

Use the Force? Understanding Force Majeure Clauses

J. Hunter Robinson[†]
J. Christopher Selman^{††}
Whitt Steineker^{†††}
Alexander G. Thrasher^{††††}

Introduction

It has been said that, sooner or later, everything old is new again.¹ In the wake of the novel coronavirus pandemic (COVID-19) sweeping the globe in 2020, a heretofore largely overlooked and even less understood nineteenth century legal term has come to the forefront of American jurisprudence: *force majeure*.

Force majeure has become a topic du jour in the COVID-19 world with individuals and companies around the world seeking to excuse non-

[†] B.S. (2011), Auburn University; J.D. (2014), Emory University School of Law. Hunter Robinson is an associate at Bradley Arant Boult Cummings LLP. Hunter is a member of the firm's litigation and banking and financial services practice groups and represents clients in commercial litigation matters across the country.

^{††} B.S. (2007), Auburn University; J.D. (2012), University of South Carolina School of Law. Chris Selman is a partner at Bradley Arant Boult Cummings LLP. Chris is a members of the firm's construction and government contracts practice group. He has extensive experience advising clients at every stage of a construction project, managing the resolution of construction disputes domestically and internationally, and drafting and negotiating contracts for a variety of contractor and owner clients.

^{†††} B.A. (2003), University of Alabama; J.D. (2008), Georgetown University Law Center. Whitt Steineker is a partner at Bradley Arant Boult Cummings LLP. Whitt is a member of the firm's litigation practice group, where he advises clients on a full range of services and routinely represents companies in complex commercial litigation.

^{††††} B.A. (2008), Washington University; J.D. (2018), Cumberland School of Law at Samford University. Alex Thrasher is an associate at Bradley Arant Boult Cummings LLP. Alex is a member of the firm's construction and government contracts practice group. He advises clients in construction and government contract-related disputes, and often drafts and negotiates contracts for new construction and development projects.

¹ This expression is often attributed to Stephen King, who used the phrase in his novel, *The Colorado Kid*. STEPHEN KING, *THE COLORADO KID* 9 (2005). The stand-alone phrase "everything old is new again" is the title of a song written by Peter Allen for the play, *All That Jazz*. PETER ALLEN, *Everything Old Is New Again*, in *ALL THAT JAZZ* (20th Century Fox 1979).

performance of contractual obligations on the basis that the pandemic and its impact constitutes a force majeure. But are those claims well-founded? The answer, to the frustration of practitioners and clients, as usual, depends on the facts of each case.

It is worth noting at the outset that the very notion of force majeure is at the same time both radical and entirely sensible, obvious even. It is radical in the sense that sophisticated parties to complex commercial contracts, where nearly every provision is negotiated in great detail and to great expense, would permit the possibility of the other party's excused non-performance based on an event both sides believe is unlikely to occur. Yet it is sensible because centuries of business dealings have taught that sometimes things happen beyond the parties' control, and what else are the parties supposed to do about it? This Article looks at that dichotomy and the tension force majeure creates when put into practice.

First, this Article begins with the history of the law of force majeure, dating back to its mid-sixteenth century European beginnings,² and then proceeds to discuss some of the underlying purposes and prevalence of force majeure clauses in various industries. Next, this Article surveys the application of force majeure throughout the course of American jurisprudence, with a focus on seminal cases and events in modern history. Viewing these cases through the lens of the COVID-19 crisis and other events that periodically, yet unexpectedly, occur, this Article details what courts may examine in force majeure litigation and canvasses the types of evidence claimants and defendants can marshal to argue their cases. Finally, this Article reviews considerations practitioners may contemplate when drafting future force majeure provisions.

I. History and Background of Force Majeure

This Article begins at the beginning. Historically, the term “force majeure” connoted events that rendered a party's performance impossible because of an unforeseeable event beyond the parties' control. Such

² Myanna Dellinger, *An “Act of God”? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 HASTINGS L.J. 1551, 1565 (2016) (“[T]he notion that ‘acts of God’ could provide a defense to liability first appeared in 1581 in the famous English ‘Shelley’s Case.’”).

events are often described as “acts of God.”³ Today, the term “force majeure” is also used in American law to refer to events beyond the parties’ control that frustrate the purpose of a contract or make performance impracticable for one or more parties.⁴ As world economies have evolved, so too has force majeure, and the “traditional doctrine of impossibility has developed towards impracticability.”⁵ Thus, though force majeure began as an implied doctrine to excuse non-performance that resulted from “an act of God, [or] natural disasters such as earthquakes and floods,” it has since come to “encompass many man-made and man-caused events such as strikes, market shifts, terrorist attack[s], computer hacking, and governmental acts,”⁶ among many others. In other words, “force majeure provides ‘a flexible concept that permits the parties to formulate an agreement to address their unique course of dealings and industry idiosyncrasies,’”⁷ allowing contractual force majeure clauses to have a much wider application than the doctrine would under its historical roots.⁸

A. What Is Force Majeure?

This raises two questions: What is force majeure, and how do courts apply force majeure principles to resolve disputes? As to the first question, although the term translates from French as “superior force,” there is no single definition of “force majeure” in American jurisprudence. Rather, the parties’ choice of contractual language defines the meaning and applicability of a force majeure provision to a particular dispute between them. Thus, exactly what constitutes force majeure in any given situation is largely a question of contract interpretation, and

³ *Id.*

⁴ 2 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 7:229 (2020) (“Project risks-Force Majeure risks”).

⁵ P.J.M. Declerq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 233 (1995).

⁶ 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:60 (3d ed. 2019) (“History of the force majeure clause”).

⁷ William Cary Wright, *Force Majeure Delays*, 26 CONSTR. LAW., Fall 2006, at 33 (quoting Richard J. Ruszat II, *Force Majeure*, 104:5 BUS. CREDIT, May 1, 2002, at 54).

⁸ *Id.*

the application of force majeure principles can vary from jurisdiction to jurisdiction and case to case.

A New York court, for instance, has explained that force majeure clauses are to be construed in accordance with their function, “which is to relieve a party of liability when the parties’ expectations are frustrated due to an event that is ‘an extreme and unforeseeable occurrence,’ that ‘was beyond [the party’s] control and without its fault or negligence.’”⁹ In general, New York courts interpret force majeure clauses narrowly and typically only excuse performance if the event that prevents it is specifically enumerated in the force majeure clause.¹⁰ If the parties’ agreement does not include a force majeure provision, then there is “no basis for a force majeure defense.”¹¹

The same court noted, however, that when a certain event is *not* expressly enumerated in the contract but the clause contains an

expansive catchall phrase in addition to specific events, “the precept of *ejusdem generis* as a construction guide is appropriate”—that is, “words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.”¹²

⁹ *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (N.Y. App. Div. 2007).

¹⁰ *E.g.*, *Kel Kim Corp. v. Cent. Mkts., Inc.* 516 N.Y.S.2d 806, 808-09 (N.Y. App. Div. 1987); *see also* *Mitsubishi Int’l Corp. v. Interstate Chem. Corp.*, No. 08 CIV.194 JSR, 2008 WL 2139137, at *3 (S.D.N.Y. May 20, 2008) (acknowledging the narrow interpretation of force majeure clauses in New York courts).

¹¹ 28A GLEN BANKS, NEW YORK PRACTICE SERIES—NEW YORK CONTRACT LAW § 20:13 (2d ed. 2020) (citing *Gen. Elec. Co. v. Metal Res. Grp. Ltd.*, 741 N.Y.S.2d 218, 220 (N.Y. App. Div. 2002)) (“The force majeure doctrine is no more helpful to defendant. The parties’ integrated agreement contained no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.”).

¹² *Team Mktg. USA Corp.*, 839 N.Y.S.2d at 246 (refusing to invoke a force majeure clause to excuse the party’s performance because “the parties were not frustrated due to unforeseeable circumstances beyond their control and of the type enumerated in the contract”) (quoting *Kel Kim Corp.*, 516 N.Y.S.2d at 809 (finding that the force majeure clause at issue contemplated irresistible forces which made consummation of any material obligation impossible and the “plaintiffs ha[d] not shown that they ha[d] been prevented from using the premises by reason of a frustrating circumstance not of their own making”)).

