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Finding Our New Normal: Reevaluating Force Majeure Within Oil and Gas Contracts in the Wake of COVID-19

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PIPER HAMPTON*

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Introduction

2020 provided the American oil and gas industry with a myriad of unprecedented problems. The novel coronavirus, COVID-19, sits predominately at the root of these unprecedented problems. Originating in Wuhan, China, as early as December 2019, COVID-19 has quickly swept across the globe, immensely impacting public health, travel, and global industry. Foreign and domestic industry alike incurred substantial economic blowback with lasting consequence. Among the industries most impacted by the global pandemic is the oil and gas industry. Global travel restrictions, international price disputes, and looming storage concerns have effectively thwarted the industry, causing panic and confusion among industry officials.

This comment will analyze the implications of exercising force majeure provisions in oil and gas contracts. Specifically, this comment will analyze whether COVID-19 fits within the ambit of an affirmative defense to contractual non-performance.

Part one will outline the basic structure of an oil and gas lease. Part two will define the concept of force majeure and its applicability within an oil and gas lease. Additionally, part two will discuss situations in which force majeure is invoked both generally and in relation to oil and gas leases. Part three introduces COVID-19's impact on the oil and gas industry from both a foreign and domestic perspective. Part four will discuss whether COVID-19 can serve as an affirmative defense to contractual performance. Part four will also introduce alternative defense to non-performance and whether COVID-19 justifies contractual relief within each defense. Finally, part five will discuss whether contracting parties should account for COVID-19 when negotiating contracts in the future.

The Structure of an Oil and Gas Lease

An oil and gas lease generally consists of a habendum clause, a granting clause, and various savings clauses. Oil and gas leases are fundamentally structured on a two-term basis. Habendum clauses are standard staples in any ordinary oil and gas lease used to define a primary term to the lessee for the development of the property.[1] The primary term of an oil and gas lease is fixed, while a secondary term is imposed variably—most notably structured to continue so long thereafter as oil or gas is produced.[2] Production is requisite to maintain any lease. Failure to produce terminates the lease.[3] To determine whether production, or lack thereof, withstands termination depends largely on jurisdiction.[4] The majority approach, followed by states including Texas, interprets production to mean actual production. Alternatively, the minority approach, followed by Oklahoma, uses a capable of production theory, where a demonstrated capability to produce survives termination under the habendum clause.[5]

Lease termination automatically occurs where production is wholly absent in the primary term.[6] If production occurs within the primary term but ceases before its expiration, such cessation usually does not result in lease termination.[7] However, if cessation occurs in the secondary term, lease cancellation is likely, absent a savings clause to the contrary.[8]

When certain actions amount to cancellation under contractual terms, we look to savings clauses. Savings clauses in an oil and gas lease exist to circumvent lease cancellation for failure to satisfy agreed-upon terms within the habendum clause. Common savings clauses include continuous drilling clauses, dry-hole clauses, cessation of production clauses, and force majeure.[9]

Cessation of production is both a doctrinal and clause-bound concept.[10] To avoid lease termination, the cessation must be temporary.[11] Temporary cessation arises where production completely ceases or ceases to produce in

1. Wiser v. Enervest Operating, LLC, 803 F. Supp.2d 109, 118 (N.D.N.Y. 2011).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. 2 KUNTZ, LAW OF OIL AND GAS § 26.8 (2021).
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.

paying quantities.[12] The classification of temporary cessation requires courts to look at three factors: (1) the cause of cessation, (2) the time required to reasonably restore production, and (3) the diligence exercised by the lessee in restoring production.[13]Additionally, courts consider voluntariness.[14] If the cessation is voluntary, the cessation is likely classified as permanent and subject to forfeiture, despite satisfying other factors that may indicate temporary cessation.[15] Economic considerations are among the most frequently cited reasons for cessation.[16] Oil price fluctuations may justify cessation under appropriate circumstances.[17] However, that determination may differ in capable-of-production states. Oklahoma courts generally hold that where the capability of production exists, a voluntary cessation may not terminate a lease.[18] Similarly, Oklahoma courts have also upheld non-termination where production ceased to provide paying quantities.[19] To solidify this rationale, the Oklahoma Supreme Court in *Pack v. Santa Fe Minerals* signified that "[a] lease continues in existence so long as the interruption of production in paying quantities does not extend for a period longer than reasonable or justifiable in light of the circumstances involved."[20] Further, the court maintains that "under *no* circumstances will cessation of production in paying quantities *ipso facto* deprive the lessee of his extended-term estate."[21]

