and certainly not the fault of either contract party. But, once the Lakeside Theater was allowed to reopen, it was possible for CB Theater to reopen; CB Theater chose not to do so for what appears . . . to be primarily economic concerns. Therefore CB Theater’s performance under the Lakeside Lease from June 5, 2020 on is not excused under the doctrine of frustration of purpose.

Id. at *14.

102. *See Declercq*, *supra* note 16, at 217 (citing *Mineral Park Land Co. v. Howard*, 156 P. 458 (Cal. 1916)). *Mineral Park* involved a construction contract dispute and was the first case to apply commercial impracticability as an excuse for nonperformance. *Mineral Park Land Co.*, 156 P. 458. In that case, the court held that “[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.” *Id.*

an impracticability defense if some event does happen and renders the performance impracticable.¹⁰³ Courts have held that a contract becomes impracticable when its performance becomes excessively and unreasonably difficult or expensive.¹⁰⁴

F. Standard Approach to Interpreting the Force Majeure Doctrine

When a contract dispute arises, a court will look to the terms of the contract first, and then consider common law defenses for nonperformance.¹⁰⁵ Thus, when a contract includes a force majeure clause, it is considered first.¹⁰⁶ Force majeure clauses vary from contract to contract, so courts *must* interpret them when parties dispute nonperformance.¹⁰⁷ Courts interpret force majeure clauses based on the specific language used in the contract.¹⁰⁸ The court's objective is to determine the intent of

at 460 (quoting 1 BEACH ON CONTRACTS § 216). The U.C.C. codified the common law doctrine of impracticability much later, in 1977. *See Declercq, supra* note 16, at 217 (noting three conditions that must be present to excuse a seller from performance under the U.C.C.). The three conditions are: (1) a contingency must occur; (2) performance must thereby be made "impracticable;" and (3) the nonoccurrence of a contingency must have been the "basic assumption" on which the contract was made. *Id.* at 218. A party asserting an impracticability defense has the burden of proof on all three of these requirements. *Id.*

103. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (Am. Law Inst. 1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.").

104. *See* CITI Grp./Equip. Fin., Inc. v. Taylor, 1991 U.S. Dist. LEXIS 18171, *9–10 (N.D. Cal. 1991) ("[T]he impracticability defense largely pertains to the performance of a physical act."); *see also* Publicker Indus. v. Union Carbide Corp., 1975 U.S. Dist. LEXIS 14305, *5 (E.D. Pa. 1975) (finding that a loss of \$5.8 million did not render contract impracticable or excuse performance under the force majeure clause because "[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance").

105. *See* Declercq, *supra* note 16, at 226 (describing courts' approach to interpreting contractual language when contracts include force majeure clauses).

106. *See* *In re Hitz Rest. Group*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020) ("Force majeure clauses in contracts supersede common law doctrine of impossibility.").

107. *See* Entzel v. Moritz Sport and Marine, 841 N.W.2d 774, 777 (N.D. 2014) (detailing the importance of the specific language of the contract to a court's interpretation of the contract).

108. *See id.* ("What types of events constitute force majeure depend on the specific language included in the clause itself. [N]ot every force majeure event need be beyond the parties' reasonable control to still qualify as an excuse." (citation omitted) (quoting 30 WILLISTON ON CONTRACTS, *supra* note 43, § 77.31)); *see also* Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998) ("[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure" with regard to that agreement and those parties, and reviewing courts are "not at liberty to rewrite the contract or interpret it in a manner which the parties never intended").

the parties at the time the contract was made, based on the language used in the contract.¹⁰⁹

Courts have historically interpreted force majeure clauses extremely narrowly; courts frequently reject claims of force majeure and rarely hold that a party should be excused from a contract on this basis.¹¹⁰ If the force majeure clause specifically includes the event that actually prevents performance, then performance will be excused.¹¹¹ When a clause lists specific events that would excuse nonperformance, then courts will excuse only the events that are specified.¹¹² If a clause is worded more broadly or includes a catchall phrase, courts will look to the rest of the contract to determine the scope of the force majeure clause, and will apply greater scrutiny to alleged force majeure events that are not specifically listed.¹¹³ Following the doctrine of *ejusdem generis*, “general words are not given an expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned in the non-exhaustive list.”¹¹⁴ The principle of *ejusdem generis* prevented a nonperformance defense in *Kyocera Corp. v. Hemlock Semiconductor, LLC*.¹¹⁵ Even though the contract in Ky-

109. See *Specialty Foods of Ind., Inc. v. City of South Bend*, 997 N.E.2d 23, 25 (Ind. Ct. App. 2013) (describing the goals of contract interpretation).

110. See *Kel Kim Corp. v. Cent. Mkts, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (holding that a lessee’s inability to procure and maintain liability coverage that was required under the lease would not be excused under the contractual force majeure clause because the clause did it was not specifically listed in the clause and did not fall within the clause’s catchall phrase).

111. See *id.* at 296 (noting the narrow defense provided by force majeure clauses).

112. See *Sniffen*, *supra* note 38, at 559 (citing *Kel Kim Corp.*, 519 N.E.2d at 296).

113. See *Kel Kim Corp.*, 519 N.E.2d at 297 (noting that the principle of interpretation applied to catchall phrases “is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned” (citing 18 WILLISTON, CONTRACTS, § 1968, at 209 (3d. ed. 1978))); see also Declercq, *supra* note 16, at 234 (describing the doctrine of *ejusdem generis* as a canon of interpretation of a catch-all provision, where general words are not given an expansive meaning). “If the drafter refrained from making a list and chose to use only general language to define the force majeure events, it is likely that courts will turn to the doctrine [of *ejusdem generis*].” *Id.*

114. Declercq, *supra* note 16, at 234 n.127 (describing the *ejusdem generis* doctrine as “a canon of construction which limits the application of general terms which follow specific ones to matters similar in kind or character to those specified”). Declercq notes that courts will usually narrowly interpret catch-all phrases using the principle of *ejusdem generis*, and commented on how the expectations for specificity in force majeure clauses is paradoxical: “If the function of a force majeure clause is to protect the parties against the unusual, how can courts then not excuse performance because an excusing event is not specifically delineated in the clause? This judicial approach . . . seems to run contrary to the purpose of force majeure clauses.” *Id.* at 234 (footnote omitted).