In other words, force majeure clauses that contain broader, generic language may expand the events and circumstances that excuse performance, even if the alleged force majeure event is not expressly listed within the provision, if the unenumerated events are of the same kind or class as those mentioned.

The party invoking the force majeure clause to excuse performance usually bears the burden to show the “event was beyond its control and without its fault or negligence.”¹³ Thus, a party relying on the application of more general catch-all force majeure language likely has a more difficult task of proving the applicability of the provision to excuse performance than the party would if the alleged force majeure event fell squarely within the parties’ identified list of force majeure events.¹⁴

Similarly, other courts have explained that force majeure is not always limited to some event equivalent to an act of God. Instead, “the test is whether under the particular circumstances there was such an insuperable interference occurring without the parties’ intervention as could not have been prevented by prudence, diligence and care.”¹⁵ In some cases, this

¹³ 30 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 77:31 (4th ed. 2020) (Force Majeure Clauses) (citing *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 452 (3d Cir. 1983)).

¹⁴ This is not always so, however, and it can be very difficult to capture all the conditions that might excuse performance. Moreover, parties’ attempts to define a force majeure event may miss the mark. In the example of “excessive rainfall,” the parties may define excessive rainfall to be a condition that results from some specified amount of rainfall during a certain period. It is possible that the stated minimum level of rainfall never occurs within the specified period, but instead, rainfall occurs incessantly at some lower level for a much longer period. In both cases, the negative effects of the excessive rainfall will be tangible at the project site, but arguably in the latter circumstance, whether performance should be excused may be contested. In such a case, the party seeking to have its performance excused may have to rely on more general catch-all language such as “or other adverse weather-related events” to argue that it should be excused from performance. This party may face challenge from the other party on the basis that excessive rainfall was specifically within the contemplation of the parties, that the events encountered do not come within the parties’ definition, and that performance should not be excused. *See* Appeal of Lane Constr. Corp., ENGBCA No. 5834, 94-1 B.C.A. (CCH) ¶ 26358 (Sept. 22, 1993) (“Appellant makes a somewhat unfocused claim for rain delays . . . for ‘an aggregate delay of four and one-half days, with a net delay of two days.’ This is clearly not allowable under the contract[] . . . which . . . require[s] weather delay to exceed a certain minimal level . . . before delay is excusable.”).

¹⁵ *Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App’x 519, 521 (9th Cir. 2004) (quoting *Pac. Vegetable Oil Corp. v. C.S.T., Ltd.*, 174 P.2d 441, 447 (Cal. 1946)).

also means that courts will look beyond the specific force majeure events identified and will read into the clause additional events that excuse performance.¹⁶ Many times, courts have concluded that an unspecified event will only excuse a party's obligation to perform if the "disabling event was unforeseeable at the time the parties made the contract," but, "when parties *specify* certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."¹⁷

B. The Purposes of Force Majeure Clauses

The primary purpose of a force majeure clause—like most contractual provisions—is to allocate risks between the parties. But in practice, that perceived benefit may prove illusory because there is often a converse relationship between the likelihood of a force majeure event occurring and the consequences of it.

Put another way, events commonly identified as force majeure events—for example, acts of God, epidemics, floods, fires, riots, terrorism—are, on the whole, unlikely to occur, at least with respect to any particular contract.¹⁸ But when force majeure events do occur, their consequences are often substantial in terms of the extent of damage incurred or the impact on the time of performance. Because of this disproportionality between the likelihood and impact of a force majeure event, it can be difficult for parties to agree to allocate the impact's expense to one party over the other. In construction contracts, for instance, a contractor impacted by a force majeure event is often provided

¹⁶ See *Burns Concrete, Inc. v. Teton Cnty.*, 384 P.3d 364, 367-68 (Idaho 2016) ("The wording of the force majeure clause does not limit the clause's application to the types of events mentioned. The clause states that it applies to 'delays resulting from weather, strikes, shortage of steel or manufacturing equipment or *any other act of force majeure or action beyond Developer's control.*' The wording 'or any other act of force majeure' could certainly be read as referring to some other act that was of the type previously mentioned. However, the clause then states, 'or action beyond Developer's control.' That shows that the 'action beyond Developer's control' was something other than the type of acts that were previously mentioned in the clause as being an act of force majeure.").

¹⁷ *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018).

¹⁸ See *supra* Section I.A.

additional time to complete a project but is not always entitled to additional money for the loss or damage incurred. Consequently, although force majeure provisions provide relief to the party whose performance is promised, the relief provided to the damaged party by the force majeure provision alone may not make it whole, and the parties may need to consider other contractual remedies.¹⁹

There is a second important purpose underlying force majeure clauses that is often overlooked—they serve to put a party without actual knowledge of an event on notice of the event’s occurrence and impact on contractual performance. Force majeure provisions commonly require the impacted party to give notice to the other party within a prescribed time after the alleged force majeure event has occurred and impacted performance. Such notice requirements help avoid prejudice that a party otherwise might incur. In some cases, failure to provide the requisite notice may be deemed failure of a condition precedent, but in others it may not.²⁰

Although a notice requirement may appear straightforward, disputes often arise regarding when a force majeure event began and when the notice provision was triggered. For example, in the event of a global pandemic, one party may argue that notice is required at the time the pandemic began, while the other contends that notice is not required until the pandemic impacts performance. In either event, where failure to provide timely notice is viewed as a condition precedent to the force majeure clause’s application, a party’s failure to provide requisite notice may prove fatal to its claims.²¹

¹⁹ For this reason, sophisticated parties may rely on other contractual provisions and risk allocation methods, such as insurance, to hedge against the potential impacts of a force majeure event.

²⁰ Compare *Vitol S.A., Inc. v. Koch Petroleum Grp., LP*, No. 01CV2184 (GBD), 2005 WL 2105592, at *11 (S.D.N.Y. Aug. 31, 2005) (holding that the defendant’s force majeure defense failed because it did not notify the plaintiff when the force majeure event occurred), with *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67-68 (S.D.N.Y. 1991) (holding that the force majeure clause’s notice requirement was a duty to perform, so the defendant’s force majeure defense was not conditioned upon notifying the plaintiff of the event within forty-eight hours).

²¹ See *Milford Power Co., LLC v. Alstom Power, Inc.*, No. X04CV000121672S, 2001 WL 822488, at *4 (Conn. Super. Ct. June 28, 2001) (“[T]he court finds that the seventy-two hour notice requirement was a condition precedent to the defendants’ right

C. Prevalence of Force Majeure Provisions in Modern Contracts

Force majeure clauses may be found in any contract, but there are certain industries in which they are more prevalent and more often contested. Most notably, construction contracts frequently contain force majeure provisions intended to address events—such as weather (tornadoes, hurricanes, floods, etc.), labor strikes, or trade tariffs—that may render performance impossible or impracticable. The need for such provisions is simple: construction contracts are often entered into with strict deadlines by which certain milestones on a project must be achieved because of constraints such as financing conditions, the need for facility operations, or perhaps even environmental or climatologic restrictions.

Similarly, as more developers have moved away from the traditional design-bid-build format for contracting, the importance of force majeure provisions has increased. For example, engineering, procurement, and construction agreements, which are routinely utilized for the development and construction of solar and hydroelectric power facilities, often contain robust force majeure provisions that may extend guaranteed substantial completion and commercial operation dates. Force majeure provisions are particularly important in these contracts because the developer of the project may lose the opportunity to supply power to a utility company for an established price if the developer does not meet the agreed-upon dates. Without a force majeure provision, the contractor may be liable to the developer for significant delay or consequential damages.

Force majeure is also an important concept in other commercial transactions. For example, commercial real estate leases often contemplate force majeure events, such as fire, and thereby excuse a lessee from further rent liability if a fire destroys the leased premises. In oil and gas leases, force majeure provisions commonly prevent termination of a lease for failure of a lessee to meet its production obligations because of a force majeure event.²² Similarly, in the sale of goods, force majeure may

of recovery under the ‘force majeure’ provisions of the contract. The defendants failed to submit the written notice within the requisite time period. Accordingly, the plaintiff’s motion for summary judgment . . . is granted.”).