Force Majeure Generally

Force majeure is defined as non-performance by a party due to an impediment beyond party control.[22] Usually, such an impediment must bear no reasonable expectation of occurrence or avoidance.[23] When a qualifying circumstance manifests, parties are relieved of all or part of the

12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*. *See also* Cotner v. Warren, 1958 OK 208, 330 P.2d 217; Pack v. Santa Fe Minerals, 1994 OK 23, 869 P.2d 323; Geyer Brothers Equip. Co., v. Standard Resources, L.L.C., 2006 OK CIV APP 92, 140 P.3d 563.
19. Stewart v. Amerada Hess Corp., 1979 OK 145, 604 P.2d 854.
20. 1994 OK 23, ¶ 10..
21. *Id*.
22. 14 CORBIN ON CONTRACTS § 77.1 (2020).
23. *Id*.

performance of the outlined contract.[24] Though force majeure is rooted in common law, the events that bring about its application are rarely defined. Instead, what constitutes a qualifying circumstance largely relies on the express events set out in each contract and whether those circumstances are foreseeable to both parties at the execution of the contract.[25]

Notice is a fundamental component to relieving non-performance. If a party fails to give notice of an event detrimental to performance, then it faces the possibility of relinquishing its right to assert force majeure in the event of non-performance.[26]

Force majeure presents itself uniquely in oil and gas leases as compared to any other ordinary contract. Given the unique nature of an oil and gas lease, force majeure subsequently provides a specific function not recognized in an ordinary contract.[27] Oil and gas leases provide that consideration is dependent upon the payment of royalties.[28] Payment of royalties requires due diligence on behalf of the lessee.[29] The issue of nonperformance in an oil and gas lease leads to a greater likelihood of courts finding for the termination of the subsequent lease.[30] This is due to the potential for irreparable harm suffered by the lessor if such performance doesn't provide said lessor with the benefit of leasing his land.[31]

Eugene Kuntz, renowned oil and gas law expert, defines three questions with respect to a supposed force majeure event.[32] The first question is whether the obligation or performance in question is covered by the force majeure clause.[33] The second question is whether the event that prevented performance is described in the clause.[34] Finally, the third question is whether the event in question effectively prevented performance by the lessee.[35] The first question is straightforward, as specific obligations that are excused "necessarily excludes others".[36] As to the second question,

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24. *Id*.
25. *Id*.
26. Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157 (W.D. Okla. 1989).
27. Joan Teshima, Annotation, *Gas and oil lease force majeure provisions: construction and effect*, 46 A.L.R.4th 976, § 2[a] (1986).
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*.
32. Kuntz, *supra* note 6, at § 53.5.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.

Kuntz suggests that the specific event must be noted within the clause to apply.[37] If the clause merely states excusal of performance due to a circumstance "beyond the control of [the] lessee," then unspecified events may qualify.[38] The third question establishes in-part a but-for causation test.[39] Essentially, the question reads, but-for the event, would performance have occurred? Further, the question requires the specific event to be the cause of the non-performance.[40] Courts recognize that materiality is also an important consideration.[41] To excuse performance, an actual, material hindrance must occur.[42] Further, the performance must be prevented and not merely made more expensive or inconvenient by the force majeure.[43]

Courts consider force majeure as a modifier to both the primary and secondary terms of a habendum clause within an oil and gas lease.[44] A specific example of this consideration is seen in *Beardslee v. Inflection Energy, LLC*.[45] Here, producers sought to employ force majeure to extend the primary term of their lease after the imposition of a hydraulic fracturing moratorium.[46] The court found that the force majeure clause did not modify the primary term of the lease.[47] Absent any express language to the contrary, the habendum clause in the lease does not incorporate the force majeure clause.[48] As to the secondary term, the court held that the force majeure provision did provide modification.[49] In this case, the force majeure clause contained express language surrounding delay or interruption in drilling or production.[50] Because no production occurred in the primary term, any force majeure provision with language mentioning cessation of production is inapplicable.[51]

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37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. Perlman v. Pioneer Ltd. P'Ship, 918 F.2d 1244 (5th Cir. 1990).
42. *Id*.
43. Kuntz, *supra* note 6, at § 53.5.
44. Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 158, 31 N.E.3d 80, 84 (N.Y. 2015).
45. *Id*.
46. *Id*. at 152.
47. *Id*. at 157.
48. *Id*. at 158.
49. *Id*.
50. *Id*.
51. *Id*. at 155.