115. 886 N.W.2d 445, 452 (Mich. Ct. App. 2015) (“[W]e hold that the conduct alleged in this case did not constitute a force-majeure event under the parties’ contract, and that the trial court should have, had it considered the issue, granted summary disposition to defendant on that additional ground.”).

ocera contained a force majeure clause that included “acts of the government,” the court determined that no force majeure event had occurred when a “trade war” between the United States and China resulted in dramatic price fluctuation for solar panel parts.¹¹⁶ After considering the contract as a whole, the court concluded that that honoring the force majeure event would “nullify a central term” of the contract.¹¹⁷

Beyond the list of force majeure events, courts are also sensitive to other particularities in a force majeure clause that could prevent it from being fully successfully invoked. For example, in *Aquila, Inc. v. C.W. Mining*,¹¹⁸ the court held that because the mining company failed to give *written* notice as required by the contract, the force majeure event did not excuse the mining company’s performance.¹¹⁹

II. DETERIORATING STRUCTURES: FORCE MAJEURE CRUMBLES IN CASES AFTER MODERN GLOBAL CRISES

Recently, the legal world, with many spectators, has been busy analyzing whether COVID-19 is a force majeure event.¹²⁰ Even prior to COVID-19, contemporary global crises were sparking debate over what should be included in a force majeure clause and which types of crises should be considered force majeure events.¹²¹ Jurisprudence around force majeure invocation in response to each of these crises demonstrate how courts frequently rely on standards from the common law doctrines of impossibility, frustration of purpose, and impracticability to deal with the difficult disruptions to contractual performance when force majeure provisions do not exist.¹²²

116. *Id.* at 448–49 (quoting the terms of the contract).

117. *Id.* at 453 (quoting *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986)); *see also TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d 176, 185–86 (Tex. App. 2018) (holding general catchall phrase must be limited to the types of events specifically listed); *Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP “C”*, No. 2:16-cv-00345-SGC, 2017 U.S. Dist. LEXIS 115394 (N.D. Ala. 2017) (applying *ejusdem generis* to limit *force majeure* events to the kinds of matters specifically listed in the *force majeure* clause), *aff’d*, 2021 U.S. App. LEXIS 4841 (11th Cir. 2021).

118. 545 F.3d 1258 (10th Cir. 2008).

119. *Id.* at 1266.

120. *See generally* Satter, *supra* note 15 (noting surge in discussions among legal scholars and practitioners regarding force majeure).

121. *See, e.g.*, Patrick J. O’Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, 23 CONSTR. L. 5, 5–6 (2003) (contemplating whether global crisis like terrorist events or pandemics are force majeure events).

122. *See* Jeremiah A. Ho, *Why Flexibility Matters: Inequality and Contract Pluralism*, 18 U.C. DAVIS BUS. L.J. 35, 82 (2017) (citing Kelley, *supra* note 47, at 93) (describing the role that the common law defenses play as gap fillers for ambiguous force majeure clauses).

A. Pre-COVID-19: Crises and Pandemic Predictions

Scholars postulated that an imminent pandemic would wreak havoc on global business transactions more than a decade before anyone had even heard of COVID-19.¹²³ Plus, previous global crises like terrorist events, hurricanes, and other natural disasters quickly triggered litigation over force majeure coverage in the past decades.¹²⁴ Although scholars' precise predictions around the timing and cellular make-up of the eventual pandemic virus varied, scholars generally agreed that the business would be dramatically affected by a pandemic in the near future.¹²⁵

Unfortunately, despite the robust canon of pandemic predictions, the term "pandemic" is glaringly absent from pre-COVID-19 contracts.¹²⁶ Even the more general term "epidemic" is hardly included in force majeure clauses drafted before COVID-19.¹²⁷ Some scholars point to this, along with the utter lack of pre-2020 caselaw examining force majeure invocation in pandemics, as evidence to be skeptical that force majeure

123. See, e.g., Kristin Choo, *The Avian Flu Time Bomb*, 91 A.B.A. J. 36 (2005) (making the case for the legal community to think through the business implications of an inevitable pandemic related to the avian flu); Jodi Fedor, *Riots! Pandemics! Active Shooters! Thinking About the Unthinkable when Negotiating Real Estate Documents*, 33 No. 2 PRAC. REAL EST. L. 5 (2017) (encouraging landlords to thoughtfully consider how a potential pandemic would affect real estate documents); Joseph Nicosia III, *Avian Flu: The Consumer Costs of Preparing for Global Pandemic*, 18 LOY. CONSUMER L. REV. 479 (2006) (suggesting preemptive legislative efforts in the United States to help the country prepare for an inevitable pandemic in the 21st century); O'Connor, *supra* note 121 (predicting that an imminent global pandemic would bring about volatility and far-reaching economic devastation in a similar way to terrorist events on and after 9/11).

124. For example, a conference group attempted to invoke force majeure to excuse them from paying for a resort reservation in Maui more than five months after the 9/11 terrorist attacks. *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214, 1216–17 (D. Haw. 2003). The court held that the terrorist attacks could not be invoked as a force majeure event to excuse performance of a resort hotel reservations in Maui "when there was no specific terrorist threat to air travel to Maui or to Maui itself. . . ." *Id.* at 1224. In another case, a New Jersey warehouse company attempted to invoke force majeure after Hurricane Sandy obliterated the New Jersey coast. *TGI Office Automation v. Nat'l Elec. Transit Corp.*, No. 13-CV-3404 (ARR) (VMS), 2014 U.S. Dist. LEXIS 189880 (E.D.N.Y. 2014). The court held that Hurricane Sandy was undisputedly a force majeure event, but that force majeure could not be successfully invoked as a defense because the clause was general and therefore required a foreseeability test—which it failed. *Id.* at *22. In yet another case, the Minnesota district court dismissed a power plant owner's claim that the 2008 financial crisis was a force majeure event. *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, 103 F. Supp. 3d 1000, 1021 (D. Minn. 2015).