²² Joan Teshima, *Gas and Oil Lease Force Majeure Provisions: Construction and Effect*, 46 A.L.R.4th 976 (1986); see, e.g., *Haverhill Glen, LLC v. Eric Petroleum*

excuse non-delivery by a seller. Specifically, Uniform Commercial Code § 2-615 provides that a seller may not be in breach of its contract when performance has been made “impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.”²³

The history, purpose, and prevalence of force majeure provisions in American law are easy to understand. As with most disputes in the law, however, the application of these tenets varies depending on the relevant facts at issue. An analysis of some modern cases is informative of how courts may evaluate the application of force majeure provisions when disputes arise.

II. Modern Case Law Applying Force Majeure Provisions

In general, certain types of events, like hurricanes and acts of government, routinely generate force majeure disputes. Similarly, certain seminal events with broad economic impact, like the September 11, 2001

Corp., 67 N.E.3d 845, 850 (Ohio Ct. App. 2016) (holding that the parties’ broad force majeure clause was triggered by an inability to access the land and did not terminate the lease); *N. Nat. Gas Co. v. Approximately 9117 Acres In Pratt, Kingman, & Reno Cntys.*, Kan., 114 F. Supp. 3d 1144, 1166 (D. Kan. 2015) (holding that the leases were not terminated when the failure to produce was due to the occurrence of a force majeure event); *Red River Res. Inc., v. Wickford, Inc.*, 443 B.R. 74, 80 (E.D. Tex. 2010) (holding that a force majeure event occurred, so the lease was not automatically terminated).

²³ U.C.C. § 2-615(a) (AM. LAW INST. & UNIF. LAW COMM’N 2019) (“Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.”).

attacks and the Great Recession,²⁴ have led to short-term spikes in such disputes. Cases within these categories illustrate some of the same key issues as force majeure litigation in other contexts: (1) whether the force majeure event caused the disruption in performance, (2) whether performance was sufficiently disrupted to trigger the force majeure provision, and (3) whether the party seeking to invoke the provision made a sufficient effort to mitigate the event's effect on the party's ability to perform.

A. Hurricanes

Natural disasters are the force majeure archetype. They are commonly listed as force majeure events and are considered "acts of God," a broad term that generally includes natural disasters.²⁵ Among natural disasters, hurricanes have been a frequent catalyst of force majeure litigation given their frequency and the breadth and extent of the destruction they cause.

Establishing that a hurricane was a force majeure event under a contract may be easy, but proving the hurricane was the cause of non-performance is more difficult. In *Gulf Oil Corp. v. F.E.R.C.*,²⁶ a gas supplier argued a hurricane excused its failure to deliver specified quantities of gas under a requirements contract.²⁷ The contract listed "storms" as a force majeure event,²⁸ and the court had little difficulty concluding a hurricane fit into that category.²⁹ But the court would not

²⁴ The Great Recession refers hereinafter to the financial crisis that spanned from December 2007 to June 2009. See Robert Rich, *The Great Recession: December 2007-June 2009*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709#:~:text=The%20Great%20Recession%20began%20in,recession%20since%20World%20War%20II.&text=The%20net%20worth%20of%20US,of%20%2455%20trillion%20in%202009.

²⁵ See 6 AM. JUR. 3D *Proof of Facts* 319 (1989) ("The geophysical phenomena most often held to be acts of God have been the phenomena commonly described as weather conditions. Under appropriate circumstances, lightning, hurricanes, tornadoes, storms, squalls of wind, freezing temperatures, and droughts have all been deemed to be acts of God.").

²⁶ 706 F.2d 444 (3d Cir. 1983).

²⁷ *Gulf Oil*, 706 F.2d at 447.

²⁸ *Id.* at 448 n.8.

²⁹ *Id.* at 453 ("[T]he occurrence of a hurricane is a force majeure event.").

infer that the hurricane had caused the equipment breakdowns that delayed the gas delivery.³⁰ On remand, the court explained it would be “incumbent on [the supplier] to establish that the pipe damage and mechanical breakdowns in issue would not have occurred if there had not been a hurricane” and “prov[e] that [its] inability to deliver was not caused by routine maintenance.”³¹

Even if a hurricane caused the disruption in performance, the party seeking to invoke force majeure still must prove the level of disruption rose above the requisite contractual threshold. In *Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, L.L.C.*,³² an investor sought to rescind its agreement to purchase an interest in an entity that was developing a luxury hotel in downtown New Orleans after Hurricane Katrina halted the hotel’s construction. The agreement did not contain a force majeure provision; rather, the investor relied on a Louisiana statute providing that a “contract can be dissolved if, ‘the entire performance owed by one party has become impossible because of’”³³ an event “that, at the time the contract was made, could not have been reasonably foreseen.”³⁴ Rejecting the investor’s argument, the court found that Katrina had not made it impossible for the investor to tender payment to the developer—it simply made tendering payment no longer profitable.³⁵ Since impossibility, rather than impracticability, was the relevant standard, the developer could not invoke force majeure to rescind the contract.³⁶

A gas supplier’s duty to mitigate the effects of two hurricanes on its contractual performance was the main issue in *Ergon-West Virginia, Inc.*

³⁰ *Id.* (“[T]he effect of the event on the delivery of gas . . . is not inferred from the event . . .”).

³¹ *Id.*

³² 962 So. 2d 1102, 1103-04 (La. App. 4th Cir. 2007).

³³ *Associated Acquisitions*, 962 So. 2d at 1107 (quoting LA. CIV. CODE ANN art. 1876 (1984)).

³⁴ LA. CIV. CODE ANN art. 1875 (1984).

³⁵ *Associated Acquisitions*, 962 So. 2d at 1107 (“The defendant can only claim *force majeure* as an excuse when encountered by an ‘insurmountable obstacle that make[s] the performance actually impossible.’” (alteration in original) (quoting SAUL LITVINOFF & RONALD J. SCALISE JR., 5 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS § 16.17 (2d ed.))).

³⁶ *Id.*

v. Dynegy Marketing & Trade.³⁷ Two gas refineries contracted with a clearinghouse for their entire natural gas supply.³⁸ After Hurricanes Katrina and Rita caused extensive damage to the natural gas infrastructure in the Gulf of Mexico, many of the clearinghouse's direct suppliers declared force majeure, and the clearinghouse followed suit by declaring force majeure in its contracts with the two refineries.³⁹ The refineries were forced to obtain gas on the open market and sued the clearinghouse to recover their costs.⁴⁰ The parties agreed the hurricanes were force majeure events that caused the clearinghouse's non-performance, but the refineries contended that the clearinghouse was required to "attempt to secure replacement gas" to fulfill its obligations to the refineries, which the clearinghouse admitted it did not do.⁴¹

The Fifth Circuit held the clearinghouse had no duty to obtain replacement gas under the force majeure provisions.⁴² The clearinghouse's contract with the first refinery required the clearinghouse to attempt to "remed[y] with all reasonable dispatch" a force majeure event, and its contract with the second refinery defined a force majeure event as one "which by the exercise of due diligence [the clearinghouse] is unable to prevent or overcome."⁴³ Citing the clearinghouse's un rebutted expert testimony that "it is practice in the natural gas industry for a seller to simply pass on force majeure if its upstream suppliers have declared force majeure," the Fifth Circuit found the clearinghouse "had no duty to attempt to provide replacement gas to" the refineries.⁴⁴ Thus, the clearinghouse's force majeure invocation was proper and absolved it of liability.⁴⁵

³⁷ 706 F.3d 419, 422 (5th Cir. 2013).

³⁸ *Ergon-West Virginia*, 706 F.3d at 422.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 426 (holding the clearinghouse was not liable "for damages stemming from its failure to search for replacement gas").

⁴³ *Id.* at 424-425.

⁴⁴ *Ergon-West Virginia*, 706 F.3d at 425-26.

⁴⁵ *See id.* at 426 ("We thus hold that Dynegy was entitled to invoke the force majeure clause . . .").

B. Terrorism

“Terrorism” is another frequently listed force majeure event, and the tragic events of September 11th led to force majeure litigation across the country. Juxtaposing two such cases—one filed in Manhattan, the other in Hawaii—shows the limited utility of a boilerplate force majeure clause for a party seeking to excuse non-performance caused by downstream effects of the force majeure event, rather than the event itself.

