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Energy Contracts: In-House Counsel, *Force Majeure* and the COVID-19 Pandemic

COVID-19 is disrupting contracts in our energy industries, impacting electric power and petroleum, and both product providers and service providers. Contracts will be breached. The phrase "*force majeure*" will be top of mind.

This paper is not legal advice. It simply reminds in-house counsel how the law treats contract disruptions and what questions are likely to be on a tribunal's mind if the dispute ends up in court or arbitration. The goal is to make it easier for in-house counsel to identify key legal issues when advising a client on whether compliance with the contract may be suspended.

Our approach reviews precedents from 12 jurisdictions, two hypothetical fact patterns and two hypothetical provisions in energy contracts. We review California, Texas, New York, Florida, Illinois, Colorado, Louisiana, New Mexico, Oklahoma, Ohio, Pennsylvania and maritime law. We address two scenarios:

- The first concerns the effect of COVID-19 on an Asian upstream parts maker. The closure of its factory allegedly prevents a U.S. company from fulfilling obligations to the developer of a solar electric generation facility.
- The second concerns the effect of COVID-19 directly on two U.S. companies engaged in drilling offshore oil and gas wells.

Sample contract language has been selected to focus the discussion for each scenario. For ease of reference, legal authorities are set out in extensive endnotes. Not every jurisdiction is covered in each scenario.

Overview

Force Majeure

There is no perfect contract. Even the lengthiest contracts for the most expensive transactions are lucky to contain language addressing the predictable range of future business risk. When parties try to address unpredictable risks – to expect the unexpected – they draft what is traditionally called a *force majeure* clause. To the extent it applies, a *force majeure* clause excuses the affected party from its obligations under the contract.[1]

A *force majeure* clause could be extremely brief: "*Force majeure* means any cause beyond the control of the party affected." In practice, the clause rarely is. With repeated use, with the drafter's urge for increasing detail, and especially with the unexamined incorporation of language through cutting and pasting from other contracts, modern clauses are long, repetitive and potentially inconsistent. A sample clause is reproduced below and illustrates the point.

As part of a contract, a *force majeure* clause is subject to all the usual rules of contract interpretation.[2] In Texas, as elsewhere, the effect of a *force majeure* clause "depends on the specific contract language[.]"[3] That said, when a court attempts to give effect to the written intentions of the parties, several jurisdictions interpret *force majeure* clauses "narrowly."[4]

When any court expresses a rule of decision by emphasizing an adverb, uncertainty follows in its wake. But subsidiary rules of decision illustrate how the principle works. The Court of Appeals of New York, for example, has stated that "[o]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused[.]" Because the clause in that case did not specifically list failure to obtain insurance, the court upheld the eviction of a tenant who failed to have the required insurance in place, despite evidence showing the tenant's failure was beyond his control.[5] In a similar vein, a California court of appeals has given a restrictive meaning to a key word in a clause. The court held that when an oil and gas lease allowed *force majeure* events to suspend "obligations of the Lessee," it construed "obligations" to refer only to the covenants in the lease, not to other contractual "conditions" in it. As a result, a lessee lost a lease because no well was actually producing at the end of the lease's term, even though *force majeure* events may have prevented the well from producing.[6]

The most frequent example of courts searching for limitations on the reach of *force majeure* clauses arises from the presence of "catch all" phrases. These follow a listing of particular *force majeure* events and often use "or any other cause," or words to that effect. Courts are likely to follow the old guide to interpretation, called *ejusdem*

generis: the catch-all phrase will cover only those events that are like the events specifically named.[7] A Texas court of appeals has added further gloss on the catch-all phrase. Because, in the court's view, the generality of a catch-all phrase makes it "unclear whether a party has contemplated and voluntarily assumed" a particular risk, the court has held as a matter of law that an event cannot be covered by the phrase unless it was unforeseeable.[8]

Noncontract Remedies

Before turning to common law or code remedies, in-house counsel must first consider the jurisdiction. Some states have not adopted doctrines of "impossibility," "frustration of purpose" or (outside the Uniform Commercial Code (UCC)) "impracticability."[9] In such a jurisdiction, no *force majeure* clause means no relief. Even with a clause, it is possible the jurisdiction might adopt the view that noncontract remedies should not apply when the parties have addressed the unexpected through contract. Now-retired Circuit Judge Richard Posner has expressed that view.[10]

Most jurisdictions have neither accepted nor rejected Judge Posner's view. In several cases, courts have silently assumed a party may invoke multiple claims to excuse performance. So when the contract lacks a *force majeure* clause, or when the breaching party does not obtain the relief it needs from the clause, that party may turn to common law, civil code or maritime law doctrines to excuse its failure to honor the contract.