125. For examples of the pre-COVID-19 scholarship on pandemic predictions, see *supra* note 123 and accompanying text.

126. See Schwartz, *supra* note 8, at 56. In April 2020, Schwartz conducted a search of Westlaw's "All State & Federal" database which revealed that none of the cases in the database mentioned force majeure with the term "pandemic." *Id.*

127. See *id.* at 56–57 (noting that a search in Westlaw in April 2020 revealed only seventy-four cases out of more than 2,000 force majeure cases where the word "epidemic" appeared).

can be invoked at all to excuse nonperformance for contracts that were interrupted by the pandemic.¹²⁸ However, early COVID-19 litigation indicates an overwhelming willingness to classify COVID-19 as a force majeure event.¹²⁹

1. Early COVID-19 Cases

Early COVID-19 litigation has shown that getting courts to recognize COVID-19 as a force majeure *event* is the smallest hurdle; most parties have been able to get courts to classify interruptions due to the pandemic as force majeure events but are unable to successfully invoke force majeure as a defense because they have been unable to connect the “event” to actually causing nonperformance.¹³⁰ For example, in *Palm Spring Mile Associates v. Kirkland's Stores, Inc.*,¹³¹ a commercial real estate company sued Kirkland's Stores for breach of a commercial lease when the retail company failed to pay rent beginning in April 2020.¹³² Kirkland's then moved to dismiss, arguing that its obligation to pay rent was relieved by the force majeure provision in the lease, which was triggered by COVID-19-related government shutdowns and restrictions.¹³³ The court readily found that COVID-19 was a force majeure event, but it firmly rejected Kirkland's argument because the restrictions related to COVID-19 did not “directly affect Kirkland's ability to pay rent.”¹³⁴

128. See Lewis et al., *supra* note 15, at 21 (“Despite the history of the Spanish Flu, we could find no reported cases from any U.S. jurisdiction that addressed force majeure in the context of an epidemic, pandemic or disease outbreak in the human population.”); see also Gegios & Duroni, *supra* note 24, at 14 (“No cookie-cutter answer suffices as to whether the COVID-19 outbreak has created an event of force majeure. Obviously, if a force majeure clause lists ‘epidemic’ or ‘pandemic,’ coverage is far more likely than if the most relevant included language is ‘act of God’ or a general catch-all phrase.”).

129. For a discussion of several cases in which courts have determined that COVID-19 qualifies as a force majeure event, see *infra* notes 130–45 and accompanying text.

130. See, e.g., *Palm Springs Mile Assocs. v. Kirkland's Stores, Inc.*, No. 20-21724-Civ, 2020 U.S. Dist. LEXIS 163880 (S.D. Fla. 2020). For a further discussion of the court's reasoning in this case, see *infra* notes 131–34 and accompanying text.

131. 2020 U.S. Dist. LEXIS 163880.

132. *Id.* at *1 (describing contract nonperformance issue at the center of contract litigation).

133. The force majeure clause in the agreement between Palm Spring Mile Associates and Kirkland's read as follows:

Whenever a period of time is prescribed in this Lease for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of such party.

Id. at *4-5.

134. *Id.* at *5 (citing *ARHC NVWELFL01, LLC. v. Chatsworth At Wellington Green, LLC.*, No. 18-80712, 2019 U.S. Dist. LEXIS 19264, at *4 (S.D. Fla. 2019)).

Similarly, the federal district court in Hawaii found that COVID-19 is undeniably a force majeure event, but dismissed the case before the parties could even litigate whether the force majeure doctrine excused non-performance in *NetOne, Inc. v. Panache Destination Management*.¹³⁵ In that case, NetOne, a travel company, planned to sponsor an event for 500 people in Hawaii in late March 2020.¹³⁶ Panache agreed to provide services for the event, and NetOne made deposits of over \$150,000 to Panache in preparation for their services.¹³⁷ But after the deposits had been made and before the event, the CDC recommended events for fifty or more people be canceled or postponed and the Hawaii governor instructed everyone on the island to heed the public health guidance.¹³⁸ NetOne canceled the event, but Panache refused to return its deposit.¹³⁹ NetOne sued Panache, arguing that refusing to return the deposit violated the force majeure clause in their agreement.¹⁴⁰ Ultimately, the court dismissed the case because, even though COVID-19 may be a force majeure event, forcing Panache to return the deposit would make the court “effectively re-write the parties contracts to include language that could have been (but was not) used.”¹⁴¹

Furthermore, courts have explicitly recognized that force majeure clauses have eliminated the option of relying on extra-contractual, default common law excuses for nonperformance for parties in the wake of COVID-19. In *In re CEC Entertainment, Inc.*,¹⁴² the company that operates a nationwide chain of Chuck E. Cheese venues tried to invoke force majeure and frustration of purpose to excuse lease payments in three different states when state-specific executive orders forced the operator to cease op-

135. No. 20-cv-00150-DKW-WRP, 2020 U.S. Dist. LEXIS 201129, at *1 (D. Haw. 2020) (introducing facts and outcome of the case).

136. *Id.* at *3–4.

137. *Id.* at *4–5.

138. *Id.* at *5.

139. *Id.* at *6–7.

140. The force majeure clause in the contract between NetOne and Panache said:

The pricing contained within this document and the performance of this agreement by either party is subject to acts of God, war, governmental regulation, disaster, or other casualty, strikes or threat of strikes (exception: neither party may terminate this agreement for strikes or labor disputes involving their own employees or agents)[,] acts and/or threats of terrorism, or curtailment of transportation services or similar cause beyond the control of either party making it illegal, impossible, or commercially impracticable to hold the meeting/convention/function or provide the facility. Either party may terminate or suspend its obligations under this agreement by written notice to the other party if such obligations are delayed or prevented by any of the above events to the extent such events are beyond the reasonable control of the party whose reasonable performance is prevented or frustrated.

Id. at *6–7.

141. *Id.* at *9.

142. 625 B.R. 344 (Bankr. S.D. Tex. 2020).

erations for months.¹⁴³ After the court determined that the force majeure clause did not excuse nonperformance of the lease agreement, the company operator argued that “because the leases do not specifically contemplate a pandemic [in the force majeure clauses], the force majeure clauses do not supersede frustration [of purpose]” as an excuse for nonperformance in the lease payments.¹⁴⁴ In all leases across all three states, the court found that the force majeure clause supersedes the frustration of purpose doctrine and prevented the operator from invoking frustration of purpose as a defense for nonperformance.¹⁴⁵

One exception to these cases, where force majeure was successfully invoked to excuse performance, is *In re Hitz Restaurant Group*.¹⁴⁶ In that case, a restaurant argued that its obligation to pay rent was relieved by the force majeure clause in its lease because of the Illinois state restrictions in place during COVID-19.¹⁴⁷ The court agreed, holding that the Illinois stay-at-home order that prevented the restaurant from providing on-premises dining was a force majeure event that partially relieved the restaurant from paying rent.¹⁴⁸

143. *Id.* at *351 (summarizing Chuck E. Cheese operator’s argument).

