International Franchise Association
54th Annual Legal Symposium
May 15-17, 2022

May the Force Be With You: A Close Examination of the Drafting and Enforcement of Force-Majeure Clauses

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I. Introduction

For a variety of reasons, a party to a contract may find its performance burdensome, impossible, or pointless. As reflected by the common-law doctrines of impossibility, impracticability, and frustration of purpose, parties facing such circumstances often seek to modify or discharge their contractual obligations. But these doctrines impose demanding burdens on a party seeking to excuse non-performance, requiring strict proof of elements that simply do not fit many contracts. Thus arose the force majeure clause, which allows parties to agree beforehand how a later change in circumstances will affect their contractual obligations.

Force majeure clauses allow parties to bargain for a reallocation of risk. By inserting such a provision in a contract, parties can determine which events might excuse non-performance, which obligations might be excused, and how the parties will proceed following a change in circumstances. In today's swiftly changing world, where global pandemics, territorial conflicts, and supply-chain disruptions can radically alter the prevailing conditions at the time the contract was signed, force majeure clauses have entered the spotlight as a potential solution to the volatility and unpredictability experienced by many modern businesses.

This paper analyzes force majeure clauses and the common-law doctrines available to a party that seeks to excuse its performance due to a change in circumstances. Section II of this paper reviews the common-law doctrines of impossibility, impracticability, and frustration of purpose, identifying the key elements and highlighting the difficulties inherent in establishing each defense. Section III of this paper focuses on force majeure clauses, addressing common issues such as how to determine whether a force majeure defense is available, the procedure for invoking a force majeure clause, and the remedies available to a party that invokes a force majeure clause. Section III also addresses the application of these principles in the context of the COVID-19 pandemic. And in Section IV, this paper addresses the role of force majeure clauses in franchise agreements, including the relatively low prevalence of such clauses and how a party to a franchise agreement without a force majeure clause might invoke a change of circumstances to forgive non-performance.

II. Common Law Defenses When Supervening Circumstances Prevent or Frustrate Performance

Supervening events that occur after a contract has been executed but before the time complete performance is due can sometimes impact the parties' basic contractual assumptions. A supervening event can excuse performance if:

1. The supervening event renders performance impossible or impracticable or it frustrates the purpose of the contract;

2. The event occurred without the fault, negligence, or misconduct of the party seeking to excuse its performance;

3. The event's non-occurrence was a basic assumption of the parties' agreement; and

4. The risk of an event was not allocated to either party.[1]

Depending on the circumstances, examples of the types of supervening events that may support an impossibility, impracticability, or frustration of purpose argument include the following: the subject matter of the agreement is destroyed or no longer exists; natural disasters; the death, illness, or disability of a person essential to the contract (depending on whether such person's personal representative can perform or accept performance); government action, including a change in the law, executives orders, or administrative decisions; court orders or decisions; or a sufficient permanent domestic embargo.

The common law doctrines of impossibility, impracticability, and frustration of purpose are often invoked as affirmative defenses in litigation to claims of breach of contract. Such defenses to non-performance may be available to a contracting party, even (or particularly) where the agreement does not contain a force majeure clause.[2] The availability of common law defenses can vary depending on state law. For example, some states recognize the doctrine of impossibility but do not recognize impracticability as a distinct doctrine and defense. Therefore, a party must carefully examine its circumstances and applicable state law in determining whether it may have an impracticability, impossibility, or frustration of purpose defense for contractual non-performance.

A. Impossibility

A party's contractual non-performance may be excused under the common law doctrine of impossibility if performance is no longer possible because of an unexpected supervening event beyond the party's control. Impossibility occurs "when the performance promised is possible at the time the contract was made, but some new event intervenes to make the performance impossible."[3] Further, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[4] Courts may consider whether the party asserting impossibility of performance assumed the risk of the intervening circumstance or brought about the intervening circumstance by its own fault.[5] These circumstances make it more unlikely

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[1] Restatement (Second) of Contracts §§ 11 Intro. Note, 261-270 (1981).

[2] *See, e.g., 1877 Webster Ave. Inc. v. Tremont Ctr., LLC,* 148 N.Y.S.3d 332, 337 (N.Y. Sup. Ct. 2021) (holding "the parties' failure to include a *force majeure* clause in their lease does not preclude Plaintiff from alleging extra-contractual doctrines such as frustration of purpose and impossibility of performance").

[3] *In re Fuzzy Thurston's Left Guard of Eau Claire, Inc.*, 6 B.R. 955, 957 n.1 (Bankr. W.D. Wis. 1980).

[4] *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987)

[5] *H. Hackfeld & Co. v. Castle,* 186 Cal. 53, 57 (Cal. 1921). *See generally In re Anchor Glass Container Corp.,* 297 B.R. 887, 892 (Bankr. M.D. Fla. 2003) (a party relying on the defense must show that the contract parties assumed the nonexistence of an unexpected contingency that has made performance impossible,

that a court would excuse a party's non-performance under an impossibility defense. As a result, "[w]hile such defenses [of impossibility] have been recognized in the common law, they have been applied narrowly, due in part to 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."[6]

Strict impossibility, as opposed to impracticability (discussed below), generally requires what is sometimes called objective impossibility in the form of destruction of the contract's subject matter or means of performance,[7] or operation of law or other government action that subjects a party performing under the contract to the risk of prosecution, fine, or imprisonment.[8] The classic illustration of the impossibility doctrine remains the landmark decision in *Taylor v. Caldwell*.[9] In *Taylor*, the plaintiff rented a music hall for four upcoming concerts.[10] The music hall burned down before the first concert. The plaintiff sued the owner for breach of contract for failing to provide a venue for the concerts, and the defendant answered that performance was impossible due to the fire.[11] Reasoning that "the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given"—a term "essential to [the] performance" of the contract—the court held the fire's destruction of the hall excused the owner's non-performance.[12]

For a party to successfully invoke an impossibility defense in many jurisdictions, performance must be "objectively impossible," not just financially unappealing or slightly more difficult, regardless of any amount of time, money, or energy spent. Performance cannot be excused when the means of performing merely becomes expensive or difficult to maintain. *Kel Kim Corp. v. Central Markets, Inc.* is instructive.[13] In *Kel Kim*, a tenant was unable to obtain a $1,000,000 liability insurance policy as required by its lease as no insurer would write it a policy above $500,000. *Id.* at 295-96. After the landlord sent a notice of default, the tenant sought a declaratory judgment that the insurance requirement should be executed as impossible. The New York Court of Appeals rejected the tenant's impossibility argument. While the tenant had been unable to secure a million-dollar policy, it was not objectively impossible to do so. *Id.* at 296. As the court noted, the tenant's "inability to procure and maintain requisite coverage could have been foreseen

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and when the parties expressly designated a particular plant for production under their agreement and it was sold in bankruptcy to a buyer that did not honor the agreement, this standard was met).

[6] *Kel Kim*, 519 N.E.2d at 296.

[7] *Id.* ("Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.").

[8] *See Innovative Modular Sols. v. Hazel Crest Sch. Dist. 152.5,* 965 N.E.2d 414, 421 (Ill. 2012).

[9] *See Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309, 312 (Q.B.).

[10] *Id.* at 310.

[11] *Id*.

[12] *Id.* at 314.

[13] 519 N.E.2d 295 (N.Y. 1987).

and guarded against when it specifically undertook that obligation in the lease, and therefore the obligation [could not] be excused on this basis." *Id.*

B. Impracticability

Given the exceedingly high standard of the impossibility doctrine, some courts have recognized a similar, but slightly more forgiving and flexible, doctrine: impracticability. (Some jurisdictions like Texas treat impossibility and impracticability as synonymous, while other jurisdictions treat them as separate doctrines.) The doctrine of supervening impracticability excuses a party's duty to perform when "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, . . . unless the language or the circumstances indicate the contrary."[14] Under such circumstance, the party's duty to render performance is discharged.

Impracticability (sometimes called "commercial impracticability") excuses performance or delays in performance if a supervening event materially changes the inherent nature of a party's obligations to become substantially more difficult, complex, or challenging. As a result of the supervening event, performance is "commercially senseless" or can only be done at a cost that is excessive, prohibitive, and unreasonable.[15]

An often cited example of impracticability is *Mineral Park Land Co. v. Howard*.[16] In *Mineral Park*, the defendants contracted with the plaintiff to haul away as much gravel from the plaintiff's land as necessary to construct "the fill and cement work on [a] proposed bridge," a job estimated to require 114,000 cubic yards of gravel.[17] After beginning excavation, the defendants learned that, contrary to the parties' expectations, less than 51,000 cubic yards of gravel lay above water level on the plaintiff's property, while the remainder was underwater.[18] The remaining gravel could not be "taken 'by ordinary means'" and instead would need to be dredged, causing a "prohibitive" increase in cost to "an expense of 10 or 12 times as much as the usual cost per yard."[19] The plaintiff sued for breach of contract based on the defendants' failure to remove more than 51,000 cubic yards of gravel. The case made it to the California Supreme Court, which held that, while it remained possible to excavate the remaining gravel, the defendants' non-performance should be excused under the defense of impracticability.[20] As the court noted, a key assumption of the contract was that "the land contained the requisite quantity [of gravel], available for use," and that the "availability" of the gravel must be viewed "in a practical

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[14] Restatement (Second) of Contracts § 261 (1981).