One doctrine is "impossibility." States that recognize this doctrine employ one of two tests: an actual one and a figurative one. New York and Louisiana are in the former camp.[11] Colorado, among many other states, following the *Restatement of Contracts*, employs the latter. There, impossibility means "impracticability" when an unanticipated circumstance has made performance "vitally different" than what was within the parties' contemplation.[12]

Another is "frustration of purpose." While this is very similar to "impracticality," the California Supreme Court has explained what sets the frustration doctrine apart. The party seeking to excuse its failure to perform must show two things: that the risk of the event was not reasonably foreseeable and that the value of the other party's "counterperformance is . . . nearly totally destroyed."[13]

CASE 1

An American company, SupplyCo, manufactures panels for solar arrays in its plant in Nebraska. It has a very large order to supply, install and maintain panels for a 200-megawatt solar photovoltaic generation station, already under construction. The project developer and counterparty, SolarCo, faces significant time pressure to begin generating electricity under the terms of its power purchase agreement with its buyer.

Key parts for the panels are manufactured by PartsCo in Daegu, South Korea. Since Feb. 23, the Ministry of Health and Welfare has maintained its infectious disease alert at the "highest level," requesting all citizens of Daegu not to leave their homes. Honoring that request, PartsCo has closed its plant until further notice. It will not even ship parts already made and in storage. SupplyCo says it has attempted to obtain replacement parts from other manufacturers without success.[14]

SupplyCo's contract with SolarCo contains time-honored phrasing defining *force majeure*, an event excusing the parties from compliance with some or all of the contract's obligations.

> As used herein, "force majeure " means any causes or circumstances beyond the reasonable control and without fault or negligence of the party affected thereby or of its subcontractors or carriers, such as acts of God, governmental regulation, war, acts of terrorism, weather, floods, fires, accidents, strikes, major breakdowns of equipment, shortages of carrier's equipment, accidents of navigation, interruptions to transportation, embargoes, order of civil or military authority, or other causes, whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the performance of an obligation under the Contract, but specifically excluding economic factors alone.

Can SupplyCo avoid liability for breach under these circumstances? Our starting point is the text of the *force majeure* clause. PartsCo's decision to suspend operations appears to be a "circumstances beyond the reasonable control" of SupplyCo. The COVID-19 pandemic might be called an "act of God," the statements of the Ministry of Health and Welfare might be an "order of civil . . . authority," and any of the above might be an "other cause[], whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the performance of an obligation under the Contract."

That is a promising start for SupplyCo. But questions that might cross the mind of a tribunal could include the following: Should it matter whether the contract between SupplyCo and SolarCo was entered into before or after the first announcement about the novel coronavirus?[15] Should it matter that the *force majeure* clause does not expressly list "epidemic" or "pandemic" in its enumeration of causes?[16] Should it matter that the South Korean government "requested," but did not "order," Daegu's citizens to stay at home?[17] Should it matter whether the parties believed that parts "made in Daegu" were preferred over those from other sources?[18] Finally, what is the import of the parties' phrase "specifically excluding economic factors alone"? SupplyCo says it could not find alternative parts, but was that simply a matter of cost?[19]

In its discussions with SolarCo, SupplyCo's opening position would likely be that COVID-19 itself, or PartsCo's response to it, falls into one of the enumerated events and the catch-all phrase and that SupplyCo had no ability to control the virus or the response to it. SupplyCo would rely on the precedents holding that circumstances like these are plainly covered by the *force majeure* clause.[20]

SolarCo's opening response would emphasize the absence of the words "epidemic" and "pandemic" in the clause. It would rely upon those cases rejecting expansive readings of *force majeure* clauses when catch-all phrases are so broadly worded that they seem to negate the significance of the particular listing preceding the catch-all. Indeed, the catch-all here expressly attempts to nullify both *ejusdem generis* (by covering events "of the same or different nature" as those specified) and foreseeability (by covering events "foreseen or unforeseeable"). Some precedent supports the view that enforcing language like this may largely undo the rest of the contract.[21]

CASE 2

Two U.S. companies, OilCo and DrillCo, have a contract under which DrillCo is to drill up to four wells in the deeper waters of the Gulf of Mexico. The drilling program is to begin in May.

The wells will be drilled from a floating vessel specially designed to hold the equipment and house the crew, who typically works two straight weeks on the rig followed by two weeks off duty. While on the rig, OilCo and DrillCo employees are in close proximity, even when working in the open air, but certainly so when in control rooms or in accommodations when they are not on shift. The crew changes are made by helicopter flights between the vessel and a shore base.