144. *Id.* at *358. Further, the operator argued that “a doctrine whose application is predicated on the occurrence of *unforeseen* events can only be abrogated if the parties foresee and contract around the specific event.” *Id.* The *In re CEC Entm’t, Inc.* court rejected this argument, stating plainly that this reasoning “is impossible.” *Id.*

145. Because of a choice of law provision in the leases, all three leases were considered by the Texas bankruptcy court. *Id.* at *358–62. When the Texas bankruptcy court examined each lease and took into account the state laws controlling each lease, the court arrived at the conclusion that the force majeure clause prevented the operator from having the frustration of purpose excuse available in all three leases. *Id.* The court recognized that the force majeure clause in the North Carolina lease specifically “contemplates unusual government regulations and how they may alter the parties’ performance obligations[,]” and that the “parties specifically agreed that unusual government regulations shall not relieve CEC’s obligation to pay rent.” *Id.* at *359–60. Further, the North Carolina lease’s force majeure clause “precludes CEC’s reliance on frustration” as a defense for nonperformance. *Id.* at *360. Similarly, the court found that the force majeure clause could not be invoked to excuse nonpayment of the lease in Washington state. *Id.* at *361. Further, as in North Carolina, CEC could not invoke frustration as a defense for nonperformance in Washington because “payment of rent is excepted from the force majeure clauses, which demonstrates that the parties assigned the risk of paying rent during a force majeure event to CEC. Washington does not allow a party to assert frustration when the lease allocates the risk of frustration.” *Id.* (citing *Scott v. Petett*, 816 P.2d 1229, 1229 (Wash. App. 1991)). Finally, regarding the leases in California, the court wrote, “[t]he Cupertino and National City leases supersede frustration of purpose under California law. Both of those leases excuse most nonperformance caused by government regulations, but expressly require rent payments notwithstanding frustrating regulations [t]he force majeure clause of the Cupertino lease supersedes frustration[.]” *Id.* at 362.

146. 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020).

147. *Id.* at 376–77.

148. *Id.* at 377 (“The force majeure clause in this lease was unambiguously triggered by . . . [Illinois] Governor Pritzker’s executive order” that suspended restaurant service for two weeks in March 2020). The court cited three reasons

III. DEMOLITION TIME: FORCE MAJEURE USELESS IN A CRISIS

The force majeure doctrine has, in many ways, outgrown itself.¹⁴⁹ As organizations and their legal counsel rush to address any number of global crises in their contacts through expanded force majeure provisions, they move further away from limiting uncertainty—the very thing the force majeure doctrine was designed to achieve.¹⁵⁰ Instead of creating greater efficiency and certainty, bumbling force majeure clauses *create uncertainty*, leading to more up-front negotiation *post hoc* litigation.¹⁵¹

A. *Practical Business Inefficiencies and Redundancy with Common Law Defenses for Nonperformance*

Updating a force majeure clause in response to COVID-19 could cause unnecessary business expenses and holdups with no promise of any actual relief or benefit.¹⁵² Practitioners should hesitate before blindly updating force majeure clauses after global crises because of practical business considerations and redundancy with common law excuses that would otherwise be available.¹⁵³ In most cases, the common law excuses provide more relief than force majeure clauses in the wake of a global crisis like the COVID-19 pandemic.¹⁵⁴

1. *Boilerplate Force Majeure Clauses are Not Helpful*

When organizations rush to update force majeure clauses in the aftermath of a global crisis, they risk accumulating hefty legal fees and precious negotiation time for little eventual pay off.¹⁵⁵ Businesses that seek to add “pandemic” to force majeure provisions may encounter challenges or holdups with contract negotiation that would otherwise proceed smoothly.¹⁵⁶ Furthermore, invoking a force majeure clause could spoil a

why the governor’s executive order is a force majeure event covered by the parties’ force majeure clause. *Id.* at 377–78.

149. For a discussion of the ways force majeure has become unwieldy and often ineffective, see *infra* note 188 and accompanying text.

150. *See id.*

151. For a discussion of the ways force majeure can lead to more litigation, see *infra* notes 162–66 and accompanying text.

152. *See* Schwartz, *supra* note 8, at 59–60 (differentiating the “legal perspective” from the “business perspective” in support of foregoing unnecessary contract negotiations); *see also* Gegios & Duroni, *supra* note 24, at 14–15.

153. For a discussion of the ways force majeure can be redundant of the default common law defenses, see *infra* notes 170–94 and accompanying text.

154. *See, e.g.*, *In re CEC Entm’t, Inc.*, 625 B.R. 344 (Bankr. S.D. Tex. 2020). For further discussion of the Texas bankruptcy court’s analysis of the leases and the protections relinquished by the Chuck E. Cheese operator when the leases included force majeure clauses, see *supra* notes 142–45 and accompanying text.

155. *See* Gegios & Duroni, *supra* note 24, at 14–15 (summarizing the negative effects a business could risk by invoking force majeure).

156. *See id.*; *see also* Eric L. Talley, *On Uncertainty, Ambiguity, and Contractual Conditions*, 34 DEL. J. CORP. L. 755, 760 (2009) (“[A]n optimal contractual allocation of uncertainty does not always track the optimal allocation of risk.”).

business relationship for little economic benefit.¹⁵⁷ Even though invoking force majeure to get out of some contractual obligations might bring short-term relief, the potential harm to future business could cause great long-term losses.¹⁵⁸

For a force majeure clause to be useful, it must be specifically and carefully tailored.¹⁵⁹ But all too often, force majeure clauses are an afterthought for parties that may be too busy to draft tailored clauses, too unrealistic to foresee potentially problematic events, or too unsophisticated or inexperienced to adjust boilerplate clauses to their actual needs.¹⁶⁰ A sloppy or hasty force majeure clause can pose huge risks to the parties of a contract.¹⁶¹

Furthermore, there is an underlying assumption that adding specific events to a force majeure clause will lead to more certain, efficient determinations regarding whether performance is actually excused should that event arise.¹⁶² The recent, highly public contract debates between the NBA and players in its league, however, demonstrate just how little it really matters that an event is specified in the force majeure clause.¹⁶³ Unlike

157. See Gegios & Duroni, *supra* note 24, at 14–15.

158. *See id.* (noting that potential harm to a future business, including potential loss of a customer or supplier, may greatly exceed the relief that organizations could experience when they invoke force majeure for minor contract issues).