[15] *Natus Corp. v. United States,* 371 F.2d 450, 455 (Ct. Cl. 1967).

[16] 156 P. 458 (Cal. 1916).

[17] *Id.* at 458.

[18] *Id.* at 459.

[19] *Id.* at 459.

[20] *Id.* at 460.

and reasonable way."[21] Without discussing whether it was foreseeable that much of the gravel was underwater, the court held that, because the gravel could not be excavated "by ordinary means" and only "at a prohibitive cost," its excavation was impossible "[t]o all fair intents."[22] While the California Supreme Court acknowledged that a mere increase in cost does not excuse performance (even if performance "would entail a loss upon" the performing party), the court found "the difference in cost" was so great as to "mak[e] performance impracticable," akin to "a total absence of earth and gravel."[23]

To be eligible for an impracticability defense, the supervening event must render performance unduly burdensome and result in an increased cost of performing that materially changes the parties' contractual relationship. The mere fact that performance under the contract is more difficult or less profitable than a party expected does not by itself relieve the party of the duty to perform.[24]

In addition, for a party to be excused from performance of its contractual obligations under the common law doctrine of impracticability, the circumstance resulting in impracticability must not have been known or foreseeable by the parties.[25] Parties can address contingencies that are foreseeable in their agreement. If the agreement does not excuse performance when a foreseeable commercial impracticability occurs, the party must perform in spite of it.[26]

C. Frustration of Purpose

The doctrine of frustration of purpose is related to the doctrines of impracticability and impossibility, and discussions of it sometimes overlap with those doctrines. The rationale of frustration of purpose as an excuse for performance, however, is not that changed circumstances present obstacles to one party's performance under the contract, or that the party's performance is objectively impossible or commercially impracticable. Rather, the rationale is that changed circumstances eliminate the known, principal purpose of performance under the contract for one of the parties (although performance remains possible), and the anticipated value of the contractual consideration for the party's performance no longer exists. Parties seeking to avail themselves of the frustration of purpose defense face an uphill battle in most jurisdictions. Like the doctrines

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[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *See, e.g., Freidco of Wilmington, Del., Ltd. v. Farmers Bank of State of Del.*, 529 F. Supp. 822, 824-25 (D. Del. 1981) (holding a 30% increase in landlord's utility costs did not make performance impracticable, particularly where, by setting a cap on tenant's reimbursement obligation, the parties implicitly foresaw that utility costs could exceed the agreed-upon cap, and any loss to landlord was not "so excessive and unreasonable that failure to excuse [the landlord's] performance would result in grave injustice."); *Natus Corp.,* 371 F.2d at 457 ("The law excuses performance . . . where the attendant costs of performance bespeak commercial senselessness; it does not grant relief merely because performance cannot be achieved under the most economical means.").

[25] *See Moyer v. City of Little Falls,* 134 Misc. 2d 299, 302 (N.Y. Sup. Ct. 1986)

[26] *See Liner v. Armstrong Homes of Bremerton, Inc.,* 19 Wash. App. 921, 926 (1978).

of impossibility of impracticability, application of the doctrine of frustration of purpose is a fact-intensive process.[27]

The Restatement summarizes the frustration of purpose defense as follows: "Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."[28] That is, due to a supervening event, a party's principle purpose for entering the transaction is destroyed or obviated. If the supervening event makes performance pointless or otherwise prevents the party from achieving the object of the contract, performance may be excused as frustrated.[29] Stated another way, "[u]nder the frustration [of purpose] defense, the promisor's performance is excused because changed conditions have rendered the performance bargained from the promisee worthless, not because the promissor's performance has become different or impracticable."[30]

For this defense to apply, generally both parties must be aware of the principal purpose of the contract in order for performance to be excused when such purpose is frustrated.[31] An unstated, private reason for entering into a contractual agreement likely is not enough to succeed on a frustration of purpose defense. Further, the supervening event that frustrates a party's purpose must not by created by that party's own fault.[32] In addition, when a circumstance that frustrates a party's purpose is foreseeable, the defense of frustration of purpose is generally unavailable.[33]

Changes in market conditions or a party's financial condition generally are not considered unforeseeable and thus do not excuse non-performance.[34] Similarly, as with the doctrines of impossibility and impracticability, loss of profits or increased difficulty or

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[27] *See, e.g., In re M & M Transp. Co.,* 13 B.R. 861, 869 (Bankr. S.D.N.Y. 1981).

[28] Restatement (Second) of Contracts § 265 (1981).

[29] *See Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga*, 96 Cal. Rptr. 3d 813, 843 (Cal. Ct. App. 2009) (excusing performance where, after the parties entered a contract for the purpose of satisfying an environmental mitigation requirement, a governmental entity determined that compliance with the contract would not satisfy the mitigation requirement).

[30] *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 349 (D.C. 2007).

[31] *See* Restatement (Second) of Contracts § 265 cmt. a (referencing "both parties" when determining whether a principal purpose was frustrated).

[32] *Chicago, M., St. P. & P. R. Co. v. Chicago & N. W. Transp. Co.,* 82 Wis. 2d 514, 523-24 (1978).

[33] *See, e.g., Lloyd v. Murphy,* 25 Cal. 2d 48, 54 (Cal. 1944) (if the risk was foreseeable, there should have been provision for it in the contract, and in the absence of this sort of provision it may be inferred that the risk was assumed).

[34] *See, e.g., Tilcon NY, Inc. v. Morris Cty. Coop. Pricing Council,* 2014 WL 839122, at *19 (N.J. App. Div. Mar. 5, 2014) (increase in price of asphalt did not excuse asphalt seller from performance under frustration of purpose, even though plaintiffs would have suffered a financial loss); *Northern Ill. Gas Co. v. Energy Coop., Inc.,* 461 N.E.2d 1049, 1059-60 (Ill. App. Ct. 1984) (frustration defense was not available to gas company where change in prices of oil product was reasonably foreseeable).

expense do not by themselves generally provide a frustration of purpose excuse for non-performance of a party's contractual obligations.[35] For example, in *Karl Wendt Farm Equipment Co. v. International Harvester Co.*, a manufacturer argued that "a dramatic downturn in the farm equipment market" frustrated the purpose of a dealership agreement.[36] The trial court rejected the argument, and the Sixth Circuit affirmed.[37] While the downturn may have made the agreement less profitable for the manufacturer, the Sixth Circuit noted the agreement's primary purpose "was to establish the dealership," not ensure the "mutual profitability" of the relationship.[38] Thus, the change in market conditions that made the contract unprofitable did not excuse performance as frustrated.[39]

These common-law defenses are often narrowly construed. For example, the defenses of impracticability and frustration of purpose were unsuccessfully raised in *7200 Scottsdale Road Gen. Partners v. Kuhn Farm Machinery, Inc.*[40] In that case, a company had agreed to hold a convention at a Scottsdale, Arizona resort. When the first Gulf War in Iraq erupted in the early 1990s, European conventioneers balked at flying U.S. airlines to Arizona. The convention planners canceled the event and refused to pay for the reserved facilities. The resort sued for breach of contract, winning liquidated damages. Rejecting the defendant's common-law defenses, the court found the plaintiff did not contract with the understanding that attendance of defendant's European conventioneers was the contract's principal purpose, the threat of terrorism to domestic air travel did not rise to the level of substantial frustration, and cancellation was not an objectively reasonable response to an extraordinary and specific threat under the theory of "apprehension of impossibility."[41]

D. Effect of Temporary or Partial Disruptions under Common Law

Under the common law, when a supervening event temporarily causes impossibility, impracticability, or frustration of purpose, the affected party generally may suspend its performance during the change in circumstances. "Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration."[42] Once the temporary disruption subsides, the party whose

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[35] *See, e.g., Lloyd v. Murphy,* 25 Cal. 2d 48, 55 (Cal. 1944) (laws or other government acts making performance unprofitable or more difficult or expensive do not excuse the duty to perform under the contract).

[36] 931 F.2d 1112, 1120 (6th Cir. 1991).

[37] *Id.*

[38] *Id.* at 1119.

[39] *Id.* at 1120.

[40] 909 P.2d 408 (Ariz. Ct. App. 1995).

[41] *Id.* at 409, 412, 415, 417.

[42] Restatement (Second) of Contracts § 269 (1981).

performance was affected by the supervening event must resume performance in full within a reasonable period of time.

A supervening event excuses only those obligations affected by the event. Therefore, in contracts with divisible performance obligations, a supervening event could cause only partial impossibility or impracticability. As summarized in Section 270 of the Restatement:

> Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if (a) it is still practicable for him to render performance that is substantial, taking account of any reasonable substitute performance that he is under a duty to render; or (b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.[43]

III. Force Majeure in the Age of the Coronavirus

This Section begins with general information concerning force majeure clauses, including a broad overview of how such clauses typically work. Next, this Section turns to practical issues that frequently arise in the application of force majeure clauses, then concludes with a survey of case law analyzing force majeure events related to the COVID-19 pandemic.