Both companies take concerns about COVID-19 very seriously. But the logistical and financial planning for the 2020 drilling program has been at least many months in the making. One company or the other faces substantial financial loss.

President Donald Trump's administration has issued guidelines for Americans to follow to combat the pandemic. It has not yet followed states such as California, New York, Illinois and others in ordering nonessential workers to stay home. And even if it had, these workers might be deemed essential.

The contract contains the following *force majeure* provision, under which OilCo is referred to as the "Operator":

> Except as otherwise provided . . . , each party to this Contract shall be excused from complying with the terms of this Contract, except for the payment of monies when due, . . ., if and for so long as such compliance is hindered or prevented by riots, strikes, wars (declared or undeclared), insurrection, rebellions, piracy, terrorist acts, civil disturbances, dispositions or order of governmental authority (but specifically excluding the inability of the Operator to obtain drilling permits), whether such authority be actual or assumed, epidemics, a pandemic, acts of God (except, however, adverse sea or weather conditions including loop, eddy and other adverse currents), or by any act or cause (other than financial distress or inability to pay debts when due) which is reasonably beyond the control of such party, such cause being herein sometimes called "force majeure."

For simplicity, the reader should assume (1) this contract is a "maritime contract,"[22] (2) other provisions of the contract are not germane, (3) drilling must begin in May or substantial liquidated damages provisions will apply and (4) the phrase in the clause "except for the payment of monies when due" is not germane. Can DrillCo avoid liability if it fails to drill on schedule?

In-house counsel (for OilCo and DrillCo) would likely focus only on two phrases or words in the *force majeure* provision. First is the phrase "hindered or prevented." That suggests the *force majeure* provision could be triggered by some effect less than full "prevention" of compliance. Second is, of course, the word "pandemic." COVID-19 checks that box. The presence of "pandemic" as an enumerated event makes it unnecessary to address "dispositions or order of governmental authority" or the catch-all phrase at the end.

The question then comes down to the meaning and application of the word "hindered." The meaning of the word, unless it is found ambiguous, is a question of law. In answering what the word means, what are the guideposts?[23] It is undefined in the contract. Does the word appear in other parts of the contract in a way that might shed light on the parties' intent? Will a court be tempted to apply notions of impracticability from the common law?[24]

The more difficult questions may be the factual ones: How much of a hindrance? How much of a risk? For example, could the risk be sufficiently mitigated by mandating that all persons on the vessel wear N95 respiratory masks? If yes, will that equipment be available by the date when performance is due? Is there other personal protective equipment that might allow workers to do their jobs without unacceptable risk of infection? And what level of risk is acceptable? These are issues for which current case law provides indirect guidance at best.

Conclusion

In-house counsel studying whether a *force majeure* clause or other doctrine may be invoked know that the burden of proof to establish an excuse from performance will rest on the party invoking it. As discussed above, the general tendency in the courts is to fashion rules limiting the circumstances when excuse may be successfully invoked. That said, COVID-19 is unlike anything the law has seen in at least a century. Forecasting outcomes here is itself a hazardous undertaking.

ENDNOTES

1 We do not address provisions in *force majeure* clauses concerning notice to the other party, limitations on how long the *force majeure* circumstance lasts or limitations on the obligations excused.

2 Texas precedent summarizes the principles well.

"The party seeking to excuse its performance under a contractual *force majeure* clause . . . bears the burden of proof to establish that defense. As we interpret the parties' contract, including the *force majeure* provisions, our primary concern is to determine the parties' intent. We must examine the contract as a whole to harmonize and effectuate all of its provisions so that none are rendered meaningless. We look at how a reasonable person would have used and understood the language, by considering the circumstances surrounding the contract negotiations and purposes the parties intended to accomplish by entering in the contract."

Virginia Power Energy Mktg., Inc. v. Apache Corp., 297 S.W.3d 397, 403 (Tex. App. – Houston [14th Dist.] 2009, pet. denied) (citations omitted). Adhering to various articles in the Louisiana Civil Code, such as Articles 2046 and 2050, Louisiana courts take a similar approach. *American Deposit Ins. Co. v. Myles*, 783 So.2d 1282, 1286 (La. 2001).

3 *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App. – Houston [14th Dist.] 2004, no pet.). The U.S. Court of Appeals for the 5th Circuit has held there is no general principle of *force majeure* that supersedes or specially illuminates the actual words of the contract. *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990). *See also Maralex Res., Inc. v. Gilbreath,* 76 P.3d 626, 636 (N.M. 2003); *Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016). Illinois courts follow the "four corners" rule when interpreting contracts. *Fleet Bus. Credit, LLC v. Enterasys Networks, Inc.*, 816 N.E.2d 619, 630 (Ill. Ct. App. 2004) (internal quotations and citations omitted). Maritime law also focuses on the language the parties specifically negotiated in the contract. *Advanced Seismic Technology, Inc. v. M/V Fortitude*, 326 F.Supp.3d 330, 336 (S.D. Tex. 2018) (reading "obligations" in a *force majeure* clause not to cover a separate "warranty and assumption of liability" clause elsewhere in the contract).