159. See Peter Crofton & Erin Peterson, *The Evolution of Force Majeure in Construction Contracts*, LAW360 (June 22, 2015), <https://plus.lexis.com/api/permalink/cd1ff2e5-d844-41a9-b634-1a6360db6e23/?context=153067> [https://perma.cc/F8NM-ZERY] (highlighting the importance of careful drafting in order to make use of force majeure as the “concise legal doctrine about what types of events excuse performance” as it is intended (citing William Cary Wright, *Force Majeure Clauses and the Insurability of Force Majeure Risks*, 23 CONST. LAW 16 (2003))); *see also* Kelley, *supra* note 47, at 98 (emphasizing the importance of the amount of detail included in the specific events constituting force majeure).

160. See Myanna Dellinger, *An “Act of God”? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 HASTINGS L.J. 1551, 1563 (2017) (noting variety of reasons parties would not make force majeure clauses sufficiently tailored); Gary D. Way, *Sudden Death: League Labor Disputes, Sports Licensing and Force Majeure Neglect*, 7 MARQ. SPORTS L.J. 427, 427 (1997) (arguing force majeure protection is badly neglected and is frequently “thrown-in” after a “12th-hour request” without much care or forethought); Timothy Murray, *Botched Force Majeure Clauses Expose Your Client to Needless Risk*, 2018 CONT. L. EMERGING ISSUES, <https://plus.lexis.com/api/permalink/3299585d-52d2-43e2-82a6-ed98b22876df/?context=1530671> (2018) [hereinafter Murray, *Botched Force Majeure Clauses*] (acknowledging many attorneys tack generic force majeure clauses onto contracts without any customization “[a]s if on autopilot”).

161. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (“Force majeure clauses are among the most misused provisions in the contract drafting milieu, and a botched force majeure clause can expose clients to enormous risk.”).

162. Indeed, this is the historical goal of the force majeure doctrine. For a discussion of the origins and evolution of the force majeure doctrine, see *supra* notes 35–40 and accompanying text.

163. See Bryan Torporek, *What If The 2019–20 NBA Season Is Over? Explaining The ‘Force Majeure’ Clause*, FORBES (Mar. 13, 2020), <https://www.forbes.com/sites/bryantoporek/2020/03/13/what-if-the-2019-20-nba-season-is-over-explaining-the->

most pre-COVID-19 contracts, the NBA's contracts with its players specifically listed "epidemic" as a force majeure event that would allow the league to trim players' pay for the season.¹⁶⁴ Even with the specificity in the clause, there was very little certainty around the appropriate course of action.¹⁶⁵ The league may have been better off without the force majeure clause to prevent the threat of triggering the provision.¹⁶⁶

Finally, invoking a force majeure event (even for parties with highly considered and specified contracts) could have potentially catastrophic business and legal ramifications for all parties.¹⁶⁷ For example, invoking force majeure may advance short-term business interests for a party that finds itself unable to perform the contract, but it may have negative long-term effects like a damaged reputation among industry peers and customers or lead to the termination of a critical contract.¹⁶⁸ Furthermore, invoking force majeure likely leads to at least some litigation, which inevitably costs valuable time and money from all parties.¹⁶⁹

2. *Force Majeure in Practice Is Redundant of Default Common Law Excuses for Nonperformance*

An overly broad force majeure clause can quickly become redundant of the defenses that, in the absence of a force majeure clause, would have been available to parties.¹⁷⁰ For example, the existing common law doctrine of impossibility applies to contracts that cannot be performed due to

force-majeure-clause/ [https://perma.cc/VQ6S-2A5A] (explaining the details of the contract between the NBA and its players).

164. See Jessica Laske, *COVID-19 and Contractual Ramifications: How Force Majeure Impacts Struggling Sporting Associations Like the NBA in Light of COVID-19 Mandated Closures and Postponements*, THE JEFFREY S. MOORAD CTR. FOR THE STUDY OF SPORTS LJ. BLOG, https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2020/Covid19andcontractualramifications.html [https://perma.cc/3ZGS-K6CJ] (last visited Sept. 30, 2020) (commenting on how force majeure impacted the NBA in light of COVID-19 closures and postponements).

165. See Torporek, *supra* note 163.

166. See *id.*

167. See, e.g., *Coronavirus (COVID-19) and Force Majeure Checklist*, LEXISNEXIS (Mar. 3, 2020), <https://plus.lexis.com/api/permalink/da4f9494-560d-45fa-a0bc-212c1e9e8753/?context=1530671> [https://perma.cc/3DAN-SWCX] (listing the potential negative business impacts of invoking force majeure).

168. See *id.* (describing the myriad ways a party could experience unintended and unwanted long-term consequences by invoking force majeure); *see also* Gegios & Duroni, *supra* note 24, at 14–15 (noting the potential for spoiled business relationships from invoking force majeure).

169. See *Coronavirus (COVID-19) and Force Majeure Checklist*, *supra* note 167 (introducing practical business considerations for companies weighing the option of invoking force majeure post-COVID-19).

170. See, e.g., Murray, *Botched Force Majeure Clauses*, *supra* note 160 (noting that parties often miss out on the benefit of gap-filler defenses by including force majeure clauses that cover the same ground).

COVID-19 and government responses to it.¹⁷¹ The doctrine of impracticability is likely to apply to COVID-19.¹⁷² To add “pandemic” to the language of a force majeure clause would be to eliminate its exclusivity in the contract itself.¹⁷³ If a force majeure clause does not add a remedy that otherwise would not exist, then it is inefficient and ineffective for parties to go through the potentially arduous process of updating the clause.¹⁷⁴

171. *See* Schwartz, *supra* note 8, at 51–52 (declaring that it is “clear” that the common law doctrine of impossibility applies “quite directly to contracts undermined by COVID-19”). Schwartz uses an example of a contract with a babysitter to exemplify how the doctrine of impossibility would apply:

[I]f the babysitter failed to show up because the COVID-19 pandemic made it physically dangerous . . . to enter your house, the Impossibility doctrine will come to her aid. Because the COVID-19 pandemic is an Act of God and so radically different from the ordinary risks and challenges of babysitting, and because it makes her performance so much more difficult and dangerous than expected, the law will excuse her nonperformance pursuant to the doctrine of Impossibility. The outcome is even clearer if the government has issued an order for the babysitter to remain home to avoid spreading the virus