A. What is a Force Majeure Clause?

A force majeure clause is a contractual provision that excuses performance or otherwise alters the parties' obligations on the occurrence of some event outside of the parties' control.[44] These provisions can be useful tools, allowing parties to allocate risk in an agreed manner. Moreover, owing to the difficulties of establishing a common-law defense based on a change of circumstances (as illustrated above), a force majeure clause gives parties an avenue to shift the risk of non-performance where a common-law defense may not be available or cannot be proved.

Force majeure clauses generally spring into effect on the occurrence of a force majeure event—"an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance."[45] A force majeure event may be an act of God, such as a hurricane or other natural disaster, or an act of people, such as a strike or a riot.[46] Indeed, a force majeure event can be whatever the parties say it is.[47]

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[43] Restatement (Second) of Contracts § 270 (1981).

[44] *Force-Majeure Clause*, Black's Law Dictionary (11th ed. 2019).

[45] *Beardslee v. Inflection Energy, LLC*, 31 N.E.3d 80, 81-82 (N.Y. 2015).

[46] *Force Majeure*, Black's Law Dictionary (11th ed. 2019).

[47] *Specialty Foods of Indiana, Inc. v. City of S. Bend*, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013) ("[M]uch of the theory's 'historic underpinnings have fallen by the wayside' . . . . [T]he scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term.") (citing

Because force majeure clauses are creatures of contract, "when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties."[48]

As a result, any discussion of force majeure must begin with the contractual language at issue. A typical force majeure clause, such as the one at issue in *Specialty Foods of Indiana, Inc. v. City of South Bend*, may read as follows:

> In the event [either party] shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes, lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war or any other reason not within the reasonable control of [either party], as the case may be, then the performance of such obligation shall be excused for the period of such delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.[49]

This particular force majeure clause appeared in a vendor's agreement with the City of South Bend, Indiana to serve as "the exclusive provider of food and beverages in the [College Football] Hall of Fame."[50] The Hall of Fame, which was established and operated by the National Football Foundation, later relocated to Atlanta, Georgia, and the City of South Bend notified the vendor that the relocation would terminate the vendor's agreement with the City.[51] But the vendor wanted to continue its operations, and sued the City and the venue for a declaratory judgment reaffirming the vendor's contractual right to continue operations in the former Hall of Fame building.[52] The trial court denied the request for declaratory judgment, and the Court of Appeals of Indiana affirmed.[53] The appellate court reasoned that "the closure and relocation of the Hall of Fame" constituted a force majeure event "not within the reasonable control" of the contracting parties.[54] And because the vendor's "operation in the Hall of Fame building was ancillary to and contingent upon the existence of the Hall of Fame," the Hall's relocation prevented the

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Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 282 (Tex. App. 1998), *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. Ct. App. 2009)).

[48] *Id.*; *see also Denbury Onshore, LLC v. APMTG Helium LLC*, 476 P.3d 1098, 1109 (Wyo. 2020) ("[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.") (citing *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (N.Y. App. Div. 2017)).

[49] 997 N.E.2d at 27 (alterations omitted).

[50] *Id.* at 25.

[51] *Id.* at 26.

[52] *Id.*

[53] *Id.* at 29.

[54] *Id.*

defendants from performing under the agreement.[55] The appellate court also rejected the vendor's argument that relocation of the Hall of Fame was a foreseeable event, as "the force majeure provision . . . contain[ed] nothing about foreseeability," and the court would not "rewrite the parties' contract by interjecting into the force majeure provision a requirement of foreseeability."[56]

B. How Do You Invoke a Force Majeure Clause?

When facing a force majeure event or other issue involving a force majeure clause, the analysis starts (and often ends) with the language of the contract. The *Specialty Foods* decision underscores the contract's central nature: If the vendor's agreement in that case required that the force majeure event be unforeseeable, the defendants might not have succeeded on their force majeure defense.[57] But while the specific contractual language may vary, some common issues frequently arise in disputes involving force majeure events, such as how to identify a force majeure event, give notice and invoke the force majeure clause, and what remedies may be available after the occurrence of a force majeure event.

i. Has a Force Majeure Event Occurred?

Before a party can invoke a force majeure clause, a force majeure event must have occurred. Identifying a force majeure event may be as simple as referring to the list of force majeure events typically included in a force majeure clause. In *Kel Kim Corp. v. Central Markets, Inc.*,[58] a tenant entered a lease for property to be used as a roller skating rink. The lease required the tenant to maintain a certain amount of public liability insurance, and contained a force majeure clause forgiving delays in performance in the event of "labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of [either] party."[59] The tenant maintained the required liability insurance for several years, until its insurer gave notice that the policy would not be renewed due to the financial uncertainty caused by the nationwide liability insurance crisis.[60] The tenant failed to procure replacement insurance, its landlord issued a notice of default, and the tenant brought a declaratory judgment action seeking a declaration that its inability to procure insurance fell under the lease's force majeure clause.[61] The Court of Appeals of New York rejected the tenant's argument, reasoning

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[55] *Id.* Notably, the court did not analyze whether the relocation "hindered or prevented" the parties' performance. Instead, it simply accepted that the defendants were unable to perform under the agreement. *See id.* at 29. This analysis suggests a frustration-of-purpose defense also may have been effective.

[56] *Id.* at 27.

[57] *See id.* at 27-28.

[58] 519 N.E.2d 295 (N.Y. 1987).

[59] *Kel Kim Corp. v. Cent. Markets, Inc.*, 516 N.Y.S.2d 806, 807 (N.Y. App. Div. 1987), *aff'd,* 519 N.E.2d 295.

[60] *Kel Kim*, 519 N.E.2d at 295-96.

[61] *Id.* at 296.

that its inability to obtain insurance was not a force majeure event.[62] "Ordinarily," the court reasoned, "only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused."[63] And in that case, "[t]he contractual provision d[id] not specifically include plaintiff's inability to procure and maintain insurance."[64] The court further explained that "the events listed in the *force majeure* clause . . . . pertain to a party's ability to conduct day-to-day commercial operations on the premises," and thus "are different in kind and nature from [the tenant's] inability to procure and maintain public liability insurance."[65] As a result, the force majeure clause did not apply.[66]

Conversely, the force majeure clause may specifically cover the supervening event at issue. In *Itek Corp. v. First National Bank of Boston*, a U.S. manufacturer contracted to supply optical equipment to the Iranian Imperial Ministry of War.[67] The contract contained a force majeure clause, under which the contract could be cancelled if "the U.S. government cancels the [manufacturer's] export license."[68] After the Islamic Revolution swept Iran, the U.S. government refused to renew or reissue the manufacturer's export license, leading the manufacturer to invoke the force majeure clause and seek cancellation of the contract.[69] The district court held the manufacturer properly cancelled the contract, and the First Circuit affirmed.[70] The appellate court reasoned that, although the U.S. government did not expressly say it was "cancelling" the export license, its "suspen[sion]" and "fail[ure] to renew" the license amounted to a cancellation as contemplated by the force majeure clause.[71]

In many states, a force majeure clause can include both foreseeable and unforeseeable events. "[W]hen parties *specify* certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."[72] "When a risk

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[62] *Id.* at 296-97.

[63] *Id.* Of course, other courts have taken a broader view of whether a force majeure event must be specifically enumerated, particularly where the force majeure clause contains language like "including but not limited to," which disclaims any limiting effect. *See, e.g.*, *Constellation Energy*, 46 N.Y.S.3d at 28 (relying on "without limitation" language preceding listed force majeure events to hold the list did "not limit the application of the clause").

[64] *Id.*

[65] *Id.* at 297.

[66] *Id.*

[67] 730 F.2d 19, 20 (1st Cir. 1984).

[68] *Id.* at 26 (cleaned up).

[69] *Id.* at 21.

[70] *Id.* at 26, 28.

[71] *Id.* at 26 ("[T]he short and conclusive answer is that the contract refers to what the United States *does,* not to the precise words that it uses when it does it.") (emphasis in original).