4 *Kel Kim Corp. v. Central Mkts., Inc.*, 519 N.E.2d 295, 296-97 (N.Y. 1987); *TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W. 3d 176, 181* (Tex. App – Houston [1st Dist.] 2018, pet. denied) (citations omitted) ("The rules of contract interpretation require that the contracting parties' intent be determined based on the language included in their contract, not by 'definitions not expressed in the parties' written agreements.'").

5 *Kel Kim Corp.*, 519 N.E. 2d at 296. Following New York precedent, a federal district court, in a case governed by Florida law, has also held that *force majeure* clauses are narrowly construed and apply only if the event is specifically identified in the clause. *ARHC NVWELF01, LLC v. Chatsworth at Wellington Green, LLC*, No 18-80712, 2019 WL 4694146 *3 (S.D. Fla. Feb. 5, 2019) *no cert*. Despite the frequency of hurricanes, "[p]recedent on the enforcement of *force majeure* clauses is limited in Florida." *Id.*

6 *San Mateo Cmty. Coll. Dist. v. Half Moon Bay L.P.*, 65 Cal. App. 4th 401, 411-12 (Cal. App. 1998).

7 In *Stepnicka v. Grant Park 2 LLC*, Nos. 1-11-3229, 1-11-3236, 1-11-3235, 1-11-3230, 2013 WL 3213061 *15 (Ill. App. Ct. June 21, 2013), the court rejected a claim that a catch-all phrase excused performance for any cause "beyond the reasonable control of the Seller." Applying *ejusdem generis*, the court found the cause was not like the specifically listed events in the *force majeure* clause. "Had defendants intended all causes beyond the reasonable control of Seller were contained in paragraph 9 [the *force majeure* clause], it would have been a simple matter for the Seller as drafter to have drafted paragraph 9 with that intent *by omitting any specific causes* of delay" (emphasis added). Texas courts also have applied the doctrine when interpreting *force majeure* provisions in contracts. *See TOC Olmos,* 555 S.W.3d at 185-86 (citing to Texas Supreme Court cases in support of applying the doctrine and explaining that the general phrase "any other cause not enumerated herein" in a *force majeure* provision must be limited to the types of events specified in the plain language of the clause). Similarly, in Snavely Siesta Associates, LLC v. Senker, 34 So. 3d 813 (Fla. App. 2010), a Florida court rejected a claim that the catch-all provision would excuse performance for "routine problems" such as "rain, wind and lightning storms" when the language of the clause included "circumstances beyond the Seller's control, such as acts of God, or any other grounds cognizable in Florida contract law as impossibility or frustration of performance, including, without limitation, delays occasioned by rain, wind and lightning storms." The court reasoned that, because the phrase "circumstances beyond the Seller's control" was tethered to the additional phrase "such as acts of God, or any other grounds cognizable in Florida contract law as impossibility of frustration of performance," the catch-all phrase restricted permissible delays to those whose grounds would be cognizable in Florida contract law under those doctrines.

8 *TEC Olmos,* 555 S.W.3d at 184. A Louisiana court of appeals has similarly rejected a broad reading of a *force majeure* clause· *Hanover Petroleum Corp. v. Tenneco Inc.·* 521 So.2d 1234, 1238 (La. App. 3d Cir. 1988) ("If this interpretation were correct, the contract would state that either party could escape responsibility if events beyond the party's control made performance wither difficult or unprofitable."). California courts have refused to apply *force majeure* provisions to events not specifically included in *force majeure* provisions when such events are foreseeable. In *Free Range Content, Inc. v. Google Inc*, No. 14-CV-02329-BLF, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016), the court declined to excuse "invalid activity" as *force majeure* where the risk of such activity was explicitly contemplated in terms agreed to by the parties but was not included in the *force majeure* provision. In *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.,* 178 F. Supp. 2d 1099, 1113-14 (C.D. Cal. 2001), the court held that the *force majeure* provision of a supply agreement, which excused breach by the supplier caused by "regulatory or governmental action," did not encompass the FDA shutdown of a plant that produced drugs for the supplier for violations of federal regulations, in part because the shutdown was foreseeable based on the plant's prior violations. The court went on to state, "[W]hen parties expressly contemplate a known risk of a regulatory prohibition, they should be expected to allocate that risk expressly, rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different." One court applying Florida law interprets contracts with catch-all language similarly. *See In re Flying Cow Ranch HC, LLC*, No. 18-12681-BKC-MAM, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018) (stating that a party should not rely on general or catch-all language to cover foreseeable events, as the party must expressly set those out in a contract to relieve itself of liability).