Id. at 52 (footnote omitted); *see also* Stephen N. Hollman, *Commentary*, § 2615 *General Comment. Commercial Impracticability*, WEST’S CAL. CODE FORMS, (3rd ed. 2020) (declaring that terrorist attacks should not be added to force majeure clauses because they have “never been the subject of any judicial scrutiny”). Terrorist attacks are widely accepted as events that render contracts impossible. *Id.* If they could be used to invoke a force majeure clause that specifies impossibility, then they surely would also meet the requirements to invoke the impossibility doctrine. *Id.*

172. *See* Schwartz, *supra* note 8, at 53. In cases where performance is more burdensome to the point where a party would have to take on a much greater expense, the added expense could rise to a level where a court would view performance as “effectively impossible.” *Id.*

173. *See* Declercq, *supra* note 16, at 227–28 (noting the importance of exclusivity of the force majeure clause within the contract). A force majeure clause should be drafted and interpreted within the context of the whole contract. Declercq further provides:

Exclusivity is often discussed in relation to the legal doctrines that would have governed the contract if the force majeure clause were left out. A drafter of a force majeure clause should be aware of the issue of exclusivity because it is within the drafter’s power to determine whether the clause has a trumping effect or merely a supplementary effect on the legal doctrine This article posed the question whether the agreement of the parties to include a force majeure clause in their contract, in itself, indicates that greater liability or specific risk allocation was contemplated. It seems that such a presumption is not made and that exclusivity must be expressly agreed upon.

Id. (footnotes omitted). Declercq further offers a suggested question that organizations can use to test exclusivity of the force majeure clause in their drafted contracts: “Does a force majeure clause have an exclusive status in relation to the other provisions of the contract or is the force majeure clause shaped by those other contractual provisions?” *Id.* at 228.

174. *See id.* at 226 (noting instances where “the force majeure clause adds nothing to the contract”).

Even worse, the parties could forfeit the benefit of the gap-filler defenses by including a force majeure clause that covers the same ground.¹⁷⁵

A potential common law defense to raise in response to COVID-19 is the impossibility defense, which requires physical impossibility to excuse performance.¹⁷⁶ The litany of events listed in modern force majeure clauses like acts of God, terrorism, fire, accidents, and more all point to the sorts of events that would make performance physically impossible.¹⁷⁷ Even though the impossibility doctrine is narrowly applied, it *would* apply to events that render performance impossible, thus listing them in a force majeure clause is redundant.¹⁷⁸ This would have been the case in *Hitz*, where government shutdowns met the “illegality” exception for the impossibility doctrine.¹⁷⁹ When the government mandated that restaurant operations cease during COVID-19 shutdowns, it rendered the restaurateur’s performance *physically impossible*.¹⁸⁰ The result of the case may have been the same had the parties not had a force majeure clause and instead relied on the readily available doctrine of impossibility.¹⁸¹

Notably, the COVID-19 pandemic may not establish an impossibility defense for every type of business.¹⁸² Because of the narrow application of the impossibility doctrine, if a business is still permitted to operate and generate revenue, a court would be unlikely to grant an impossibility excuse for nonperformance.¹⁸³ However, for those businesses that have not

175. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (noting that the force majeure clause supersedes the impossibility doctrine, which is “an ‘off-the-rack’ provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision”). For a further discussion, see *infra* note 188 and accompanying text.

176. For a discussion of the impossibility doctrine and its applicability as a common law defense for contract non-performance, see *supra* notes 78–83 and accompanying text.

177. See Schwartz, *supra* note 67, at 810 (detailing events commonly listed in force majeure clauses that render performance physically impossible).

178. For an overview of the impossibility doctrine, see *supra* notes 68–74 and accompanying text.

179. See Perrie Weiner et al., *The Progression of COVID-19 Force Majeure Litigation*, LAW360 (Aug. 28, 2020), <https://www.law360.com/articles/1304931/the-progression-of-covid-19-force-majeure-litigation> [https://perma.cc/CHW8-99H8] (commenting on the government orders in Illinois that made operations impossible, not just unprofitable, in *Hitz*).

180. *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020) (holding Illinois governor’s executive order made performance impossible).

181. See *supra* note 173 and accompanying text.

182. See Weiner et al., *supra* note 179. For example, a business that is still permitted to operate and generate revenue may be heavily impacted by COVID-19 and struggling to pay rent, but unable to invoke COVID-19 as a force majeure event because pandemic-related restrictions did not make generating income to pay rent *impossible*. See *id.*

183. See *id.* (noting that the impact from the COVID-19 pandemic may be considered too “attenuated as simply a macroeconomic event that reduces [a] business’s profitability” and would not meet the court’s requirements to establish an impossibility defense for many businesses).

been directly impacted by government shutdown mandates, the impracticability doctrine provides an alternative common law excuse that would apply.¹⁸⁴

To invoke impracticability as a defense, a party must demonstrate that performance was made impracticable by an event that the parties assumed would not occur when the contract was made, and that it was not their fault.¹⁸⁵ The force majeure doctrine has evolved to address the same issues as the default impracticability doctrine.¹⁸⁶ Parties often characterize force majeure events as “unforeseen” contingencies, which precisely fit the requirements of invoking the impracticability doctrine and do not add anything to the contract through the force majeure clause.¹⁸⁷

Crucially, parties not only waste valuable resources in drafting and including force majeure clauses that are redundant of the already-available common law defenses of impossibility and impracticability.¹⁸⁸ They also risk giving up these common law protections by including a generic or improperly drafted force majeure clause.¹⁸⁹ In *Aquila, Inc. v. C.W. Mining*,¹⁹⁰ for example, the court held that the mining company could not invoke common law excuses for nonperformance because the parties’ contract contained a force majeure clause that expressly spelled out when supervening events would excuse performance.¹⁹¹ The force majeure clause at the heart of the *Aquila* case circumvented default, gap-filler contract doctrines like impossibility and impracticability.¹⁹² Thus, when the terms of force majeure were not satisfied, the court could not extend the common law doctrines that otherwise would have excused nonperform-

184. See RESTatement (SECOND) OF CONTRACTS § 261.

185. See *id.*

186. See Schwartz, *supra* note 67, at 801 (describing the evolution of the force majeure clause).

187. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (detailing the risks of including a hasty force majeure clause).