The tragic facts of *One World Trade Center LLC v. Cantor Fitzgerald Securities*⁴⁶ led to a straightforward application of the force majeure clause at issue. In *Cantor Fitzgerald*, a tenant in the Twin Towers sought to recover a portion of the “front-loaded” rent it had paid to its landlord before the September 11th attacks in exchange for a future fixed rental rate and the landlord’s commitment to improve the premises.⁴⁷ The landlord contended the claims were barred by the lease’s force majeure provision, which stated the landlord would “not be liable” for a failure to perform its obligations due to “acts of third parties for which [the landlord] was not responsible.”⁴⁸ The court agreed, holding the landlord clearly could not improve the premises after the premises were destroyed by the acts of third parties.⁴⁹ The court noted there was “no reason to excuse [the sophisticated commercial tenant] from the operation of the *force majeure* clause they freely negotiated.”⁵⁰

The connection between the terrorist attacks on September 11th and the contract at issue in *OWBR LLC v. Clear Channel Communications, Inc.*⁵¹ was far more attenuated. In *OWBR*, a multimedia company rented a Hawaii resort to host a music industry conference from February 13-17, 2002—just over five months after the September 11th attack.⁵² Less than a month before the conference, the multimedia company cancelled the

⁴⁶ 789 N.Y.S.2d 652 (N.Y. Sup. Ct. 2004).

⁴⁷ *Cantor Fitzgerald*, 789 N.Y.S.2d at 654.

⁴⁸ *Id.*

⁴⁹ *See id.* (“[T]here is no provision in the Lease for recoupment of such payments where the Lessor's future performance is rendered impossible due to the destruction of the Building without any fault of plaintiff.”).

⁵⁰ *Id.*

⁵¹ 266 F. Supp. 2d 1214 (D. Haw. 2003).

⁵² *OWBR, LLC*, 266 F. Supp. 2d at 1215.

conference, citing sponsor and participant withdrawals stemming from “[t]he events of September 11th coupled with the fragile condition of the U.S. and international consumer economies.”⁵³ The resort sued for breach of contract, and the company asserted as a defense the force majeure clause, which stated that “[t]he parties’ performance under this Agreement is subject to acts of . . . terrorism . . . making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.”⁵⁴

It was clear September 11th was an act of “terrorism” that did not make it “illegal” or “impossible” to hold the conference. The suit thus turned on whether the attacks in New York made it “inadvisable” to hold a conference in Hawaii five months later.⁵⁵ The multimedia company produced evidence showing the conference’s expected attendance had fallen by more than 60%, contending that showed it was “undoubtedly inadvisable” to proceed with the conference.⁵⁶ The court found this evidence showed “it was certainly unwise, or *economically* inadvisable, for [the company] to continue with the [conference].”⁵⁷ But as the court explained, “a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event.”⁵⁸ In other words, it was not the September 11th attacks, but rather the economic fallout from them, that made moving forward with the conference “inadvisable.”⁵⁹ Because the force majeure clause did “not contain language that excuses performance on the basis of poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants,” it did not excuse the company’s non-performance under its contract with the resort.⁶⁰

⁵³ *Id.* at 1216.

⁵⁴ *Id.* at 1220.

⁵⁵ *Id.* at 1221.

⁵⁶ *Id.* at 1223.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1224 (“To excuse a party’s performance under a force majeure clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age, where terrorism could conceivably threaten our nation for the foreseeable future.”).

⁶⁰ *Compare id.* at 1223-24 (finding lower attendance numbers as a result of the September 11th attacks did not excuse a company’s performance under a contract),

C. Acts of Government

An “act of Government” is another commonly listed force majeure event, but even minor government actions can impact performance under many contracts to some degree. Litigation regarding this force majeure event thus frequently turns on whether the government act was the actual cause of the disruption to performance, and, if so, whether the disruption met the contractual threshold.

In *Kyocera Corp. v. Hemlock Semiconductor, LLC*,⁶¹ a Japanese solar panel manufacturer entered into a “take-or-pay” contract⁶² with a United States supplier of a silicon used to make solar panels.⁶³ After the contract was executed, the Chinese government provided subsidies to its domestic manufacturers so they could “dump” cheap solar panels on the world market to drive foreign competitors out of business—a strategy that resulted in the United States government imposing retaliatory tariffs on Chinese solar panels.⁶⁴ When this trade war significantly lowered the market price of silicon, the manufacturer informed the supplier that it would cease payments under the take-or-pay contract because the actions of the Chinese government constituted a force majeure event.⁶⁵

with Cartan Tours, Inc. v. ESA Servs., Inc., 833 So. 2d 873, 874-75 (Fla. Dist. Ct. App. 2003) (requiring the court to consult extrinsic materials to determine the parties’ intent, when deciding whether a force majeure clause in a hotel agreement, that required the hotel to issue a refund if terrorism affected the holding of the 2002 Olympics, entitled the company that booked the rooms to a refund when the Olympic Games went forward but attendance was negatively affected by the September 11th attacks).

⁶¹ 886 N.W.2d 445 (Mich. Ct. App. 2015).

⁶² Take-or-pay contracts—which have provided fertile ground for force majeure disputes—obligate a buyer to purchase a specific quantity of a product from a seller at a fixed price. *See Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Co.*, 498 U.S. 211, 229 (1991) (explaining take-or-pay contracts obligate specific purchase requirements). The purpose of such contracts is “to allocate to the buyer the risk of falling market prices by virtue of fixed purchase obligations at a long-term fixed price and to thereby secure for the buyer a stable supply, while allocating to the seller the risk of increased market prices and, by virtue of the buyer’s obligation to take or pay for a fixed quantity of product, removing from the seller the risk of producing product that may go unpurchased.” *Kyocera Corp.*, 886 N.W.2d at 447.

⁶³ *Kyocera Corp.*, 886 N.W.2d at 447-48.

⁶⁴ *Id.* at 449.

⁶⁵ *Id.* at 450.

The manufacturer then filed suit, seeking a declaration that the force majeure provision excused its failure to perform.⁶⁶ The trial court granted the supplier's motion to dismiss and the appellate court affirmed, explaining that the manufacturer did not allege that the actions of the Chinese and United States governments "prevented its performance under the contract."⁶⁷ Instead, the manufacturer "merely allege[d] that the depression of prices in the solar panel market caused performance . . . to become unprofitable or unsustainable as a business strategy."⁶⁸

A governmental act with a more direct impact on contractual performance led to a different result in *International Minerals & Chemical Corp. v. Llano, Inc.*⁶⁹ In that case, a mining facility that purchased natural gas under a take-or-pay contract became subject to new emission restrictions, which forced it to decommission processing equipment that had consumed about six percent of its natural gas requirements under the contract.⁷⁰ The contract provided that if the facility was "unable to receive gas as provided . . . for any reason beyond the reasonable control of the parties . . . an appropriate adjustment in the minimum purchase requirements . . . shall be made."⁷¹

The Tenth Circuit explained that interpreting "unable" literally would render the provision meaningless, as the facility would never be truly "unable" to take the gas—"even if its [plant] were completely destroyed," it "could always take the gas and vent it into the air."⁷² Instead, the Court read "unable" as synonymous with "impracticable," a standard under which the "important question is whether an unanticipated circumstance

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*; see also *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1330 (4th Cir. 1987) (rejecting the invocation of force majeure in a fixed price contract based on alleged market interference by Saudi Arabia and noting that a "[s]hortage of cash or inability to buy at a remunerative price cannot be regarded as a contingency beyond the seller's control"); *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986) ("The normal risk of a fixed-price contract is that the market price will change . . . [a] force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.").

⁶⁹ 770 F.2d 879 (10th Cir. 1985).

⁷⁰ *Int'l Minerals*, 770 F.2d at 883-84.

⁷¹ *Id.* at 886.