9 For example, "frustration" is not a defense to breach under Indiana precedent. *Ross Clinic, Inc. v. Tabion*, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981) (*citing Krause v. Bd. of Trustees*, 70 N.E. 264, 265 (1904)). In Louisiana, which has not adopted the UCC, commercial impracticability is not a defense to breach.

10 Sitting by designation as trial judge in *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp.850 (N.D. Ill. 1990), Judge Posner explained that when "the parties include a *force majeure* clause in the contract, the clause supersedes the doctrine" of impossibility. *Id.* at 855. Judge Posner cited two cases that do not state the principle as directly as he did. *See Wiggins v. Warrior River Coal Co.*, 696 F.2d 1356, 1359 (11th Cir. 1983) (applying Alabama law and holding that "[i]mpossibility does not excuse nonperformance where the promisor has indicated an intent to assume the risk thereof") and *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277-78 (7th Cir. 1986) (Posner, J.) (after ruling that the court "need not decide whether a *force majeure* clause should be deemed a relinquishment of a party's right to argue impracticability or frustration," it adopted the narrower holding that the doctrines could not be applied in the case before it because the contract "explicitly" assigned the particular risk at issue). For a view from a Florida appeals court, *see Am. Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. App. 1998) (considering whether an event outside the *force majeure* clause should excuse nonperformance under the doctrine of impossibility, noting that "[t]he doctrine of impossibility of performance should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement.").

11 "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." *Kel Kim Corp.*, 519 N.E.2d at 296. Under Articles 1873, 1875 and 1876, Louisiana's Civil Code has a counterpart doctrine for "fortuitous event[s]," which also requires actual impossibility.

12 *City of Littleton v. Employers Fire Ins. Co.*, 453 P.2d 810, 812 (Colo. 1969). *See also Golsen v. ONG Western, Inc.*, 756 P.2d 1209, 1221 (Okla. 1988) (Kauger, J., concurring) (collecting cases, explaining "commercial impracticability" under Article 2 of the UCC and why it is so rarely successfully invoked); and *Summit Properties, Inc. v. Pub. Serv. Co. of New Mexico*, 118 P.3d 716, 727 (N.M. Ct. App. 2005) (following the "impracticality" approach, requiring that the defendant establish "that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not [defendant's] fault, and (4) [defendant] did not assume the risk of the occurrence."). Under California law, the doctrine of legal impossibility has been expanded to include "impracticability due to excessive and unreasonable expense," though performance may still be technically possible. *City of Vernon v. City of Los Angeles*, 290 P.2d 841, 845 (1955). Referred to as "commercial frustration" in Illinois, the doctrine is a viable defense, but "is not to be applied liberally." *Northern Illinois Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049, 1059 (Ill. App. Ct. 1984) (quoting *Smith v. Roberts*, 54 Ill.App.3d 910 (Ill. App. Ct. 1977)). The *Smith* decision sets out a two-part test that requires the impacted party to show that (1) the frustrating event was not reasonably foreseeable and (2) the value of counterperformance has been totally or nearly totally destroyed by the frustrating event. *Id.*

13 *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1948) (holding that (1) the risk of a lease for an automobile distributorship becoming unprofitable was foreseeable, as it was entered into after President Franklin Delano Roosevelt had invoked the National Defense Act to convert automotive plants to the production of military vehicles, and (2) the value of the lease, and thereby the lessee's counterperformance, was not destroyed, as "[t]he sale of automobiles was not made impossible or illegal but merely restricted and if governmental regulation does not entirely prohibit the business to be carried on at the leased premises but only limits or restricts it, thereby making it less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance."). However, "where a lease restricts and limits the use of premises let to a particular specified purpose" and such use becomes unlawful due to the enactment of governmental statutes, "the subject matter of the contract is destroyed and the covenant of such lease will not be enforced against either party thereto." *Davidson v. Goldstein*, 136 P.2d 665, 667 (Cal. App. Dep't Super. Ct. 1943). For example, in *Indus. Dev. & Land Co. v. Goldschmidt*, 206 P. 134, 136 (Cal. Ct. App. 1922), the doctrine of frustration might have applied because the lease specifically restricted the use of the premises as a saloon and a national prohibition made the sale of alcoholic beverages illegal. In Florida, the doctrine of frustration of purpose is broader than the doctrine of impossibility. *Hopfenspirger v. West*, 949 So. 2d 1050, 1054 (Fla. Dist. Ct. App. 2006) (stating that the "doctrine is not limited to strict impossibility, but includes 'impracticability' due to unreasonable expense" where performance of a contract had become futile).