188. See *id.* (“[A]n improperly drafted, generic force majeure clause can leave the parties with fewer protections than they would have under the law without it.”); see also Declercq, *supra* note 16, at 225. The assumptions courts must make when force majeure clauses are litigating “devalue a force majeure clause to zero since the clause only gives you what would have applied anyway if there were no force majeure clause at all in a contract. In such a case, the force majeure adds nothing to the contract.” Declercq, *supra* note 16, at 225.

189. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (“If you’re going to have a force majeure clause, you need to do it right.”).

190. 545 F.3d 1258 (10th Cir. 2008).

191. *Id.* at 1264. The district court held that “CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract.” *Aquila, Inc. v. C. W. Mining*, 2007 U.S. Dist. LEXIS 80276, 16 (D. Utah Oct. 30, 2007).

192. See *Aquila, Inc.*, 545 F.3d at 1260, 1266 (holding the parties to the terms of the contract regarding notice, as opposed to the Missouri statute requirements, because contract terms were binding).

ance.¹⁹³ A force majeure clause can limit the applicability of default common law protections.¹⁹⁴

B. *Re-drafting Force Majeure Clauses in the Wake of COVID-19: Practical Advice*

For many businesses, it would be most beneficial to scrap the force majeure clause entirely.¹⁹⁵ The existing common law doctrines of impossibility and impracticability, although ubiquitously applied narrowly, do provide clear relief for most organizations facing disruptions after a global crisis.¹⁹⁶ Boilerplate force majeure clauses will not allocate risk with more certainty after a global crisis than the common law doctrines.¹⁹⁷ If businesses do maintain their force majeure clauses, they should keep these points of advice in mind:

1. *Make the force majeure clause succinct and specific.*

The most effective force majeure clauses (that parties are most likely to be able to successfully invoke) focus on the *effect* that force majeure events are likely to have on the performance of the contract.¹⁹⁸ Instead of listing as many events as they can fathom, drafters should keep the force majeure clause specific and succinct.¹⁹⁹ Furthermore, they should avoid catchall provisions, which can obscure their actual force majeure agree-

193. *Id.* (finding that the notice requirement spelled out in the force majeure clause was not met, and therefore that force majeure could not be invoked as an excuse for nonperformance).

194. *See supra* note 188.

195. For a discussion of the ways force majeure clauses can cause more trouble than good, see *supra* notes 155–69 and accompanying text.

196. *See, e.g., In re Cinemex USA Real Estate Holdings, Inc.*, No. 20-14695-BKC-LMI, 2021 B.R. LEXIS 200, at *1 (Bankr. S.D. Fla. 2021) (considering the impossibility and frustration of purpose doctrines to excuse a movie theater operator's missed lease payments). For a further discussion of the Florida bankruptcy court's consideration of these doctrines, see *supra* notes 77–78 and accompanying text.

197. *See* Dellinger, *supra* note 160, at 1619 (“The use of such phrases as ‘act of God’ or ‘force majeure’ in boilerplate or closely drafted agreements is not and should not be dispositive. The crux of the matter is whether the event causing the alleged impracticability should have been reasonably foreseen and, at bottom, whether the parties were reasonable in assuming that the event would not occur.”).

198. *See* Declercq, *supra* note 16, at 234–35.

199. *See id.* (suggesting that a contract drafter should not spend time thinking of every possible event that might occur to then list them in a contract). One scholar helpfully illustrated this point by using a hypothetical meteor or comet collision:

If you add “meteor collision with the earth,” but a comet, rather than a meteor, ends up hitting the earth, a court would likely hold that calamity not to be covered. If you exclude the Force Majeure clause entirely, the court would likely treat a comet collision the same as it would a meteor crash.

Schwartz, *supra* note 8, at 60.

ment.²⁰⁰ This prevents a court from interpreting the clause narrowly and ultimately serves to better protect the business transaction from unexpected challenges because it makes the force majeure apply to these surprises.²⁰¹

2. *Do not parrot the common law through the force majeure clause.*

In addition to potentially allowing for more force majeure coverage, less expansive force majeure clauses add the alternative benefit of preserving the option to apply the common law defenses in cases of contract non-performance.²⁰² Therefore, force majeure clauses should be used to create new defenses for nonperformance, not take the place of common law defenses that already exist for all parties.²⁰³ If it mirrors common law doctrines, then it was not necessary to go through the trouble of negotiating it as a force majeure event and could even make it more difficult for the parties to successfully invoke a common law defense like impossibility or impracticability.²⁰⁴ Importantly, a force majeure clause should not require that force majeure events are unforeseeable, impossible, or impracticable—standards which would effectively make a force majeure clause a clone of a common law defense.²⁰⁵

3. *Use AI-enabled technology to smartly and uniformly update force majeure clauses.*

Businesses that plan to continue using the force majeure doctrine should be able to readily adapt contracts in response to global crises.²⁰⁶

200. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (“Don’t hide what you want in the niceties of a generic listing of force majeure events—a court may not agree that the particular risk is encompassed by it.”).

201. See Schwartz, *supra* note 8, at 60 (identifying the insistence of adding terms like “pandemic” or “terrorism” to a force majeure clause as “fight[ing] the last war”). As Schwartz aptly notes:

There are countless other disasters that might come to pass in the future and make performance more difficult, from super-volcanoes to meteors colliding with the earth. If you try to list all of these in a Force Majeure clause, they will be interpreted narrowly, and you may well fail to include the one that eventuates.

Id. at 60 (footnote omitted).

202. See Murray, *Botched Force Majeure Clauses*, *supra* note 160.

203. For a discussion on how force majeure clauses are frequently redundant of the impossibility doctrine, see *supra* notes 179–87 and accompanying text.

204. See Murray, *Botched Force Majeure Clauses*, *supra* note 160 (detailing the risks of including a force majeure doctrine, which can eliminate the option of using the common law defenses that would otherwise be available to parties).

205. See *id.* (advising that force majeure clauses should never use the same language that the court would otherwise apply to determine whether a party could successfully invoke a common law defense for nonperformance).