[72] *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018) (emphasis in original); *see Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1247-48 (5th Cir. 1990) (holding force majeure provision that listed "inability to obtain governmental permits" did not require showing unforeseeability when

has been contemplated and voluntarily assumed . . . foreseeability is not an issue and the parties will be held to the bargain they made."[73]

In addition to listing specific triggering events, force majeure provisions often include catch-all language, such as "or other circumstances beyond the reasonable control of the party whose performance is affected." Catch-all language does not normally encompass foreseeable events as courts expect parties to expressly set those out to excuse performance:

> [W]hen . . . the alleged force majeure event is not specifically listed—i.e., the party did not protect itself through an explicit provision—and the alleged force majeure event is alleged to fall within the general terms of the catch-all provision . . . we find it appropriate to apply common-law notions of force majeure, including unforeseeabilty, to 'fill the gaps' in the force majeure clause. . . . To dispense with the unforeseeability requirement in the context of a general 'catch-all' provision would . . . 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.[74]

As a result, courts often limit invocation of catch-all language in force majeure provisions to unforeseeable events.[75] Further, courts generally interpret force majeure clauses with

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performance was hindered by inability to obtain permits); *Specialty Foods*, 997 N.E.2d at 27 (declining to "interject[] into the force majeure provision a requirement of foreseeability"); ***but see Gulf Oil Corp. v. FERC***, 706 F.2d 444, 454 (3d Cir. 1983) (even though mechanical repairs were a listed force majeure event under warranty contract, court held the party claiming application of force majeure clause also must show the mechanical repairs were "unforeseeable and infrequent").

[73] *E. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976).

[74] *TEC Olmos*, 555 S.W.3d at 184 (emphasis in original). In *TEC Olmos*, the force majeure provision of the parties' farmout agreement included the following "catch-all" language: "any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected." *Id.* at 182. Unable to obtain necessary financing due to a downturn in the oil and gas market, the lessee argued the force majeure clause's catch-all language excuses its inability to perform because the downturn was an event beyond its control. The court disagreed, holding that fluctuations in oil and gas market were foreseeable, and thus could not be considered a force majeure event unless specifically listed as such in the force majeure provision. *Id.* at 184-85.

[75] *See, e.g., E. Air Lines*, 532 F.2d at 990 ("Exculpatory provisions which are phrased merely in general terms have long been construed as excusing only unforeseen events which make performance impracticable."); *In re Flying Cow Ranch HC, LLC,* No. 18-12681-BKC-MAM, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018) (notwithstanding catch-all language, failure to obtain zoning approvals or permits does not qualify as a force majeure event unless specifically included in the contractual provision at issue); *Kel Kim*, 519 N.E.2d at 296 (holding, in absence of specific clause non-performing party's inability to obtain insurance did not fall within "catch-all" provision because problem could have been foreseen and guarded against in contract). That said, different jurisdictions follow different rules on foreseeability. Some courts decline to require unforeseeability even if the party claiming force majeure has invoked the catch-all provision. *E.g.*, *Specialty Foods*, 997 N.E.2d at 27 (rejecting argument that force majeure event arising under catch-all provision must be unforeseeable, reasoning that "the force majeure provision . . . contain[ed] nothing about foreseeability").

catch-all language to capture only unlisted events that are similar to the listed events.[76] Accordingly, contracting parties should heed the following advice quoted in *TEC Olmos*: "If an event is foreseeable, parties should protect themselves through explicit provisions. If a party does so protect itself, it should not then have to bear the burden of proving that the event was unforeseeable."[77]

Even if the purported force majeure event appears to be listed in the force majeure clause, it still may not excuse performance if the event was within the reasonable control of the non-performing party. In *Denbury Onshore, LLC v. APMTG Helium LLC*,[78] Denbury contracted to deliver certain amounts of helium to APMTG. The contract contained a detailed force majeure clause, which excused failure to perform due to "any event outside the reasonable control of a Party that could not have been avoided or overcome by that Party's exercise of reasonable care and due diligence," including "delay(s) or failure of performance of contractor(s)" and "natural or mechanical supply well failure."[79] Denbury failed to provide the required amounts of helium, APMTG sued, and Denbury claimed the contract's force majeure clause excused Denbury's non-performance.[80] Specifically, Denbury claimed a contractor-failure force majeure, due to the failure to timely construct a natural gas processing plant, and also claimed a well-failure force majeure, due to sulfur depositions and other issues that caused certain supply wells to fail.[81] The trial court entered judgment in favor of APMTG after a seven-day bench trial, and the Supreme Court of Wyoming affirmed.[82] The Supreme Court reasoned that the force majeure clause only covered third-party contractor failures, as the contract limited force majeure events to those "outside the reasonable control of a Party."[83] "[B]ecause there was no third-party contractor," and Denbury alone bore the blame for failing to build the processing plant, the contractor failure did not excuse performance.[84] Similarly, because the evidence showed Denbury could have "avoided or overcome" the well failures "by the exercise of reasonable care and due diligence," such as the use of chemical treatments or other procedures standard in the drilling industry, the well failures only excused performance for a brief period.[85] As illustrated by *Denbury*, it is not enough for an enumerated event to occur—that event also must fall outside of the non-performing

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[76] *State of Florida v. Hearns,* 961 So. 2d 211, 219 (Fla. 2007) (discussing the interpretative rule of ejusdem generis, under which the latter must be limited to things like the former).

[77] *TEC Olmos*, 555 S.W.3d at 184 (quoting Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 104 (2007)).

[78] 476 P.3d 1098 (Wyo. 2020).

[79] *Id.* at 1101-02.

[80] *Id.* at 1104.

[81] *Id.* at 1102-04.

[82] *Id.* at 1104, 1117.

[83] *Id.* at 1109-10.

[84] *Id.* ("It would make little sense for a party's failure of performance to be contained in a force majeure provision, which is intended to excuse a party's non-performance.").

[85] *Id.* at 1114-16.

party's control and, if the contract so provides, be unavoidable through the exercise of reasonable care.[86]

Assuming that a force majeure event has occurred, a party must next ask whether that event actually caused nonperformance. Generally speaking, it is not enough that the force majeure event make performance difficult, undesirable, or unprofitable. Rather, as illustrated by *Butler v. Nepple*, the force majeure event must actually prevent performance.[87] The *Butler* court heard a dispute concerning an assignment of an oil-and-gas lease, under which the defendant had to begin drilling an 8,200-foot well within six months or else reassign the lease or pay a delay rental.[88] The assignment contained a force majeure clause, which provided for the suspension of the defendant's obligations "while the [defendant] is prevented from complying therewith, in whole or in part, by strikes, lockouts, actions of the elements, or other maters or conditions beyond the control of the [defendant]."[89] Due to a strike, the price of well casings (a crucial material for the drilling operation) jumped precipitously, "way over the regular prices" for such items, leading the defendant to decline to drill the well.[90] The plaintiff sued for delay rentals, and the defendant responded that the increase in casing prices qualified as a force majeure event under the assignment.[91] The Supreme Court of California disagreed.[92] The Court reasoned that, "[e]ven in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'"[93] Because the defendant failed to show "the increase in price was 'extreme and unreasonable,'" he failed to prove that the force majeure clause excused his delay in performing under the lease.[94] Of course, not every contract requires that the force majeure event actually *prevent* performance—in *Specialty Foods*, for instance, the force majeure clause applied to events that "delayed or hindered or prevented" performance.[95]

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[86] Notably, some jurisdictions apply these requirements even if not expressly stated in the contract. *Id.* at 1114 ("Some courts will not allow a party to rely on an excusing event if he could have taken reasonable steps to prevent it. The rationale behind this requirement is that the force majeure did not actually prevent performance if a party could reasonably have prevented the event from occurring.") (citing *In re Old Carco LLC*, 452 B.R. 100, 120-21 (Bankr. S.D.N.Y. 2021)); *see also Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) ("[E]lements of the common law *force majeure* defense are often read into the *force majeure* provision of a contract.").

[87] 54 Cal. 2d 589, 599, 354 P.2d 239, 245 (1960).

[88] *Id.* at 592, 354 P.2d at 240-41.

[89] *Id.* at 598, 354 P.2d at 244 (cleaned up).

[90] *Id.* at 597, 354 P.2d at 243.

[91] *Id.*

[92] *Id.* at 599, 354 P.2d at 244-45 ("The mere fact that compliance with his contract would involve greater expense than he anticipated would not excuse defendant.").

[93] *Id.*

[94] *Id.*

[95] 997 N.E.2d at 27.

In the same vein, the nonperforming party must establish a causal link between its nonperformance and the force majeure event. As explained by the United States Court of Appeals for the Third Circuit, "[f]or *force majeure* events to excuse nonperformance, some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party."[96] In *Gulf Oil Corp. v. FERC*, Gulf contracted to provide specified quantities of natural gas, failed to do so, then sought to excuse its nonperformance under the contract's force majeure clause, claiming that a hurricane prevented performance.[97] The Third Circuit rejected Gulf's argument.[98] Although the court agreed that "the occurrence of a hurricane is a *force majeure* event," it explained that the force majeure clause would protect Gulf only if Gulf "establish[ed] that the pipe damage and mechanical breakdowns in issue would not have occurred if there had not been a hurricane."[99] The court therefore remanded the case for further proceedings on the question of whether Gulf's "source of supply was either unavailable or undeliverable due to *force majeure* occurrences."[100]

Though not involving a contractual force majeure provision, a recent federal Worker Adjustment and Retraining Notification Act ("WARN Act")[101] case regarding COVID-19 typifies a court's analysis regarding whether a force majeure event caused a party's inability to perform. The WARN Act requires an employer to provide certain notice prior to a plant closing or mass layoff, unless, among other affirmative defenses, the employer can show the plant closing or mass layoff is a "direct result" of a natural disaster.[102] After COVID-19 decimated the travel industry in the spring of 2020, Enterprise Rent-A-Car terminated several hundred employees at the Orlando and Tampa airports without providing the statutory required notice. Enterprise argued it was entitled to the natural disaster defense due to COVID-19. In *Benson v. Enterprise Leasing*,[103] the U.S. District Court for the Middle District of Florida denied Enterprise's motion to dismiss the WARN Act lawsuit, finding that, while COVID-19 may be a natural disaster, Enterprise could not show the layoffs resulted "directly" from the pandemic. Rather, the court found only an indirect connection:

> But while COVID-19 may be a natural disaster within the meaning of the WARN Act, the Complaint does not allege the layoffs resulted directly from the pandemic. The Complaint (and unfortunate experience) shows a more tenuous connection: COVID-19 caused global concern over the spread of the virus, leading to a global shutdown—travel stalled, as did economies. So fewer people traveled, fewer people flew—and fewer people rented cars

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[96] *Gulf Oil Corp. v. FERC*, 706 F.2d at 455.