14 Because SupplyCo attempted to find an alternate source, it likely would avoid the fate of an oil and gas company that attempted to invoke *force majeure* when the supplier providing drilling casing was incapacitated by a strike. The California Supreme Court held that, although "strike" was identified as a *force majeure* event in the contract, the company was still obliged to find the casing elsewhere, even though the alternate supply was costlier. *Butler v. Nepple*, 354 P.2d 239, 245 (Cal. 1960).

15 If the contract was entered into after the announcement of COVID-19, performance under a contract governed by Texas law would not be excused by reason of an "act of God." *See R & B Falcon Corp. v. Am.. Expl. Co.*, 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001) (noting that the phrase "act of God" refers to an event that could not have been prevented by "any amount of foresight or prudence"). Under California law, whether the contract was entered into before or after the first announcement of the novel coronavirus would be significant, as it directly relates to the foreseeability of the *force majeure* event. "Under California law, unless a contract explicitly identifies an event as a *force majeure*, the event must be unforeseeable at the time of contracting to qualify as such." *Free Range Content* 2016 WL 2902332, at *6. If the contract was entered into after the first announcement of the coronavirus, California courts would likely find that at least some fallout due to the virus was foreseeable and therefore, because it was excluded from the *force majeure* clause, decline to excuse performance. Florida courts recognize that a *force majeure* clause can cover both foreseeable and unforeseeable events. In *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849 (11th Cir. 2009), the 11th Circuit noted that *force majeure* clauses that contain foreseeable events are enforceable, so long as the foreseeable events are beyond the control of the performing party. Under Oklahoma law, a reviewing court would most likely find a fact pattern whereby the parties entered into a contract after the announcement of the novel coronavirus to be prohibitive of a claim of commercial impracticability because two of the essential elements of the Oklahoma statute could be defeated (i.e., (1) that the nonperforming party's performance was made impracticable by the occurrence of a contingency or condition, the nonoccurrence of which was basic assumption of contract, and (2) that the occurrence making performance impracticable was unforeseeable). It is still possible, however, that a reviewing court would entertain a defense of commercial impracticability that is asserted in the beginning phases of the outbreak based on the theory that (1) no one could foresee the potential impact the virus would have on the worldwide supply chain and (2) the nonoccurrence of a major worldwide outbreak that affected the global supply chain is still a basic assumption of the contract. Certainly, though, as time marches on and parties become more aware of the impact of this virus through media outlets or otherwise, and the potential for prolonged interruptions to the supply chain, it will become more and more difficult for a party to assert a claim of commercial impracticability because the parties can no longer argue they were not aware of or could not foresee the potential for interruption to the supply chain. *See Golsen,* 756 P.2d at 1221 (Kauger, J., concurring). In the absence of a contractual provision, Illinois courts will require that the party claiming *force majeure* establish that the frustrating event was not foreseeable at the time the contract was made. *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F.Supp.2d 913 (N.D. Ill. 2009). In *Ner Tamid*, a real estate developer contracted with the Ner Tamid Congregation of North Town to purchase property Ner Tamid owned in Chicago. After postponing the originally scheduled closing, the developer refused to go forward with the deal because he could not obtain the kind of financing he hoped to receive. Because the purchase contract contained no financing clause, the developer pleaded that the downturn in the economy (known now as the Great Recession) was "unanticipated" and "unforeseeable" and therefore excused his nonperformance. In ruling against the developer, the court noted that the developer produced insufficient evidence to support his claim that the economic downturn was unforeseeable.

16 If an epidemic or pandemic is not expressly listed, a Texas court would look to whether it was foreseeable at the time of contract formation. *TEC Olmos*, 555 S.W.3d at 185 (explaining broad catch-all language generally requires a demonstration of foreseeability). For California, *see Free Range Content,* 2016 WL 2902332, at *6; *see also Watson Labs.,* 178 F. Supp. 2d at 1113-14. In Florida, an "act of God" for purposes of the doctrine of impossibility will include an event that is so extraordinary and unprecedented that human foresight could not anticipate or guard against it, and the effect of such event could not be prevented or avoided by the exercise of reasonable prudence, diligence and care. *Seaboard Air Line Ry. Co. v. Mullin*, 70 Fla. 450 (1915). Although Florida case law interpreting *force majeure* clauses is limited, at least one Florida court has adopted this standard for the term "act of God" when incorporated within *force majeure* clauses. *Florida Power Corp. v. City of Tallahassee*, 18 So. 2d 671 (Fla. 1944).