206. See Tyler Marion et al., *Improving Contract Management Post-COVID-19: Beyond Force Majeure*, LEGALTECH NEWS (May 26, 2020), <https://www.law.com/legaltechnews/2020/05/26/improving-contract-management-post-covid-19-beyond-force-majeure/?slreturn=20210424000103> [https://perma.cc/V8SS-DFZ2]

AI-enabled technology can help ensure that all parties remain clear about all contract provisions if and when the contract changes after a crisis event, including resolution clauses and notice requirements.²⁰⁷

IV. REBUILDING CONTRACTS AFTER COVID-19

COVID-19 had an unprecedented reach into every aspect of life across the globe, including business transactions.²⁰⁸ As legal scholars and practitioners navigate contract disputes in the post-pandemic world, they agree that having a force majeure clause that specifically references “epidemics” or “pandemics” would be most helpful to a party seeking contract relief for nonperformance, but acknowledge that very few contracts contained pandemic-specific language before COVID-19 started to spread across the globe.²⁰⁹ There is ongoing litigation and discussion around how force majeure clauses may provide relief for organizations affected by COVID-19, whether they have included language related to the pandemic in their clauses or not.²¹⁰

The COVID-19 pandemic will likely shape our lives for decades to come.²¹¹ Many parties have started litigating contracts that were not performed in the early months of the pandemic, often looking for refunds or some sort of other remedy.²¹² In fact, almost every federal circuit is was

(recommending proper review and analysis of past contracts in light of future global crises that could impact contracts in manners similar to COVID-19).

207. *See id.* (promoting the use of AI-enabled technology which, along with a “proven process” and “the right expertise” will help organizations as they face any future crises).

208. *See* Gegios & Duroni, *supra* note 24, at 14 (noting the far reach of COVID-19’s impact).

209. *See* Adam Schramek, *Force Majeure in the Age of Coronavirus*, 83 TEX. B.J. 303, 303 (2020) (predicting that parties that already have “pandemics” or “epidemics” in their contracts will have the easiest path to obtaining contractual relief).

210. *See id.*

211. *See* Megan Scudellari, *How the Pandemic Might Play Out in 2021 and Beyond*, NATURE MAG. (Aug. 5, 2020), <https://www.nature.com/articles/d41586-020-02278-5#ref-CR1> [<https://perma.cc/B7WX-N5EW>] (reporting predictions from scientists and epidemiologists around the globe whose COVID-19 forecasting models, despite differences in precise timelines, show that “COVID-19 is here to stay”); *see also* *Coronavirus Will Change the World Permanently. Here’s How.*, POLITICO MAG. (Mar. 19, 2020), <https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579> [<https://perma.cc/DWB9-EHX3>] (detailing predictions of how COVID-19 would permanently reorder society in dramatic ways, including fundamental changes to the ways Americans approach religious worship, physicians provide care using telemedicine, and communities vote for elected officials).

212. *See, e.g.*, Leandra Bernstein, *College Tuition Lawsuits Target High Costs of Online Education During COVID-19*, WJLA (Sept. 1, 2020), <https://wjla.com/news/nation-world/college-tuition-lawsuits-target-high-costs-of-online-education-during-covid-19> [<https://perma.cc/JL9M-C95B>] (summarizing tuition and class scheduling changes at American universities, and how many student groups have initiated litigation to pursue tuition reimbursement); Jayme Butcher et al., *COVID-19 Litiga-*

reviewing a case litigating force majeure and contract law in the wake of COVID-19 before the end of 2020.²¹³ Businesses need to know how they should be adjusting contracts to prepare for a continuously unknown future as the world recovers from the catastrophic impact of the COVID-19 pandemic.²¹⁴

Despite the fact that COVID-19 is “unprecedented,” the reality is that a wide variety of global crises have shaken contracts around the world already in this century; they will continue to do so.²¹⁵ COVID-19 is just the latest global crisis to challenge contractual relationships.²¹⁶ Practitioners should be preparing for the future, not just responding to COVID-19, as they weigh their options in redrafting contracts for a crisis-filled world.²¹⁷ For many organizations, it is not efficient or helpful to add “pandemic” to an existing force majeure clause; instead, the additional negotiations would only cause short-term business delays and the broader clause would cause long-term challenges by eliminating the opportunity use common law defenses that would otherwise be available.²¹⁸ Force majeure clauses have become overly broad and narrowly applied to the point of providing no additional source of relief for contracting parties.²¹⁹ Practitioners

tion Report – August 2020 #2, JD SUPRA (Sept. 1, 2020), <https://www.jdsupra.com/legalnews/covid-19-litigation-report-august-2020-2-56298/> [https://perma.cc/2J3J-MZLG] (reporting emerging contract litigation tracked by Blank Rome LLP, including an event organizer who refused to refund tickets to a Florida-based event that was cancelled due to the COVID-19 pandemic, parents that filed suit against a travel insurer after their kids were not able to attend summer camp in New York, and Philadelphians who demanded a refund after the 2020 Broad Street Run was changed to a virtual event).

213. Bloomberg Law, *Civil Cases Including “COVID-19” and “Force Majeure”*, BLOOMBERG L. DOCKET SEARCH, <https://www.bloomberglaw.com/start> [https://perma.cc/MPD8-QLKE] (click “Docket Search” then search for the terms “COVID-19” and “force majeure” in United States courts) (last visited Sept. 21, 2020).

214. For an overview of practical considerations for businesses intent on keeping force majeure clauses in contracts, see *supra* notes 195–207 and accompanying text.

215. Previous global crises like terrorist attacks, natural disasters, and economic recessions prompted force majeure litigation, as well as scholarly predictions of how an inevitable pandemic could wreak havoc in contract courts. Unfortunately, such global crises will continue to undoubtedly plague the globe in unexpected and unwelcome ways. For a brief discussion of previous global crises, see *supra* notes 124–25 and accompanying text.

216. *Id.*; see also Schwartz, *supra* note 8, at 58 (“This will not be the last pandemic that renders performance more difficult than anticipated. Pandemics have happened in the past and will certainly return, just like hurricanes, earthquakes, floods, and war.”)

217. See Schwartz, *supra* note 8, 58–59 (writing on the importance of drafting for future pandemics and other crises).

218. For a discussion of the redundancy of the force majeure clause and common law defenses, see *supra* notes 170–94 and accompanying text.

219. See *supra* note 173 and accompanying text.

should resist the urge to pile on more and more potential force majeure events “just in case.”²²⁰

220. For a discussion of the dangers of making a list of force majeure events that is overly broad, see *supra* notes 198–201 and accompanying text.