[97] *Id.* at 446-47.

[98] *Id.* at 456.

[99] *Id.* at 453.

[100] *Id.* at 455-56.

[101] 29 U.S.C. § 2100, *et seq.*

[102] 29 U.S.C. § 2102(b)(2)(B).

[103] No. 6:20-cv-891-RBD-LRH, 2021 WL 1078410, *5 (M.D. Fla. Feb. 4, 2021).

> from Enterprise in Orlando's and Tampa's airports. Enterprise experienced "a dramatic downturn in business" and Plaintiffs were laid off. This isn't a situation where, for example, a factory was destroyed overnight by a massive flood—that would be a "direct result" of a natural disaster. This is an indirect result—more akin to a factory that closes after nearby flooding depressed the local economy. Defendants' facilities or staff didn't disappear overnight, suddenly wiped out. Instead, COVID-19 caused changes in travel patterns and an economic downturn, which affected Defendants—so the natural disaster defense doesn't apply.[104]

Another example of the strict view of causation courts often take in force majeure cases is *OWBR LLC v. Clear Channel Communications, Inc.*, which involved the cancellation of a conference in Hawaii in the wake of the September 11 attacks.[105] The event organizers had scheduled the conference for February 13-17, 2002, at a resort in Maui, Hawaii. The parties' contract contained a force majeure provision under which "[t]he parties' performance under this Agreement is subject to acts of . . . terrorism . . . or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement."[106] The event organizers cancelled the conference following the withdrawals of numerous attendees and sponsors due to the September 11th attacks and the fragile condition of the U.S. economy.[107] After the resort sued for breach of contract, the organizers responded that the force majeure clause excused their non-performance. The U.S. District Court for the District of Hawaii disagreed, ruling in favor of the resort because there was no specific terrorist threat to air travel to Hawaii and the parties' force majeure provision did "not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event."[108] While the terrorist attack was an extreme, unforeseeable occurrence, it did not render performance five months later objectively inadvisable.[109] The real reason for canceling the Hawaii conference was because of the worldwide economic recession that followed September 11. Although due in part to the terrorist attacks, the economic downturn in travel was too attenuated to excuse performance under the contract's *force majeure* clause. Because the drop in attendance was not directly caused by the terrorist attacks, and 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," the court held the organizer's performance was not excused.[110]

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[104] *Id.*

[105] 266 F. Supp. 2d 1214 (D. Haw. 2003).

[106] *Id.* at 1220-21.

[107] *Id.* at 1216.

[108] *Id.* at 1223.

[109] *Id.* at 1222.

[110] *Id.* at 1224.

Sometimes a change in circumstances delays but does not prevent performance. A force majeure clause may cover such an event, but parties should be mindful of the clause's language and of their performance obligations under the contract. In *Nelkin v. Wedding Barn at Lakota's Farm, LLC*, a betrothed couple contracted in 2018 to rent a venue for their 150-guest wedding on October 10, 2020.[111] The contract contained a force majeure clause, which provided for "termination without liability and refund of all refundable deposits upon the occurrence of any circumstances beyond the control of either party – such as . . . government regulations . . . – to the extent that such circumstances make it illegal, impractical, or impossible to provide or use the Venue's facilities."[112] After the advent of the COVID-19 pandemic, and following the issuance of repeated executive orders prohibiting non-essential gatherings, the couple contacted the venue in May 2020 to cancel the contract under the force majeure provision.[113] The venue refused to make any refund to the couple, leading the couple to sue for the return of their refundable deposit.[114] The couple moved for summary judgment, and the Civil Court of the City of New York granted their motion, reasoning that the executive orders "f[e]ll within the scope of the Contract's force majeure provision as 'government regulations.'"[115] In granting the motion, the court rejected the venue's argument that, by the October wedding date, "the restrictions had lifted enough . . . to have allowed for a fifty-person wedding."[116] The court reasoned that the central question was "whether the Plaintiffs had sufficient grounds to exercise the force majeure provision in May of 2020 based upon the circumstances present *at that time*, not how those circumstances may have changed by [the wedding date]."[117] Because "the prohibitions on non-essential gatherings became stricter and were repeatedly extended" in the period before the couple gave notice, thus "strongly suggesting that the restrictions would remain in effect into the foreseeable future," the court held the executive orders "present in May of 2020 were sufficient for the Plaintiffs to exercise the force majeure provision of the Contract on the basis that the Defendant would not be able to perform on October 10, 2020."[118]

ii. Have You Given Notice?

Not only must a force majeure event occur, but generally the nonperforming party also must give notice that it is invoking the force majeure clause. Failure to give proper

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[111] 152 N.Y.S.3d 216, 218 (N.Y. Civ. Ct. 2020).

[112] *Id.* at 220.

[113] *Id.* at 222.

[114] *Id.* at 219.

[115] *Id.* at 222.

[116] *Id.*

[117] *Id.* (emphasis in original). Although the venue argued that the number of guests was not a material term of the contract, the court reasoned that the executive orders in effect at the time the couple gave notice "specifically required 'postponement or cancellation of all non-essential gatherings of individuals of any size for any reason,'" and therefore "prohibited any weddings regardless of the number of attendants." *Id.* at 223.

[118] *Id.* at 222-23.

notice can sink an otherwise valid force majeure defense. In *L&A Jackson Enterprises v. United States*, a contractor agreed to install an HVAC system for the Naval Marine Corps Reserve Center.[119] The contract included penalties and a right of termination for delays in installation, but also provided that the contractor could not "be terminated if the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor," and if, "within 10 days from the beginning of any delay," the contractor gave notice "in writing of the causes of delay."[120] In addition, the contractor agreed that "weather related time extension requests must relate to official weather data and be beyond normal conditions."[121] The contractor failed to complete the work on time, leading the Navy to withhold a portion of the contractor's payment to account for the late fees accrued due to the delay.[122] The contractor sued, arguing his delay resulted from unforeseeable inclement weather, and therefore should be excused under the contract.[123] But the Court of Federal Claims disagreed, reasoning that, even if the weather could excuse the contractor's delay, the contractor never gave notice or requested "an extension of time due to unusual weather conditions," and never provided "official weather data demonstrating a period of unusual weather during contract performance, as required by the contract."[124] Because the contractor failed to give proper notice, its force majeure defense failed.[125]

Even when the nonperforming party gives proper notice, issues still can arise to limit the effectiveness of a force majeure defense. In the *Denbury* case, for instance, Denbury gave notice of a force majeure event, claiming that the event had started in June and would "continu[e] until about mid-August."[126] The force majeure event actually continued beyond mid-August, but the court excused Denbury's nonperformance only for the period between the notice and the stated mid-August "end-date of the force majeure event."[127] In reaching this result, the court relied in part on Denbury's failure to inform its counterparty that "the circumstances had changed" or to provide the counterparty with "a new force majeure end date."[128] Thus, *Denbury* teaches that, if a notice of a force majeure event states the anticipated length of the delay, additional notices should be sent to cover any further delays or other events that might affect performance beyond the period included in the original notice.

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[119] 38 Fed. Cl. 22, 26 (1997), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998).

[120] *Id.* at 43-44 (cleaned up).

[121] *Id.* at 44.

[122] *Id.* at 35.

[123] *See id.* at 43-44.

[124] *Id.* at 44.

[125] *Id.*

[126] 476 P.3d at 1112.

[127] *Id.*

[128] *Id.* at 1113.

Some courts treat notice as a condition precedent for the invocation of a force majeure clause. In these jurisdictions, failure to provide notice operates as an absolute bar to relief under the force majeure provision.[129] In other jurisdictions, where neither the contract nor the governing law make notice a condition precedent for force majeure relief, courts will ask whether the nonperforming party's failure to give notice prejudiced the counterparty.[130] In such jurisdictions, failure to give formal notice might not preclude a force majeure defense if the counterparty had actual notice of the force majeure event. As always, practitioners should scrutinize the contract and review applicable case law to determine the extent and nature of their clients' notice obligations.

iii. What Remedies Are Available Upon the Occurrence of a Force Majeure Event?