⁷² *Id.*

has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”⁷³ The court concluded that the change in emission standards and the resulting operational changes to the facility rendered it “unable, for reasons beyond its reasonable control, to receive its minimum purchase obligation of natural gas,” meaning that the force majeure provision excused it from paying “for any natural gas it did not take.”⁷⁴

Other courts have not interpreted catch-all “beyond the reasonable control” force majeure events so broadly. In *URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education*,⁷⁵ developers sought to invoke a force majeure provision to excuse their failure to obtain construction financing for a power plant, which was precipitated by their failure to obtain zoning approval. The developers contended the Town Council’s capricious refusal to amend the town’s zoning ordinance was an event “beyond the reasonable control and without the[ir] fault or negligence.”⁷⁶ The court rejected the developers’ argument by reading into the force majeure provision an unforeseeability requirement: “force majeure clauses have traditionally applied to unforeseen circumstances—typhoons, citizens run amok, Hannibal and his elephants at the gates—with the result that the Court will extend [the force majeure clause] only to those situations that were demonstrably unforeseeable at the time of contracting.”⁷⁷ Thus, “only if the actions of the . . . Town Council were beyond the realm of imagination [when the contract was signed] would the law of force majeure apply.”⁷⁸ Noting it was far from unforeseeable that the Town Council “would prove less pliable than [the developers] hoped,” the court held that the force majeure clause did not excuse the developers’ non-performance.⁷⁹

⁷³ *Id.*

⁷⁴ *Id.* at 887.

⁷⁵ 915 F. Supp. 1267 (D.R.I. 1996).

⁷⁶ *URI Cogeneration Partners*, 915 F. Supp. at 1286.

⁷⁷ *Id.* at 1287.

⁷⁸ *Id.* (citing *A&S Transp. Co. v. Cty. of Nassau*, 154 A.D.2d 456, 459 (N.Y. App. Div. 1989)) (“[T]he law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable.”).

⁷⁹ *Id.*

D. Great Recession

The Great Recession produced a flurry of force majeure lawsuits. Terms such as “financial crises” and “economic downturns” are rarely listed as force majeure events, so many of the parties seeking to invoke force majeure contended the Great Recession fit into the catch-all “circumstances beyond the parties’ reasonable control” event in their respective contracts.

These parties had little success.⁸⁰ For example, in *Great Lakes Gas Transmissions Ltd. Partnership v. Essar Steel Minnesota, LLC*, a steel manufacturer contracted with the owner of a pipeline for the delivery of natural gas to the manufacturer’s yet-to-be-built steel plant.⁸¹ When the Great Recession prevented it from obtaining construction financing, the manufacturer sought to invoke the force majeure provision in its contract with the pipeline, which included a catch-all for “any other cause . . . not within the control of the party claiming suspension” of its performance.⁸² The court rejected this argument, finding that the manufacturer’s obligation to pay for the gas was not contingent on it completing the steel plant.⁸³ Although the Great Recession prevented the manufacturer from building its plant and thus needing the gas, it did not prevent the manufacturer from paying for the gas.⁸⁴ The court followed the lead of other courts that have read an unforeseeability element into catch-all force majeure events,⁸⁵ noting that the failure to obtain construction financing

⁸⁰ See *Evalon, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F. Supp. 2d 1298, 1307-08 (N.D. Ga. 2011) (“While the economic perils that faced the banking industry during 2008 may have been ‘reasonably beyond the control’ of Wachovia . . . there was no external force majeure that prevented Wachovia from continuing to perform under the Alliance Agreement.”); see also *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, No. 2413-09, 2010 WL 1945738, at *4 (N.Y. Sup. Ct. May 12, 2010) (“Defendant’s decision to undertake a capital-intensive expansion during a time of apparent economic growth and its subsequent responses to the severe economic downturn represent business decisions on the part of Ruby Tuesday, not events outside of its control.”).

⁸¹ 871 F. Supp. 2d 843, 846-47 (D. Minn. 2012) (“Under the general terms of the Contract . . . Great Lakes agreed to transport up to 55,000 dekatherms of natural gas per day on MSI’s behalf.”).

⁸² *Great Lakes Gas*, 871 F. Supp. 2d at 847.

⁸³ *Id.* at 855.

⁸⁴ *Id.*

⁸⁵ See, e.g., *URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1287 (D.R.I. 1996) (stating that force majeure clauses generally

for a large projects is “foreseeable” even “absent a global financial crisis.”⁸⁶ Finally, the court found the manufacturer failed to adequately allege it took “specific measures in mitigation,” like making “reasonable efforts to sell its pipeline capacity on the secondary market.”⁸⁷ For these reasons, the court held the manufacturer failed to state a claim for a declaratory judgment that its performance was excused by the force majeure clause.⁸⁸

A provision that listed as a force majeure event “changes to economic conditions” that were “beyond [the party’s] reasonable control” led to a different result in another post-Great Recession case, *In re Old Carco, LLC*.⁸⁹ In that case, a car parts manufacturer claimed the Great Recession forced it to close a plant and sought to invoke a force majeure provision to excuse its breach of a tax exemption agreement related to the plant.⁹⁰ The court began its analysis with two hornbook propositions: (1) “as a general rule, financial difficulty does not excuse the defaulting party’s performance” under a force majeure clause;⁹¹ and (2) “where a force majeure clause explicitly includes the event alleged to have prevented performance, such performance will be excused” if performance was in fact prevented.⁹² Taking these together, the court explained that “while courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse.”⁹³

apply to “situations that were demonstrably unforeseeable at the time of contracting”).

⁸⁶ *Great Lakes Gas*, 871 F. Supp. 2d at 855.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 452 B.R. 100, 112 (Bankr. S.D.N.Y. 2011).

⁹⁰ *In re Old Carco*, 452 B.R. at 111-12.

⁹¹ *Id.* at 119 (citing *Stand Energy Corp. v. Cinerger Servs., Inc.*, 760 N.E.2d 453, 456-58 (Ohio Ct. App. 2001) (holding that worsening economic conditions do not qualify as a force majeure that would excuse economic hardship where the force majeure clause at issue is silent as to economic conditions); *Dunaj v. Glassmeyer*, 580 N.E.2d 98, 100-01 (Ohio 1990) (finding that bad economic conditions do not qualify as force majeure where the force majeure clause at issue is silent on economic conditions)).

⁹² *Id.* (citing *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (“Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.”)).

⁹³ *Id.*

The court found it was “clear that the [Great Recession] constitute[d]” a “change to economic conditions” under the force majeure provision.⁹⁴ The court also found it “clear that the . . . change in economic conditions” caused the plant closing, noting that auto sales during 2009 were at a twenty-six-year low, and “the failure of numerous financial institutions [led to] the unavailability of credit on which [the manufacturer] had relied for years.”⁹⁵ The court rejected the opposing party’s argument that “*how* the [Great Recession] affected [the manufacturer] was within its reasonable control” citing the manufacturer’s myriad efforts to mitigate the crisis’s effects, including forming alliances with several major carmakers and obtaining billions in TARP financing from the United States Department of Treasury.⁹⁶ The court thus held the manufacturer’s breach of the tax exemption agreement was excused by the force majeure provision.

These cases represent only a small sample of published cases involving force majeure disputes. However, with insight into the purposes of force majeure clauses and how courts have applied them to particular disputes, a practitioner can formulate a plan for how she intends to prosecute or defend a client’s position in force majeure litigation.

III. Litigating Force Majeure

Force majeure enters into litigation⁹⁷ most often in one of two ways: (1) an action by the non-performing party seeking a declaratory judgment that force majeure excuses its non-performance, or (2) as an affirmative defense to a breach of contract claim. This section analyzes pleading considerations for a non-performing party seeking a ruling that a force majeure provision excuses its performance, and the evidence litigants commonly marshal to prove or disprove certain key force majeure “elements.”

⁹⁴ *Id.* at 120.

⁹⁵ *Id.*

⁹⁶ *Id.* at 119, 122-23, 125-26.

⁹⁷ Force majeure disputes are often arbitrated in certain industries like construction. For ease of reference, this section discusses litigation and the procedural rules applicable in state and federal courts.

A. Pleading Considerations

Successfully pleading that force majeure excused performance requires careful analysis of the subject contract and the gap fillers and default rules applied under relevant state law. Starting with the contract's requirements, invoking any force majeure provision usually requires pleading (1) a force majeure event occurred (2) that caused the requisite level of disruption to performance.⁹⁸

In many cases, pleading the first “element” is easy. For example, the invoking party may have little trouble pleading that Hurricane Katrina fell within the enumerated force majeure event of a “storm,” or that September 11th was an act of “terrorism.” Other cases will not be so clear cut. This is especially so where the invoking party contends an event falls within catch-all language like “other circumstances beyond the parties’ control.” In some jurisdictions, this may require pleading the alleged event was unforeseeable at the time of contracting.⁹⁹ In others, if the catch-all language follows a list of specific force majeure events, only events that are similar to the specific force majeure events may qualify as a force majeure event.¹⁰⁰

⁹⁸ See, e.g., *Kodiak 1981 Drilling P’ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720 (Tex. App. 1987) (“[F]or a party to successfully use ‘force majeure’ to excuse performance, it must show: (a) the occurrence of the ‘force majeure’ event, (b) that the ‘force majeure’ event caused the failure to perform . . .”).