17 In Texas, an unforeseen, intervening act of a competent government agency may constitute a *force majeure* event. *See Frost Nat'l Bank v. Matthews*, 713 S.W.2d 365, 368 (Tex. App. – Texarkana 1986, writ ref'd n.r.e.). However, the impact of any such governmental order or regulation must be more than mere speculation. *Anadarko Petroleum Corp. v. Noble Drilling* (U.S.), LLC, No. CIV-H-10-2185, 2012 WL 13040279, at *18 (S.D. Tex. May 3, 2012). In *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576 (2nd Cir. 1993), the court held that a New York-based manufacturer established the affirmative defense of "commercial impracticability" to a distributor's breach of contract claim, where the manufacturer showed that it had complied in good faith with the federal government's "informal requirements" prohibiting it from selling certain products for export to Iran. Id. at 580 (citing N.Y. U.C.C. § 2-615 and cmt. 10). The manufacturer had agreed to the requirements through a compromise with relevant federal officials, and there was "overwhelming and uncontradicted evidence" that the government would not allow the manufacturer to continue the sales at issue (indeed, the government had the power to "compel compliance" if the manufacturer did not adhere to the voluntary restrictions). *Id.* at 578-80. The court also held that the *force majeure* language set forth in the parties' agreements, which relieved the manufacturer of the obligation to perform in the event of "governmental interference," applied to this case. *Id.* at 580. In Illinois, whether a government or regulatory order compelled a party's nonperformance is a question of law for the court to decide. In *Northern Illinois Gas*, the court determined that a rate order denying a public utility's request to increase its prices for natural gas was not a government order compelling nonperformance on a long-term fixed quantity purchase agreement for natural gas feedstock.

18 In the interest of brevity, we use "made in Daegu" to convey that the parties' contract may contain extensive specifications about the quality and properties of parts going into the panels. In determining whether the closing of the factory in Daegu was the cause of SupplyCo's breach, in-house counsel must explore whether there were sources of parts of comparable quality that SupplyCo failed to purchase from. In this example, if the parties intended that the parts come from a particular factory in Daegu, and if the closure of the

factory was a *force majeure* event, at least one Texas court would not impose a duty to seek alternate sources for the parts. *Virginia Power Energy Mktg.*, 297 S.W.3d at 403 (parties agreed that gas was to be delivered to a specified location and the location was destroyed by Hurricane Katrina – a circumstance within the *force majeure* clause; therefore, the seller had no obligation to deliver to an alternate location).

19 Some jurisdictions hold that a change in circumstances making the seller unable to sell a product at a profit is not "a *force majeure* event." *Golsen v. ONG Western, Inc.*, 756 P.2d at 1213; *Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex. App. – Houston [1st Dist.] 1987, no writ) (citing *Alamo Clay Prod., Inc. v. Gunn Tile Co. of San Antonio, Inc.*, 597 S.W.2d 388 (Tex. Civ. App. – San Antonio 1980, writ ref'd n.r.e.); *see Measday v. Kwik–Kopy Corp.*, 713 F.2d 118, 126 (5th Cir. 1983), and *Mainline Inv. Corp. v. Gaines*, 407 F. Supp. 423, 427 (N.D. Tex. 1976)) ("An economic downturn in the market for a product is not such an unforeseeable occurrence that would justify application of the *force majeure* provision, and a contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated."). But *see Smith v. Long*, 578 P.2d 232 (Colo. App. 1978), where the court found that a mineral lessee was excused from a work requirement of $8,000 per year under a provision excusing performance of the requirement "in the event there exists no market for developed ore." Looking to the parties' correspondence before the controversy arose, the court found that the "parties intended the application of a profit standard to the term 'market,'" and that "the lessee does not have an obligation to engage in an unprofitable endeavor." *Id.* at 234. *Cutter Labs., Inc. v. Twining*, 221 Cal. App. 2d 302, 316, 34 Cal. Rptr. 317, 325 (Cal. Ct. App. 1963) (holding that "[t]he rule of frustration was never intended to apply to a contract . . . merely because what seemed advantageous to the seller at the time, later turned out to be a bad bargain."). In Florida, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless and expensive to the performing part. *See Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267, 1269-70 (Fla. Dist. Ct. App. 1985) (the "feelings of financial frustration do not necessarily equate to findings of frustration or impossibility under the law.").

20 *See* note 3, *supra*. *See also Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850-51 (Ohio Ct. App. 2016) (enforcing a "broadly written" *force majeure* clause).