Force Majeure Events

Common law refrains from delineating precise events that constitute force majeure. Instead, modern courts defer to the events expressly agreed upon in individual contracts.[52] When individual events are described within the contracts, the common-law doctrine of force majeure should not supersede the express, bargained-for terms.[53] The most common circumstances provoking force majeure contemplation are divisible into three categories: market failure, acts of the government, and acts of God.

Market Failure

One of the most common yet largely controversial events circumscribed in a contractual force majeure clause is non-performance due to market failure. Our economy notoriously follows the systemic principles of a free market.[54] Free-market economies are dependent upon private ownership and production driven by competition.[55] To meet the demand of individuals, private companies produce and maintain supply, adjusting as necessary. This system is not without flaws. When demand supersedes supply, or vice versa, the system falls out of equilibrium, and thus requires corrective measures.[56] Such a shock can generate a market failure.[57]

The oil and gas market is infamously volatile.[58] Both price and supply change at drastic rates.[59] These market shifts are especially impactful upon production-oriented states.[60] Taking volatility into account, issues surrounding market failure occur enough to necessitate consideration in force majeure clauses.[61] Oil and gas industry participants routinely include

52. Perlman, 918 F.2d at 1248.

53. *Id*.

54. Tara Kibler, *Capitalism, Socialism, or Fascism? A Guide to Economic Systems and Ideologies*, HEIN ONLINE (July 22, 2020), https://home.heinonline.org/blog/2020/07/capitalism-socialism-or-fascism-a-guide-to-economic-systems-and-ideologies/.

55. *Id*.

56. Stanley Fischer, *Supply Shocks, Wage Stickiness, and Accommodation*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH (May 1983), https://www.nber.org/papers/w1119.pdf.

57. *Oil Price Volatility: US Shale Has Reshaped the Oil Market, But Boom-Bust Cycles Are Probably Here to Stay*, COLUMBIA GLOBAL ENERGY DIALOGUES (December 14, 2016), https://www.energypolicy.columbia.edu/sites/default/files/pictures/Volatility%20Workshop%20Summary.pdf.

58. *Id*.

59. *Id.*

60. *Id*.

61. *Id*.

failure of market provisions within their leases to provide a remedy in the event of market failure.[62] Courts tend to split on their interpretations of such events within contractual clauses. Courts generally recognize that incremental price increase alone does not suffice to exercise force majeure.[63] Nonproduction in an economic downturn usually does not satisfy a declaration of force majeure either.[64] The reasoning behind that involves the consideration of foreseeability.[65] However, if a contract contains an express provision considering market failure, a different result likely occurs.[66]

Acts of the Government

Another event routinely included within the ambit of force majeure clauses concerns implications on behalf of the government. When the government acts, by imposing certain restrictions, subsequent contractual performance may be impacted. One of the biggest limitations to declaring force majeure due to government action is whether the action existed at the time of contract execution.[67] If the action existed prior to executing the contract, courts generally reject force majeure claims.[68] Alternatively, if the action postdates the contract, courts have a greater inclination to uphold force majeure claims.[69]An additional limitation to a claim against government action is whether the non-performance due to government action was beyond party control.[70]

Both foreign and domestic government action may invoke force majeure. An example of foreign government action necessitating exercise of a contractual force majeure provision is demonstrated in *Kyocera Corp. v. Hemlock Semiconductor, LLC*.[71] Here, the invocation of force majeure on behalf of a seller in a take-or-pay solar contract spurred from allegations of a foreign government illegally subsidizing its domestic companies.[72]

62. *Id*.
63. Golsen v. ONG Western, Inc., 1988 OK 26, ¶ 13, 756 P.2d 1209, 1213.
64. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 183 (Tex. App. 2018).
65. *Id*.
66. Kodiak 1981 Drilling P'Ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715 (Tex. App. 1987).
67. Teshima, *supra* note 27, at § 8.
68. *Id*. at § 8[a].
69. *Id*. at § 8[b].
70. *Id*. at § 8[c].
71. Kyocera Corp. v. Hemlock Semiconductor, LLC, 313 Mich. App. 437, 886 N.W.2d 445 (2015).
72. *Id*. at 442.