⁹⁹ See *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 184, 186 (Tex. App. 2018) (“To dispense with the unforeseeability requirement in the context of a general ‘catch-all’ provision would, in our opinion, render the clause meaningless because any event outside the control of the nonperforming party could excuse performance, even if it were an event that the parties were aware of and took into consideration in drafting the contract.”); *URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1287 (D.R.I. 1996) (finding force majeure clauses apply “only to those situations that were demonstrably unforeseeable at the time of contracting.”).

¹⁰⁰ See *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (N.Y. App. Div. 2007) (“When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, ‘the precept of *eiusdem generis* as a construction guide is appropriate’—that is, ‘words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.’”); *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003) (“In applying [*eiusdem generis*], we look to the specific terms employed and seek the common characteristics among them, excluding anything that does not share those characteristics.”).

The second “element” raises a threshold question—what is the requisite level of disruption to performance? The answer is often found in the force majeure provision itself. Terms like “prevent,” “hinder,” and “obstruct” may create different standards to evaluate the requisite level of disruption necessary to qualify as a force majeure event. If the contractual language is clear, the standard chosen by the contracting parties is most often honored by the courts.¹⁰¹ If the language is unclear, the default rule applied varies by jurisdiction.¹⁰²

There are several other requirements commonly found in force majeure provisions that play a role in the outcome of force majeure disputes. First, many force majeure provisions require that the invoking party provide notice to the other party within a certain amount of time. Second, many provisions require that the invoking party make efforts to mitigate the force majeure event’s effects on its performance. Some jurisdictions read this mitigation requirement into all force majeure provisions on the basis that it is a component of the duty of good faith that applies to all contracts.¹⁰³

¹⁰¹ *R&B Falcon Corp. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001) (“Contractual terms are controlling regarding force majeure with common law rules merely filling in gaps left by the document.”); *Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (N.Y. App. Div. 2017) (“[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.”) (quoting *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436, 438 (N.Y. App. Div. 2011)) (internal quotation marks omitted); *Perlman v. Pioneer Ltd. P’ship*, 918 F.2d 1244, 1248 (5th Cir. 1990) (“Because the clause labelled ‘force majeure’ in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law.”).

¹⁰² *Compare Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 204-05 (N.D.N.Y. 2012) (Under New York law, a “force majeure event is an event beyond the control of the parties which *prevents* performance under a contract and may excuse non-performance.”) (emphasis added), *with Erickson v. Dart Oil & Gas Corp.*, 474 N.W.2d 150, 156 (Mich. Ct. App. 1991) (“The purpose of a force majeure clause is to relieve the lessee from harsh termination of the lease due to circumstances beyond its control that would make performance *untenable* or impossible.”) (emphasis added).

¹⁰³ *See Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 291 P.2d 17, 21 (Cal. 1955) (“No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.”).

Finally, some jurisdictions read additional requirements into force majeure provisions. For instance, under California law, the invoking party must show that the force majeure event was beyond its “reasonable control.”¹⁰⁴ “Reasonable control” contains two separate requirements: (1) the invoking party cannot affirmatively cause the alleged force majeure event; and (2) the alleged force majeure event will not excuse performance if the party “could have taken reasonable steps to prevent it.”¹⁰⁵

Combining these common contractual requirements, gap fillers, and default rules, the following is a list of elements a non-performing party may be required to plead (and ultimately prove) in an action seeking a ruling that its performance is excused by a force majeure event:

1. A force majeure event occurred.
2. The party provided the requisite notice of the force majeure event and its impact on performance.
3. The event was unforeseeable.
4. The party did not cause the event to occur.
5. The party could not have taken reasonable steps to prevent the event from occurring.
6. The party did not cause the event through its fault or negligence.
7. The event disrupted the party’s performance to the requisite level.
8. The party made sufficient efforts to mitigate the event’s effect on its ability to perform.¹⁰⁶

B. Proving or Disproving Force Majeure

The scope of force majeure litigation and the evidence required to prove or disprove performance was excused will depend on numerous

¹⁰⁴ *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1540 (5th Cir. 1984) (“[T]he California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest.”); *In re Clearwater Nat. Res., LP*, 421 B.R. 392, 397 (Bankr. E.D. Ky. 2009) (Under Kentucky law, the “party asserting force majeure has the burden of proving the event was beyond its control and not due to its fault or negligence.”).

¹⁰⁵ *Nissho-Iwai Co.*, 729 F.2d at 1540.

¹⁰⁶ Given parties’ freedom of contract, this list cannot be exhaustive and is intended only as an illustration of potential elements that a party must prove at trial.

factors, including the industry, contractual language, and jurisdiction. This subsection analyzes some of the evidence commonly marshalled to prove or disprove four frequently litigated force majeure “elements”—notice, whether a force majeure event occurred, whether the event caused the disruption to performance, and whether the invoking party took reasonable steps to mitigate the event’s effects.

1. Notice

The evidence required to prove adequate notice is often self-explanatory—the written notices themselves. If the contract requires notice be given within a certain timeframe, the invoking party should consider whether it has evidence to satisfy that requirement, which may include time-stamped emails, certified mail receipts, or authenticated business records from a private carrier showing the notice was in fact delivered.¹⁰⁷ Summary judgment may be appropriate if the invoking party fails to produce evidence that it provided requisite notice.¹⁰⁸

2. Force Majeure Event

In many cases, the occurrence of a force majeure event will be undisputed or beyond reasonable dispute. Courts may take judicial notice of certain alleged force majeure events, like “acts of Government.”¹⁰⁹ Other alleged force majeure events, like natural disasters, may be proven by government records.¹¹⁰

Proving this element becomes more difficult if it requires proof that the alleged force majeure event was unforeseeable, beyond the party’s reasonable control, or both.¹¹¹ The evidence required to make this

¹⁰⁷ See *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1169 (W.D. Okla. 1989) (finding that a letter unaccompanied by evidence that it was delivered was insufficient to show compliance with the force majeure provision’s notice requirements).

¹⁰⁸ *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98, 108-9 (W.D. La. 1985) (holding on summary judgment that the invoking party was “barred from asserting a force majeure defense because it failed to properly invoke the force majeure clause”).

¹⁰⁹ See FED. R. EVID. 201(b).

¹¹⁰ See *id.*

¹¹¹ See *supra* Section I-C.

showing, of course, depends on the alleged force majeure event. For example, to prove a weather event was unforeseeable, the invoking party may use past weather data, and perhaps expert testimony, to show the rarity of the weather event in question.¹¹²

To show the force majeure event was beyond the party's reasonable control, the party may be required to prove it could not "have taken reasonable steps to prevent it."¹¹³ For instance, proving a fire at a party's factory was beyond its reasonable control may require evidence of the factory's fire prevention systems or policies and procedures.¹¹⁴ Expert testimony regarding industry practices may be relevant to show what steps are reasonable to prevent the occurrence of the alleged force majeure event.¹¹⁵ Where the invoking party is relying on a natural disaster with widespread impact, like a hurricane, evidence regarding the natural disaster's impact on similarly situated businesses may be relevant to show the event's effects on the invoking party were beyond its reasonable control.¹¹⁶

¹¹² See 6 AM. JUR. 3D *Proof of Facts* 319 (1989) ("Undoubtedly the most convincing way of proving the abnormality of a particular phenomenon is to show that its occurrence was unprecedented within the particular locality.").

¹¹³ *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1540 (5th Cir. 1984).

¹¹⁴ See *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 45 Cal. 2d 784, 789 (Sup. Ct. 1955) ("Many fires can be prevented by the use of foresight and sufficient expenditure.").

¹¹⁵ *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 256 n.15 (N.D. Ill. 1974) (finding that the party invoking force majeure failed to make an adequate showing that an "explosion" was beyond its reasonable control and noting "[t]here was insufficient evidence to the effect that [the invoking party] employed available means to avoid explosions, such as by using improved lubricants or by modifying its ring design, both of which [another party] had successfully done under similar circumstances").