21 *Hanover Petroleum. Corp.*, 521 So.2d at 1238 ("If this interpretation were correct, the contract would state that either party could escape responsibility if events beyond the party's control made performance wither difficult or unprofitable."). *See also Golsen*, 756 P.2d at 1214 (the court refuses to apply the phrase "failure of markets" in a *force majeure* clause to undue five pages of contract devoted to contingencies around the price of natural gas); *TEC Olmos*, 555 S.W.3d at 184 ("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.").

22 *In re Larry Doiron, Inc.*, 879 F.3d 568, 575 (5th Cir. 2018) (en banc), cert. denied, 138 S. Ct. 2033 (2018) ("Our cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity."). The clarity of the word "pandemic" in the *force majeure* clause above forestalls the need for precise explanation of the maritime law of contracts here. It suffices to say the parties to a maritime contract can choose some other source of law to govern their disputes, and absent compelling reasons that choice will be enforced. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972). Absent a choice of law clause, the maritime rules of interpretation will still feel familiar to the non-admiralty attorney, for "the general maritime law, as developed by the judiciary . . . is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *E. River. S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986) (citations omitted). Therefore, many cases in U.S. courts decided under the maritime law of contracts will follow "the general principles of contract interpretation." *World Fuel Serv. Singapore Pte, Ltd. v. Bulk Juliana M/V*, 822 F.3d 766, 774 (5th Cir. 2016).

23 *R&B Falcon Corp.* lays out a district court's analysis of a *force majeure* clause in a maritime (offshore drilling) contract where the law of Texas was followed in lieu of the general maritime law of contracts. A drilling unit's leg was bent most likely due to seabed anomalies when the rig was being placed on station and *force majeure* was declared as a result. In analyzing the *force majeure* provision, the district court held the contract was not ambiguous (the operative clause was similar to the one in the example here) and, since seabed anomalies or unknown causes were not listed as act of God events, or as events beyond the control of the parties, the accident did not fall within the clause in the contract. The court looked to the specific language the parties' bargained for in the contract to determine intent, rather than resorting to any traditional definition of the term *force majeure* and "[c]ontractual terms are controlling regarding *force majeure* with common law rules merely filling in gaps left by the document." The agreement itself defined the application, effect and scope of *force majeure*. 154 F.Supp.2d at 973 (quoting *Sun Operating L.P. v. Holt*, 984 S.W.2d 277, 283 (Tex. App – Amarillo 1998)).

24 Commercial impracticability in the maritime context has been analyzed as: "Even though the owner is not excused because of strict impossibility, it is urged that American law recognizes that performance is rendered impossible if it can only be accomplished with extreme and unreasonable difficulty, expense, injury, or loss." *American Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (2nd Cir. 1972) (case arising out of the closure of the Suez Canal in 1967 due to war in the Middle East). The closure of the Suez Canal due to war in the Middle East required a vessel to transit the Cape of Good Hope and arrive 30 days later than initially planned, as well as travel approximately 8,300 extra miles. This was not considered to be "extreme and unreasonable difficulty." The court also held that the increased cost (less than one-third over the agreed-upon amount) was not enough to constitute commercial impracticability, and a mere increase in cost is not a sufficient excuse for nonperformance. In *American Trading*, the route taken was well recognized even though it resulted in a much longer and more expensive transit. The increase in cost must be an "extreme and unreasonable expense." Here, perhaps because there would be additional expenses and delays coupled with the risk to personnel due to the nature of the pandemic (increased danger or risk to personnel was not present in *American Trading*), a court may reach a different result.

Commercial impracticability to excuse further performance has been found when the increased cost to repair a vessel that was damaged while being converted was more than twice the fair market value of the vessel, the vessel was old, and the vessel would be subject to reinspection and recertification, requiring additional improvements. *Asphalt Int'l, Inc. v. Enter. Shipping Corp., S.A.*, 514 F. Supp. 1111 (S.D.N.Y. 1981). Cases from Texas and Ohio, while not controlling, may be instructive. In *Haverhill Glen, LLC*, an Ohio court of appeals rejected the argument that a party's access to the property had to be "completely denied" because the *force majeure* clause covered actions that "prevented or delayed" access, a phrase the court found "quite broadly written." 67 N.E.3d at 850-51. *See also TEC Olmos*, 555 S.W.3d at 176 (discussing, where the contract contemplated a party's performance being "prevented or hindered" by a *force majeure* event, whether such event must have been foreseeable, and further assessing whether the liquidated damages provision in the contract was a "reasonable forecast of actual damages by considering the time of contracting, not the time of breach.").

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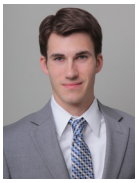

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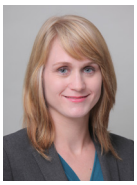

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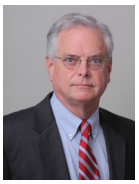

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