As with other aspects of force majeure doctrine, the remedies available to a party on the occurrence of a force majeure event generally depend on the language of the contract at issue. For instance, the contract in *Nelkin* allowed for termination and called for a "refund of all refundable deposits upon the occurrence" of a force majeure event.[131] Thus, when the plaintiffs invoked the force majeure clause to terminate the contract, the court awarded the amount the plaintiffs paid on the contract, less a booking fee the parties had agreed was non-refundable.[132] In other cases, a valid force majeure defense may simply give the nonperforming party more time to complete its performance.[133] Had the contractor in *L&A Jackson* succeeded with its force majeure defense, its delayed performance would have been forgiven and it would have been entitled to a return of the late fees charged for the untimely completion of the contractor's work.[134]

Conversely, sometimes a force majeure clause will state that certain remedies are *not* available on occurrence of a force majeure event. Leases of real property commonly include such limitations, requiring the tenant to continue paying rent even if a force majeure occurs.[135] In *1600 Walnut Corp. v. Cole Haan Company Store*, the tenant vacated its leased premises after the advent of the COVID-19 pandemic and stopped paying rent.[136] The lease's force majeure clause provided that, even if a force majeure

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[129] *E.g.*, *Milford Power Co., LLC v. Alstom Power, Inc.*, No. X04CV000121672S, 2001 WL 822488, at *4 (Conn. Super. Ct. June 28, 2001) (granting plaintiff's motion for summary judgment and holding force majeure clause's notice requirement was a condition precedent such that notice of a force majeure "event is required before the duty arises on the part of the plaintiff to provide relief as set forth under the 'force majeure' provisions of the contract").

[130] *E.g.*, *Denbury*, 476 P3d at 1111 (ruling notice was not condition precedent to force majeure defense, but holding nonperforming party's failure to give notice prejudiced the counterparty such that the failure of notice barred relief under the force majeure clause).

[131] 152 N.Y.S.3d at 220.

[132] *Id.* at 223.

[133] *See, e.g.*, *L&A Jackson*, 38 Fed. Cl. 22.

[134] *Id.* at 43-44.

[135] *1600 Walnut Corp. v. Cole Haan Co. Store*, 530 F. Supp. 3d 555, 558 (E.D. Pa. 2021).

[136] *Id.* at 557.

event occurred, the tenant would not be "relieved of its obligation to pay rent."[137] The landlord sued for back rent, and the tenant asserted various counterclaims rooted in the unforeseen change in circumstances caused by the pandemic.[138] But the district court dismissed the counterclaims, holding that the pandemic qualified as a force majeure event, and that the lease required continued rental payments even after the occurrence of such an event.[139]

Recent force majeure cases underscore that courts will strive to enforce a force majeure provision as written. In a recent COVID-19-related decision involving Cinemex theaters, a Florida bankruptcy court addressed the construction of a remedy portion of a force majeure provision.[140] The provision excused rent under a movie theater lease due to acts of God or government restrictions, but expressly extended the lease's term to equal the time during which the payment obligation was excused because of the force majeure event. The theater tenant completely closed for a period when required to do so by governmental COVID-19 shutdown orders. The theater later reopened after relaxed governmental orders allowed movie theaters to operate at 50% capacity. The tenant argued its rent should be excused during the period it was completely closed and that its rent following its partial reopening should be proportionately reduced until it is legally allowed to operate at full capacity. Enforcing the force majeure clause as written, the court held the tenant's rent was excused during the period the theater was closed due to governmental shut down orders (with that period being added to the end of the lease's term) but that the tenant was not entitled to any proportionate or equitable reduction after it reopened under the express terms of the force majeure provision.[141] While the court recognized the trying times relating to the pandemic, the court emphasized that the parties had bargained for this remedy resolution, so the court found it enforceable.[142]

iv. How does a Force Majeure Clause Interact with Common-Law Defenses?

In addition to the remedies available under the contract, parties should consider how a force majeure clause affects their ability to seek the common-law remedies discussed in Section II. Some courts have rejected common-law defenses based on an event included in the parties' force majeure clause, reasoning that the inclusion of such an event in the contract shows the event was foreseeable.[143] These results make sense:

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[137] *Id.* at 558.

[138] *Id.* at 557.

[139] *Id.* at 558.

[140] *In re Cinemex USA Real Est. Holdings, Inc.,* 627 B.R. 693 (Bankr. S.D. Fla. 2021).

[141] *Id.* at 700-02.

[142] *Id.* at 701.

[143] *E.g.*, *Gap Inc. v. Ponte Gadea N.Y. LLC*, 524 F. Supp. 3d 224, 234 (S.D.N.Y. 2021) (rejecting frustration and impossibility defenses based on COVID-19 lockdown orders where contract defined force majeure events to include "governmental preemption of priorities or other controls in connection with a national or other public emergency"); *A/R Retail LLC v. Hugo Boss Retail*, 149 N.Y.S.3d 808, 824-27 (N.Y. Sup. Ct. 2021) (rejecting pandemic-rooted common-law defenses to performance under lease where "the risk of

The common-law doctrines serve to reallocate risk in the event of an unforeseen change of circumstances. If the parties have foreseen particular changes and negotiated a different apportionment of risk than provided under the common law, their agreement will be enforced as written.[144] If one of those foreseen changes occurs, common-law doctrines will not override the parties' agreement.[145] That said, "a force majeure clause and a common law remedy can be complementary."[146] In particular, many courts have held that a force majeure clause does not preclude a frustration-of-purpose argument, especially where the supervening event falls under the force majeure clause's catch-all provision.[147]

Although a force majeure clause may limit a party's recourse to common-law defenses, a party seeking protection from changes of circumstances generally will want to include a force majeure clause in its contract. As discussed in Section II, the common-law doctrines are narrowly defined and, as a result, it can be difficult for a party relying on one of them to prevail. Contracting parties, however, are not at the mercy of the common law.

> Parties can . . . contract around the doctrine, because it is just a gap filler—a guess at what the parties would have provided in their contract had they thought about the contingency that has arisen and has prevented performance or made it much more costly. . . . Modern contracting parties often do contract around the doctrine [of impossibility] . . . by specifying the failures that will excuse performance. The clauses in which they do this are called force majeure ("superior force") clauses.[148]

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government restriction on use of the Premises . . . was not only foreseeable, it was actually foreseen and addressed in the text of [the force majeure clause]").

[144] *See Gap*, 524 F. Supp. 3d at 237 ("[T]he inclusion and limited application of the Force Majeure Event definition of the Lease demonstrate that the parties foresaw, and apportioned the risk associated with, the possibility that government measures in the event of a public emergency could affect performance under the Lease.").

[145] *A/R Retail*, 149 N.Y.S.3d at 825 (declining to "provide a remedy" under the common law "that [the parties] had expressly bargained away in the Lease").

[146] *Rembrandt Enters., Inc. v. Dahmes Stainless, Inc.,* No. 15-cv-4248-LTS, 2017 WL 3929308, at *12-14 (N.D. Iowa 2017).

[147] *Id.* (reviewing the case law and finding "no authority suggest[ing] that the existence of [a force majeure] clause precludes the doctrine of frustration of purpose"); *see also In re CEC Entertainment, Inc.*, 625 B.R. 344, 357 (Bankr. S.D. Tex. 2020) ("Unlike the force majeure clauses at issue, frustration relates to the purpose of a contract, as opposed to a party's actual inability to perform."). Notably, despite holding that the force majeure clause did not bar a frustration of purpose defense, the *CEC Entertainment* court held the debtor's frustration argument failed where the frustrating event (pandemic-related shutdown orders) was specifically enumerated in the contract as a force majeure event. 625 B.R. at 359 ("[T]he force majeure clause of the Greensboro lease supersedes the frustration of purpose doctrine because the parties specifically allocated the risk of unusual governmental regulation.").

[148] *Wis. Elec. Power Co. v. Union Pac. R. Co.*, 557 F.3d 504, 506-07 (7th Cir. 2009) (focusing on the language of the particular force majeure provision rather than the common doctrine of impossibility) (internal citations omitted).

Impossibility, impracticability, and frustration of purpose are default rules that are often altered or superseded when parties include a force majeure clause in their contract.[149] Parties to a contract may agree to a broader force majeure clause than what would be available to them under the common law and may adopt a lower standard for nonperformance than would otherwise be allowable under alternative common law theories.[150]

A contract's force majeure provision will generally control over the common law doctrines. "If . . . the parties include a force majeure clause in the contract, the clause supersedes the doctrine of impossibility. For, like most contract doctrines, the doctrine of impossibility 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."[151] Where the parties include a specific force majeure provision, "it is the contract, rather than a body of judicial doctrine, that [the court] must interpret."[152]

C. How Have Courts Applied Force Majeure Clauses in the Context of the COVID-19 Pandemic?

In the immediate aftermath of the shutdowns and other government regulations passed to slow the spread of the COVID-19 pandemic, commentators speculated that courts might use force majeure clauses to relieve parties from their contractual obligations in unpredictable manners.[153] But three years into the pandemic, the case law has not borne out these concerns. Rather, courts generally have continued to apply force majeure clauses as written, without fashioning remedies not bargained for by the parties.