Additionally, the seller alleged that given the subsidies, the companies participated in large-scale dumping, effectively flooding the market.[73] Ultimately, the Michigan Court of Appeals determined that conduct causing a market downturn for a take-or-pay contract cannot suffice for relieving a party of contractual obligation.[74] The court's rationale rests upon both the nature of the contract and the bargaining power each party had with respect to contemplating governmental action.[75]

Courts have held that government orders imposing a moratorium on hydraulic fracturing do not constitute a force majeure event.[76] This holding was the result when a landowner brought action against oil and gas lessees after governor David Patterson imposed a directive effectuating a moratorium on fracking within the state of New York.[77] The lessees contended that the fracking ban hindered the development of the mineral formation.[78] Further, lessees alleged that fracking was the only viable method for obtaining the minerals within the formation.[79] Conversely, landowners, the parties pursuing the action in court, maintained that traditional drilling methods existed, thereby contesting that the fracking ban cannot constitute a force majeure event.[80] Ultimately, the court upheld the landowners' position, finding that New York's fracking moratorium, though it may be factually consistent with a force majeure event, did not extend the disputed leases.[81] Additionally, the court indicated that if drilling specifications had been contracted for, the result could be different.[82] The results have been consistent in other cases dealing with force majeure claims due to New York's fracking ban. In *Beardslee v. Inflection Energy, LLC*, the New York Court of Appeals held that a force majeure claim based on the state moratorium did not modify an oil and gas lease in its primary term.[83]

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73. *Id*.
74. *Id*. at 451.
75. *Id*. at 455.
76. Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012).
77. *Id*. at 203.
78. *Id*. at 209.
79. *Id*.
80. *Id*.
81. *Id*. at 210.
82. *Id*.
83. Beardslee, 25 N.Y.3d at 158.

"Acts of God"

Congress, through legislation, routinely defines an act of God as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[84] Courts typically assess extraordinary phenomena in three parts.[85] The phenomenon must be (1) abnormal or unusual in occurrence, (2) a force strictly of nature with no human assistance or influence, and (3) of such severity that human prudence or precaution could not have avoided the damage thereby caused.[86] An act of God signifies that an individual is not liable "for injuries or damages caused by an act that falls within the meaning of the term 'act of God.'"[87] However, this claim of relief is not automatic.[88] Instead, the "proponent bears the burden of proof."[89] Further, the established defense then becomes a question of fact, left in the hands of the fact finder.[90] It is pivotal to recognize that acts of God, unlike an inevitable accident, lack a component of human agency.[91] On this contention, some courts only consider acts of God absent fault of man, as the presence of one "excludes the other."[92]

Courts generally recognize that natural disasters and extreme weather conditions can constitute an act of God.[93] This presupposition requires that the act was unforeseeable and unanticipated.[94] If the act is foreseeable, there is a requirement to exercise due care towards prevention efforts.[95] Causation is also an important consideration when determining acts of God. Courts generally maintain that human interference or influence must be absent, even if the event is otherwise considered an act of God.[96] This was the holding in *American National Red Cross v. Vinton Roofing Co.*, where a roofer's waterproofing measures added a human interference component to

84. 33 U.S.C.A § 2701(1) (2018). *See also*, 42 U.S.C.A § 9601(1).
85. 6 AM. JUR. PROOF OF FACTS 3D 319 § 1 (1989).
86. *Id*.
87. 1 AM. JUR. 2D ACT OF GOD § 3 (2021).
88. *Id*.
89. *Id*.
90. *Id*.
91. 1 AM. JUR. 2D ACT OF GOD § 2 (2021).
92. Cox v. Vernieuw, 604 P.2d 1353, 1356 (Wyo. 1980).
93. Michael Faure et al., *Industrial Accidents, Natural Disasters and "Acts of God"*, 43 GA. J. INT'L & COMP. L. 383, 392 (2015).
94. *Id*.
95. *Id*. at 404.
96. Am. Nat. Red Cross v. Vinton Roofing Co., 629 F. Supp. 2d 5, 9 (D.D.C 2009).

an otherwise force-majeure-protected rainstorm.[97] Ultimately, the court barred recovery due to human agency, despite the rainstorm factually representing a force majeure event.[98]

In addition to events like natural disasters, illness or death may also constitute an act of God.[99] Like natural disasters and weather-related events, asserting illness as an act of God defense requires a showing the event was both unforeseeable and unavoidable.[100] Illness as an act of God defense, however, is rarely invoked. And finally, courts refrain from classifying saltwater seepage and subsequent shut-in orders as force majeure events requiring remedial action.[101]