¹¹⁶ 6 AM. JUR. 3D *Proof of Facts* 319 (1989) ("Evidence showing the degree of damage inflicted on other, similarly situated property within the same area can also be relevant to the closely related issues of whether the party relying on the alleged act of God contributed to the injury or loss through his own conduct, and whether the injury or loss could have been prevented beforehand through reasonable precautionary measures."); *Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 932 (S.D. Ind. 2008) (discussing evidence of the Great Recession's economy-wide impact on credit markets).

3. Causation

Causation, vexatious as it tends to be, is where the rubber meets the road in many force majeure suits. The invoking party's likelihood of proving causation, and the complexity of the litigation around this issue, depends on whether the contract requires that the force majeure event render performance impossible, impracticable, or some other level of disruption.¹¹⁷

Where the force majeure provision or applicable law requires impossibility, the invoking party likely must prove the alleged force majeure event itself prevented its performance.¹¹⁸ Courts have concluded that evidence showing the force majeure event prevented the party from performing in the way it originally planned did not suffice.¹¹⁹ Similarly, evidence that the event rendered performance economically ruinous has been found insufficient.¹²⁰

Impracticability is a lower standard for the invoking party to meet. Although there are numerous contractual and common law definitions of impracticability,¹²¹ in many cases, whether performance was rendered

¹¹⁷ See *supra* Section I.C.

¹¹⁸ Compare *N. Ill. Gas Co. v. Energy Co-op., Inc.*, 122 Ill. App. 3d 940, 951 (1984) (holding a government order that made terminating the contract "commercially reasonable," but did not prevent performance, did not "proximately cause[] non-performance"), with *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 66-67 (S.D.N.Y. 1991) (granting summary judgment in favor of the invoking party based on evidence that a hurricane had destroyed significant portions of its storage facilities, rendering it unable to timely accept delivery of crude oil shipment).

¹¹⁹ See *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012); *Hess Corp. v. ENI Petroleum US, LLC*, 435 N.J. Super. 39, 47-49 (2014) (finding the impossibility of providing gas from the original source did not render performance impossible when gas was available from other sources).

¹²⁰ *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 296 N.Y.S.2d 338, 344 (1968) ("[W]here 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."). But see *In re Old Carco, LLC*, 452 B.R. 100, 119 (Bankr. S.D.N.Y. 2011) ("[W]hile courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse.").

¹²¹ See *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976) ("The rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern."); *Gulf Oil Corp. v.*

sufficiently impracticable comes down to the increased cost of performance brought about by the force majeure event. But the line at which performance becomes so expensive that it is excused is amorphous.¹²² Showing that performance would result in a loss on the contract is not always enough—the party seeking to excuse its performance may be required to show “the loss will be especially severe and unreasonable.”¹²³ For example, courts have held that cost increases of 31.6%,¹²⁴ 38%,¹²⁵ and 52.2%¹²⁶ were not so “severe and unreasonable” that they rendered performance impracticable.

Business records are the likely vehicle for proving the cost increase itself, but disentangling the cost increases caused by the force majeure event from other causes may require an expert witness.¹²⁷ Causation is a quintessential jury issue,¹²⁸ but a force majeure claim or defense may fail at summary judgment if the amount of the cost increase is insufficient to show performance was impracticable.¹²⁹

Fed. Power Comm’n., 563 F.2d 588, 599 (3d Cir. 1977) (“The crucial question in applying that doctrine to any given situation is whether the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice.”).

¹²² See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (“The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community’s interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.”).

¹²³ *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981).

¹²⁴ *Am. Trading & Prod. Corp. v. Shell Int’l Marine Ltd.*, 453 F.2d 939, 942 (2nd Cir. 1972).

¹²⁵ *Louisiana Power & Light*, 517 F. Supp. at 1324.

¹²⁶ *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 139-40 (N.D. Iowa 1978), *rev’d on other grounds*, 603 F.2d 1301 (8th Cir. 1979). Of course, parties are free to delineate in the contract itself a certain percentage increase in price or cost that will excuse performance.

¹²⁷ See *id.* at 133 (illustrating the use of business records and expert testimony in establishing the cause of cost increase).

¹²⁸ See *Atl. Richfield Co. v. ANR Pipeline Co.*, 768 S.W.2d 777, 781-82 (Tex. App. 1989) (“[I]t was a question of fact for the jury whether these admitted [force majeure] events rendered ANR ‘unable, wholly or in part’ to comply with the obligation of the contracts.”).

¹²⁹ See, e.g., *Louisiana Power & Light*, 517 F. Supp. at 1326 (“While great care should be exercised in granting summary judgment motions in cases of this sort, the

4. Mitigation

Many force majeure provisions require that a party use “reasonable efforts” or “best efforts” to mitigate a force majeure event’s effect on its performance.¹³⁰ This leads to two separate questions: (1) what constitutes “reasonable efforts” and (2) did the invoking party use such efforts?

Expert testimony regarding industry practices has been used to establish what mitigation efforts were reasonable under the circumstances.¹³¹ Case law has helped draw the reasonable line for some common force majeure events. For example, where an act of government is an enumerated force majeure event and a zoning ordinance is the alleged force majeure event, seeking a variance “might well be regarded as encompassed by the duty to make a bona fide effort” to mitigate.¹³² In contrast, if the alleged force majeure event is a new statute, courts have concluded that “reasonable efforts” would not require a lobbying campaign to repeal the statute.¹³³

To prove it undertook reasonable efforts to mitigate, the invoking party’s contemporaneous records of its mitigation efforts will likely be

mere invocation of the term ‘commercial impracticability’ is not a talisman behind which a defaulting seller may hide and be guaranteed a trial in the absence of a dispute as to the material facts in the matter.”).

¹³⁰ See *Perlman v. Pioneer Ltd. P’ship*, 918 F.2d 1244, 1249 (5th Cir. 1990) (“[U]nder the terms of the contract Perlman had a duty to make a reasonable effort to remove the force majeure condition should one occur.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981) (“[A] party is expected to use reasonable efforts to surmount obstacles to performance . . . , and a performance is impracticable only if it is so in spite of such efforts.”).

¹³¹ *Ergon-West Virginia, Inc. v. Dynegy Mktg. & Trade*, 706 F.3d 419, 425 (5th Cir. 2013) (finding the district court did not err in finding a gas supplier had no duty to secure replacement gas following a force majeure event based on expert testimony “that it is practice in the natural gas industry for a seller to simply pass on force majeure if its upstream suppliers have declared force majeure”); see also *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 405-06 (Tex. App. 2009) (evaluating expert testimony regarding the common industry understanding of the term “gas supply”).

¹³² *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 860 (N.D. Ill. 1990).

¹³³ See, e.g., *id.* (“The duty of ‘continuing diligence,’ as I shall dub the duty to remove an obstacle to performance, is not a duty to exert heroic efforts to change laws, regulations, or policies of general applicability.”).

key.¹³⁴ The mitigation efforts may include attempting “other avenues of performance” than the one originally contemplated and subsequently prevented,¹³⁵ or seeking financing to shore up cash flows running dry due to the force majeure event.¹³⁶

With an understanding of how force majeure provisions are litigated and have been applied by courts in a relevant jurisdiction, a practitioner can informatively craft provisions that are more likely to provide the benefits for which the parties bargained.

IV. Practical Drafting of Force Majeure Provisions in Contracts

What constitutes a force majeure event, and what a party’s remedies are upon the occurrence of a force majeure event, are usually determined by the terms of the parties’ agreement. The definition of a force majeure event and the impacts an event may cause vary in general terms from industry to industry, and even more so from contract to contract. For instance, during the COVID-19 pandemic, an entertainment company might be fully excused from its obligations to host a concert at a local amphitheater, but a construction contractor who was tasked with renovating the amphitheater may only be excused from performance until the force majeure event ceases. The answer to what degree either company is excused from performance, and for how long, is likely found within the terms of each respective contract. Thus, applying a methodical approach to contract drafting is critical.

To start, a drafter may want to consider whether it is prudent to rely on boilerplate language pulled from form contracts or prior deals. While these documents can be useful as a starting point, many practitioners are lulled into thinking that language used in these existing documents—

¹³⁴ See *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 455 (3d Cir. 1983) (requiring the invoking party to show “how it tried to overcome the event and its effects”).