The decision in *In re Hitz Restaurant Group* is commonly cited as an example of unpredictable pandemic justice.[154] In that case, a Chicago restaurant entered a lease with a force majeure clause excusing each party "from performing its obligations or

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[149] In addition, some states have statutory provisions (outside the UCC) that may apply in the absence of a contractual force majeure provision. For example, California Civil Code Section 1511 provides that, unless the parties have agreed otherwise, delayed performance or partial or entire non-performance is excused when caused by an irresistible and superhuman cause, or the acts of public enemies of the United States or California. Cal. Civ. Code § 1511. Louisiana law excuses performance where a fortuitous event either (1) makes performance impossible, or (2) would have destroyed the object of performance in the hands of the oblige had the affected party rendered timely performance. La. Civ. Code Ann. arts. 1873 & 1874.

[150] *See, e.g., Stein v. Paradigm Mirasol, LLC,* 586 F.3d 849, 857 n.6 (11th Cir. 2009) ("force majeure clauses broader than the scope of [common-law] impossibility are enforceable under Florida law.").

[151] *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 855 (N.D. Ill. 1990) (internal citations omitted).

[152] *Id.* at 856. However, "merely reciting 'force majeure' in a contract, or including in the contract a standard, boilerplate, catch-all force majeure provision, invokes a body of common law doctrine interpreting the term that is largely indistinguishable from the doctrine of impossibility (or impracticability)." *Id.* at 855-56.

[153] *E.g.*, J. Hunter Robinson et. al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 1, 34 (2020) ("It will take years for courts to establish a reliable body of law regarding force majeure in a world of global pandemic . . . .").

[154] 616 B.R. 374 (Bankr. N.D. Ill. 2020).

undertaking provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by laws, governmental action or inaction, [or] orders of government."[155] The lease also specifically provided that "[l]ack of money shall not be grounds for Force Majeure."[156] After Illinois Governor J.B. Pritzker issued an executive order prohibiting "on-premises consumption" of food or beverages, the restaurant declared bankruptcy, and its landlord moved to require the restaurant to make post-petition rent payments.[157] The restaurant opposed the motion, claiming that the shutdown order excused its rent obligation under the lease's force majeure clause.[158] The bankruptcy court agreed, rejecting the landlord's argument that the restaurant's failure to perform was caused by a "lack of money" and therefore not covered by the force majeure clause.[159] But the court did not hold the force majeure clause forgave the rent obligation altogether.[160] Rather, because the "executive order did not prohibit [the restaurant] from performing carry-out, curbside pick-up, and delivery services," the court reduced the restaurant's rent "in proportion to its reduced ability to generate revenue due to the executive order."[161] Because the restaurant used 75% of the premises for indoor dining, leaving 25% of the leased square footage still usable after the executive order, the court required the restaurant to pay 25% of its original rental obligation.[162] Notably, nothing in the lease provided for such a prorated rent reduction on the occurrence of a force majeure event.[163]

Since the *Hitz* decision, however, courts have applied force majeure clauses to pandemic-related events in largely the same manner as before the COVID-19 outbreak. If anything, courts have demonstrated even greater adherence to contract terms. For instance, in *Vota Inc. v. Urban Edge Caguas L.P.*, Vota executed a lease for commercial space in a mall food court in Caguas, Puerto Rico, where Vota intended to operate a

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[155] *Id.* at 376-77 (cleaned up).

[156] *Id.* at 377.

[157] *Id.* at 376-77.

[158] *Id.* at 377.

[159] *Id.* at 378. In reaching this result, the court applied background rules of contract interpretation to rule that "the lease's more specific provision" forgiving performance in the event of governmental actions prevailed over "the lease's general provision that 'lack of money' does not trigger the force majeure clause." *Id.* at 378 n.2.

[160] *Id.* at 379 ("Nevertheless, Debtor is not off the hook entirely.").

[161] *Id.*

[162] *Id.* at 379-80.

[163] *See id.* at 376-77. That said, some commentators explain the result in *Hitz* by pointing to the lease's relatively low standard for force majeure relief. *E.g.*, Robyn S. Lessans, *Force Majeure and the Coronavirus: Exposing the "Foreseeable" Clash Between Force Majeure's Common Law and Contractual Significance*, 80 MD. L. REV. 799, 814 (2021). The *Hitz* lease allowed for a force majeure event to excuse performance if it "delayed, retarded or hindered" the parties' performance, and did not require that the force majeure render performance impossible. *Hitz*, 616 B.R. at 376-77. Under this view, *Hitz* qualifies as a causation decision, not an example of a unique remedy crafted in response to the pandemic.

Casa Mofongo Xpress franchise.[164] The lease contained a typical force majeure provision, which applied to "Acts of God, . . . restrictive governmental laws or controls, . . . and any [other] unforeseeable causes beyond the reasonable control of a party."[165] The provision also stated that, "[n]otwithstanding the foregoing, the occurrence of such events shall not excuse Tenant's obligation to pay Rent or any other charges due under this Lease nor excuse Tenant's inability to obtain funds."[166] The mall closed in March 2020 as a result of "mandatory, state-wide lockdowns" issued in response to the advent of the COVID-19 pandemic, later reopening on June 1, 2020.[167] But Vota declined to reopen at that time, claiming "the 'liability was too high to reopen' due to the alleged lack of 'guidance and specific instructions' to prevent the spread of the virus."[168] Vota ceased rent payments, then sued for reformation of the lease "under the civil doctrine known as *rebus sic stantibus*," claiming that the pandemic prevented or delayed Vota's fulfillment of its contractual obligations.[169] But the district court dismissed Vota's complaint.[170] The court reasoned that "the Lease Agreement provide[d] in unambiguous terms that plaintiff agreed to continue with its payment obligations thereunder even in case of an event of 'force majeure,'" such that *rebus sic stantibus* did not apply.[171]

Vota is no outlier. In cases where parties have claimed the pandemic excuses their payment defaults, even though the force majeure clause explicitly requires continued payments after the occurrence of a force majeure event, courts have enforced the force majeure clauses as written.[172] These "hell or high water" payment provisions, which require performance of financial obligations even if a force majeure event occurs, can be useful tools in drafting or negotiating a force majeure clause.

IV. The Prevalence of Force Majeure in Franchising

Franchise agreements typically contemplate performance obligations over an extended period of time, which raises risks that events entirely unforeseeable at the time

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[164] No. 20-cv-1634 (ADC), 2021 WL 4507979, at *1 (D.P.R. Sept. 30, 2021).

[165] *Id.* at *8.

[166] *Id.*

[167] *Id.* at *1.

[168] *Id.*

[169] *Id.*; *see also Rebus Sic Stantibus*, Black's Law Dictionary (11th ed. 2019) (defining *rebus sic stantibus* as "[t]he principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances").

[170] *Id.* at *8.

[171] *Id.* at *7. The court also noted "that it was plaintiff's choice not to open the restaurant once the Mall reopened to the public," and that this choice barred Vota from "seek[ing] refuge under an extraordinarily rare, equity doctrine to free itself from its contractual obligations. *Id.* at *8.

[172] *E.g.*, *1600 Walnut Corp.*, 530 F. Supp. 3d at 558; *Victoria's Secret Stores, LLC v. Herald Square Owner LLC*, 136 N.Y.S.3d 697 (N.Y. Sup. Ct. 2021) (granting motion for summary judgment where "[t]he parties agreed that [a force majeure event] would not relieve the tenant's obligation to pay rent"); *see also A/R Retail*, 149 N.Y.S.3d at 824-27 (declining to fashion "a remedy that [the parties] had expressly bargained away in the Lease").

of execution might interfere with performance many years later. As such, one would expect force majeure clauses to have some prominence in these types of arrangements. Yet they typically don't—a random review of franchise agreements of some major chains reveals that force majeure is not addressed, or if it is addressed, it appears relatively untailored to any particular circumstances and simply inserted as part of the "boilerplate" at the end of the agreement.[173]

Why is this so? The nature of the franchise relationship requires the franchisor to provide to the franchisee a license to use intellectual property rights and know-how, as well as a variety of support and assistance services, throughout the term of the relationship. On the other hand, the franchisee has relatively limited performance obligations directed towards the franchisor—typically the principal obligations are ongoing reporting and payment obligations. But, in addition and most importantly, the franchisee typically has a multitude of performance obligations relating to the public and the system's customer base in order to maintain the goodwill associated with the franchisor's brand and to ensure a consistent customer experience at all system outlets. Although this performance is not directed at the franchisor per se, it is critical to the franchisor and the franchise system to ensure success for all parties involved in the franchise system.

Franchise agreements are drafted by the franchisor and typically reflect an unbalanced approach that franchisors justify (correctly so) as being necessary to strictly maintain the standards at each franchised unit for the benefit of the system as a whole. This approach often also carries over into obligations that have no bearing on the standards of the system. Thus, many of the long-term performance obligations of the franchisor are couched as being discretionary, rather than mandatory obligations. As the scrivener of the document in which much of one's performance obligations are not mandatory, but the other party's performance obligations relating to the customer experience are extensive and important, it is little wonder that very little prominence is given to force majeure, other than possibly an afterthought in the boilerplate of the agreement.[174]

In the absence of a force majeure provision in a franchisor's form franchise agreement, one might expect the franchisee to negotiate for inclusion of a force majeure clause. Here the paths diverge between U.S. franchise agreements and international

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[173] A random selection of some major franchise chains reveals that mostly their franchise agreements do not contain force majeure clauses. The authors reviewed franchise agreements used by Wendy's, Coverall, Panera Bread, Arby's Habit Burger, Caribou Coffee, Einstein Bros., Maggiano's, Chili's, Burger King, Taco Bell, Pizza Hut, Kentucky Fried Chicken, Popeye's, and Tim Horton's. Of these chains, only Caribou Coffee, Coverall and Einstein Bros. have force majeure clauses in their franchise agreements.

[174] To the extent force majeure clauses exist in franchise agreements, they are likely to include the typical carve out that a force majeure event does not excuse failure to pay. In this respect, it should be noted that franchisee royalty payment obligations, when expressed as a percentage of sales, tend to be self-adjusting for force majeure events. If such an event causes the franchise business to be closed or to reduce its level of business, the royalties adjust to the complete loss or reduction of revenues. Hence during the COVID-19 lockdown in 2020, getting landlord lease payment relief was more meaningful to franchisees (due to monthly fixed amounts), although some franchisors also provided relief, whether in the form of fee deferrals (to help address cash flow problems) or even royalty forgiveness.

franchise agreements. U.S. agreements often are presented to the franchisee as non-negotiable (sometimes based on misguided justifications that franchise regulations inhibit negotiations) or subject to only limited negotiations—principally key business terms—on the premise that consistent administration of a multiplicity of franchise agreements and relationships is important. In this context and with a typically budget-minded franchisee client, franchisee counsel will understandably focus (with varying degrees of success) on better financial terms and renewal rights, more flexibility on key performance requirements, limited franchisor termination rights with fair pricing on purchase options, greater ability to sell the business, fewer restrictions on competitive activities, etc. Force majeure often is not on the radar screen nor a topic for negotiations that is received with enthusiasm by the franchisee client who has to pay the legal bills for the negotiations.[175]

Force majeure clauses are more prevalent in international franchise agreements. The parties' geographic distance may give the franchisee pause about weak assurances that a franchisor may (at its discretion) provide services, particularly where the franchised concept is unproven or has little traction in the host country and the foreign franchisee is at significant risk of business failure. These transactions often involve multiple units with the expectation of a significant investment in the business, setting a dynamic that tends to be much more negotiable than domestic arrangements, involving lawyers for both parties often resulting in more concrete commitments by the franchisor. As both parties consider their respective performance obligations, the parties may have different reasons for wanting a force majeure clause in this arrangement and may have commonality or different perspectives on the scope of the force majeure clause, including "catch all" provisions, appropriate remedies and process of dealing with the invocation of a force majeure event.[176]

Aside from a general force majeure clause in international franchise agreements, these types of agreements may have clauses excusing performance specifically tailored to particular events, a species of force majeure. Examples include foreign exchange provisions that outline a mechanism for avoiding the risk of immediate termination if the host country restricts the franchisee from remitting hard currency payments abroad; visa provisions that would excuse franchisor from sending personnel to a host country that unexpectedly imposes restrictions on foreign visitors; and government "no travel advisory" clauses that would similarly excuse the franchisor from sending personnel to provide assistance where they are at risk of physical harm in a country or region due to internal or external conflicts or other causes. A unique provision sometimes found in international

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[175] Contrast this with the dynamics of M&A transactions, where "material adverse event" clauses—essentially force majeure clauses—are heavily negotiated. Due to the typical length of time between signing and closing, the buyer will want to be able to walk away from the deal or renegotiate the price if intervening events have a material adverse effect on the target company. The importance of these types of clauses in this context is illustrated by deals that were terminated or renegotiated when COVID and government lockdowns occurred after signing and the target company was financially impacted by these circumstances.

[176] Of course, the approach to force majeure issues in international agreements needs to be considered in light of the choice of law governing the relationship. Although common law and civil code jurisdictions both are likely to have concepts of impossibility/impracticability and frustration of purpose and the interpretation of force majeure clauses, the scope and significance may vary significantly and influence this discussion.

franchise agreement for a country where the franchised concept is unproven is a so-called "Beta-test" or "test phase provision," again a species of force majeure. Essentially, the parties define certain financial and performance metrics that the foreign franchisee needs to meet at a limited number of test units in order to proceed with the relationship and be bound by the larger commitment of unit development contemplated by the agreement. In other words, if the test demonstrates that the franchise concept is not well received in the market, the franchisee can choose not to proceed and terminate the agreement.

Other forms of excused performance provisions for tailored situations can be found in both domestic and international franchise agreements. Examples include excused non-performance relating to minimum unit development obligations and minimum product purchase or sales requirements. Basing excused non-performance on natural disasters and other acts of God for development obligations tends not to be controversial, but other events involving, for example, government approvals are more difficult as a franchisee's actions (or inaction) may have some effect on government decision-making. Likewise, a franchisee's action or inaction can influence the failure to meet minimum purchase or sales requirements.[177]

In sum, force majeure clauses are far from ubiquitous in franchising and when included, typically have a carve-out that prevents force majeure from being invoked to excuse non-payment. That being said, a franchisee subject to a long-term agreement without a force majeure clause is not without recourse, compelled to honor contractual obligations when unforeseen events prevent or hinder performance. As noted in Section II, common law concepts of impossibility, impracticability and frustration of purpose can still be invoked. Of course, reliance on these concepts presents its own set of problems: Courts narrowly construe these concepts in their application, and reliance on the common law can lead to less predictable results than if the parties had defined in the contract the events that will excuse nonperformance. This is particularly the case with questions of foreseeability, remedies, and the process for invoking a change-of-circumstance defense.

V. Conclusion

The failure of parties to a contract to identify future events that might impair performance and allocate between them the risk and impact of such performance failures often leaves them in an unsatisfactory state when an unforeseen event occurs, particularly for the one directly impacted. Although not left without recourse, the common law concepts to be invoked, such as impossibility, impracticability, and frustration of purpose, are judicially construed very narrowly in an effort to preserve the integrity of contractual commitments and avoid a rush for judicial relief when performance challenges occur. It's sometimes hard to understand why one set of circumstances excuses performance and yet a facially similar situation leads to the opposite conclusion. The case law on these common-law concepts reveals that, even under apparently compelling

[177] Another example prevalent in hotel franchise agreements (and even more so in hotel management agreements) are clauses dealing with eminent domain. Although these clauses are at least in part intended to cover excused non-performance and right to terminate, they also deal with the allocation of proceeds in connection with government awards for the taking of property.

circumstances, the decisions turn on specific facts with highly unpredictable results. In particular, the element that the circumstances must have been "unforeseeable" to the parties at the time of contracting is a hindsight exercise that is prone to result-oriented analysis.

The force majeure clause seeks to overcome these uncertainties by defining up front the events and circumstances that excuse performance and whether such an event justifies delayed performance or excuses performance entirely. These clauses remove some of the common law uncertainties, but the party invoking force majeure as a contractual right may still have some significant hurdles to overcome, particularly if the force majeure clause is an afterthought in the boilerplate of the contract. By definition, unforeseeable events can't be foreseen, and the question is whether a particular event falls within the parameters of what is typically a string of general types of events described in the contract as force majeure, with or without a catch all of "other circumstances beyond the reasonable control of the party." If "pandemic" isn't in the list, is COVID perhaps still a "national emergency?" Perhaps not, but it may be viewed as "beyond the reasonable control of the party." If Western sanctions on Russia cause interest rates to double and the economy to collapse, can the Russian franchisee seek to excuse his performance due to "war?" And is the alleged force majeure event something the impacted party could have prevented or mitigated? Have the proper notices been given and has the impacted party taken reasonable steps to remedy whatever is hindering performance? Thus, although a force majeure clause may be helpful to an impacted party, the clause may not present a "get out of jail free" card: Among other things, the clause might not list an event unforeseeable at the time of contracting, and fair arguments might be made whether the event falls beyond "the reasonable control of the impacted party" under a catch-all provision. Again, parties face a fact-specific inquiry prone to result-oriented analysis.

Among the wide array of commercial contracts, one would expect the parties to franchise agreements to consider inserting a force majeure clause due to the typical long length of time for performance, yet these clauses are not pervasive. And the few agreements that do have force majeure clauses appear to have approached it as a simple boilerplate provision. Perhaps with COVID, continuing supply chain disruptions, and international crises, such as the war in Ukraine, more thought might be given to whether to have a force majeure clause and what exactly it should say.