¹³⁵ *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 72 (Tex. App. 2003); see, e.g., *Perlman*, 918 F.2d at 1249 (detailing potential mitigation options); see also *Erickson v. Dart Oil & Gas Corp.*, 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (“A lessee’s failure to explore or utilize available options to overcome the delaying condition can constitute a lack of due diligence.”).

¹³⁶ *In re Old Carco, LLC*, 452 B.R. 100, 123-24 (Bankr. S.D.N.Y. 2011).

which are the classic example of “fine print”—is sufficient. The terms of each deal are different and relying on boilerplate language without further analysis of the risks, remedies, and circumstances at issue may result in a force majeure clause that is ambiguous or inapplicable, potentially leaving a client exposed to an unacceptable risk.

With that context in mind, a drafter may want to consider whether a force majeure clause establishes: (1) the events that constitute force majeure, (2) the minimum level of impact required of the triggering event, (3) the notice that must be provided by the party invoking the force majeure provision, (4) the relief to which the performing party is entitled as a result of the force majeure event, and (5) the mitigation efforts the invoking party must undertake to minimize the event’s effects.

A. The Events Constituting Force Majeure

To begin drafting a force majeure provision, a practitioner will likely want to consider identifying potential unavoidable events that might prevent the parties’ performance under a contract. In doing so, the drafter may consider contract-specific factors such as the location of contract performance and the type of performance required. For example, while hurricanes are enumerated as a force majeure event in many contracts, if the place of performance is Montana, then listing a hurricane as a force majeure event may not make sense. While being overly inclusive is not inherently imprudent, it may not add any value to the parties’ agreement. By comparison, if materials required for performance are solely sourced from Florida, listing a hurricane as a force majeure event may be appropriate and offer an appropriate measure of relief to the parties.

Next, the practitioner may consider identifying the risks to each party that could result from each force majeure event identified and discuss those various risks with the client. Often, without assistance of the practitioner, a client might not recognize many potential risks on its own. The opposite is also true, as the client has a richer understanding of his or her business risks and the attendant consequences, the client may be able to identify risks that the practitioner would not have considered. Once the identified risks have been discussed with the client, the practitioner can consider the client’s concerns when crafting and subsequently negotiating the provisions. In some cases, a significant time delay may cause major consequences for a party. In others, a party may

not be as concerned with delays in performance. Being mindful of what matters to the client and using this information as effectively as possible are important when drafting these provisions.

The practitioner may also consider the pros and cons of including broad, generic catch-all language after the enumeration of specific events, which may be used to expand the applicability of the force majeure clause. While this may seem beneficial at the drafting stage if the drafter's client is the party most likely to invoke the force majeure provision, what's good for the goose is good for the gander. Generic catch-all language, coupled with an unexpected event years in the future, could lead to a "creative" invocation of force majeure by the other party. Predicting the outcome of a dispute regarding whether the event falls within the broad catch-all language will be difficult, and the dispute resolution process will likely be lengthy and costly for both parties. To mitigate this unpredictability, drafters who plan to include catch-all language in a force majeure provision may want to carefully consider which state's laws will apply to the contract given the states' varying interpretations of catch-all language and consider carefully drafting the choice-of-law provision to increase the likelihood the parties' choice is honored by the court or arbitrator.

B. Prescribing the Degree of Impact Encountered from the Force Majeure Event

The drafter of a force majeure provision may also want to think carefully about the degree to which a party claiming force majeure must be impacted before the party is entitled to relief. Terms used in contracts are typically assigned their plain and ordinary meanings. For example, there may be critical differences between performance that is "prevented" and performance that is "hindered," "disrupted," or "delayed." Many courts have interpreted the word "prevent" very narrowly to mean physically impossible or illegal, and not merely difficult or unprofitable. Conversely, use of the words "hindered," "disrupted," or "delayed" may be applied more broadly to provide relief where a party's performance is substantially more burdensome than planned because of the force majeure event. The practitioner may find it appropriate to employ various terms to establish when performance may be excused by one force majeure event because it completely prevents performance versus when

performance may be excused by another force majeure event because it has been hindered or delayed.

C. Determining What Notice Is Required and When

As explained above, one of the important purposes of a force majeure clause is to provide the party with written notice of the event's occurrence and its impact on contractual performance. Timely written notice of a force majeure event and its impact can help avoid prejudice to the party not seeking to have its performance excused, and without it, a party may be unable to adequately mitigate resulting damages. For instance, with timely notice, the other party may be able to obtain relief from its own performance obligations in separate contracts if the force majeure event impairs its ability to perform them. On the other hand, premature notice of a force majeure event arguably gives rise to a duty to begin mitigating damages by the noticing party, even though the extent of the impacts from the force majeure event may not yet be ascertained fully.

Therefore, a practitioner may approach drafting notice requirements from at least two perspectives. First, a drafter may want to consult with his or her client to discuss a reasonable requirement for the client to provide notice when impacted by a force majeure event. If a provision requires the affected party to provide notice to the non-affected party within, for example, twenty-four hours of a force majeure event, circumstances may be that this is an impracticable burden to meet. In that case, a notice requirement of seventy-two hours or longer may be more reasonable and practicable depending on the dynamics surrounding performance. This consideration may be important to hedge against the risk that the client cannot provide the requisite notice, which may lead to an argument that the client waived entitlement to relief under the force majeure provision.

The practitioner may also want to discuss with the client how soon it reasonably believes notice is required from the other party to avoid prejudice to its own ability to mitigate. Likewise, a practitioner may consult with the other party's representative to discuss what it considers is reasonable notice to and from the other party. By taking a collaborative approach to establishing the timeliness of notice, a practitioner may be able to minimize the likelihood that the opposing party can successfully

raise waiver as a defense to force majeure claims, and all parties may be better positioned to adequately mitigate damages in the event of force majeure.

There are likely other relevant considerations when drafting the notice provision. Merely requiring “prompt notice” that a party has been impacted by a force majeure event may create an unacceptable ambiguity that minimizes the notice requirement’s effectiveness. Not only is “prompt notice” subjective, but when a given force majeure event, such as an epidemic, evolves over time, it may be difficult to determine when the event began. Although such subjectivity cannot always be avoided, it likely behooves the parties to avoid contract provisions creating additional subjectivity. In some cases, a better practice may be to tie the triggering event that starts the time to provide notice to a date of loss or occurrence of some other objective event, like the date of a government declaration to shelter in place. Again, though, the facts are seldom cut and dry, and it is often difficult to prospectively identify the best triggering event in all cases.

D. Relief from Force Majeure Events

Often, force majeure provisions establish the remedies that are available to a party impacted by a force majeure event. Most commonly, an impacted party is entirely excused from further performance or is granted an extension in the period of performance equivalent to the period of suspension or delay arising from the force majeure event. Less often, a party may be entitled to additional compensation for increased costs arising from the force majeure event.

A practitioner may want to consider being as succinct and explicit as possible when setting forth the relief to which a party is entitled. In complex contracts, it may make sense to provide alternative forms of relief depending on the force majeure event that impacts performance. However, simplicity and clarity may help avoid disputes over the available relief.

E. Mitigating Damages by the Parties

A practitioner may also consider whether the force majeure provision should include a requirement that the parties mitigate the effect of the

force majeure event. In construction, for example, this may mean that a contractor is required to perform alternative tasks on the project's critical path schedule to the extent that he can. In other contexts, it may mean that an excused party must undertake measures to procure goods or labor from alternative sources.

Conclusion

It borders on truism to note that the COVID-19 pandemic dramatically and immediately changed the world. But whether the COVID-19 pandemic created a legal excuse for the non-performance of contractual obligations is a much more nuanced question involving a careful analysis of the facts and circumstances of each case.

It will take years for courts to establish a reliable body of law regarding force majeure in a world of global pandemic, but now is the time for practitioners to begin to lay the groundwork for force majeure arguments. Fortunately, there is a small but growing body of case law to aid in their quest.

Change is the only constant in life. When circumstances change dramatically, it is reasonable to ask whether parties should be required to adhere to a contract. But the economy will not function if every time something changes parties can simply walk away from their obligations. The resolution to this tension lies, as it often does, somewhere in the middle.