Introduction of COVID-19 & Force Majeure

COVID-19's Impact on Domestic Oil and Gas Industry

On April 20, 2020, the price of oil went negative for the first time in history.[102] This unprecedented drop marked the price of a barrel of West Texas Intermediate at minus $37.63, the lowest recorded price ever.[103] This drastic drop was a product of storage concerns.[104] Given state-imposed lockdowns and global travel restrictions at the time, oil demand virtually collapsed.[105] Decreased demand in conjunction with increased output created a substantial supply shock.[106]

Following the crash of crude oil prices, domestic producers began to call on state legislative action for relief.[107] Oklahoma was the first state to respond to the requested relief.[108] On April 22, 2020, the Oklahoma Corporation Commission issued an emergency order effectuating

97. *Id*. at 10.
98. *Id*.
99. 1 AM. JUR. 2D ACT OF GOD § 6 (2021).
100. *Id*.
101. Teshima, *supra* note 27 at §9[b].
102. Andrew Walker, *US oil prices turn negative as demand dries up*, BBC NEWS (Apr. 21, 2020), https://www.bbc.com/news/business-52350082.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. Liz Hampton, *Reeling Oklahoma oil producers win right to keep leases while wells shut*, REUTERS (Apr. 22, 2020), https://www.reuters.com/article/us-oil-usa-oklahoma-cuts/reeling-oklahoma-oil-producers-win-right-to-keep-leases-while-wells-shut-idUSKCN2242DR.
108. *Id*.

permissible cessation of production.[109] The decision allowed Oklahoma oil companies to consider unprofitable production as economic waste, which may shield producers from losing their leases that would otherwise be cancelled.[110] The New Mexico State Land Office followed in Oklahoma's footsteps by passing similar emergency measures.[111]

COVID-19's impact also extended to domestic drilling. At the end of 2020, domestic output of crude oil fell well below pre-pandemic levels at roughly 2.1 million barrels per day.[112] The domestic output drop reflects cost cuts made by producers in light of COVID-19.[113] COVID-19's impact resulted in numerous companies declaring bankruptcy, employee layoffs, and ultimately a resurgence of OPEC as the top global market player.[114]

COVID-19's Impact on Foreign Oil and Gas Industry

COVID-19's impact caused great, international concern in the oil and gas industry. Much of the international impact stemmed from China. In February 2020, the China Council for the Promotion of International Trade commenced the issuance of force majeure certificates.[115] In March 2020, PetroChina, China's leading gas supplier, declared force majeure to suspend natural gas imports.[116] The decision to suspend imports ultimately resulted in the delay of multiple cargoes due to their inability to operate some of their liquefied natural gas terminals at full capacity.[117]Additionally, in February 2020, China National Offshore Oil Corp ("CNOOC") declared

109. *Id*.
110. *Id*.
111. Id.
112. David Wethe, *Oil Drilling in U.S. Ends Fraught 2020 at Pre-Shale Levels*, BLOOMBERG LAW (Dec. 30, 2020), https://www.bloomberg.com/news/articles/2020-12-30/oil-drilling-in-u-s-ends-a-fraught-2020-at-pre-shale-era-levels.
113. *Id*.
114. *Id*.
115. *CCPIT Provides COVID-19 Force Majeure Certificates and Other Services*, CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE (Mar. 13, 2020), https://en.ccpit.org/infoById/40288117668b3d9b0170d2952a7f0799/2.
116. Chen Aizhu & Jessica Jaganathan, *PetroChina suspends some gas contracts as coronavirus hits demand*, REUTERS (Mar. 5, 2020), https://www.reuters.com/article/us-petrochina-gas-exclusive/petrochina-suspends-some-gas-contracts-as-coronavirus-hits-demand-sources-idUSKBN20S10W.
117. Stephen Stapczynski, *CNOOC refuses LNG cargoes, declaring force majeure over coronavirus*, WORLD OIL (Feb. 6, 2020), https://www.worldoil.com/news/2020/2/6/cnooc-refuses-lng-cargoes-declaring-force-majeure-over-coronavirus.

force majeure on liquefied natural gas deliveries from three suppliers.[118] CNOOC's declaration carried great weight because CNOOC operates roughly half of China's liquefied natural gas terminals.[119] On the receiving end of CNOOC's force majeure declaration, two of Europe's largest energy companies, Shell and Total, rejected CNOOC's pleas.[120] Both Shell and Total's justifications for rejection came from concern over the possibility of Chinese firms exiting long-term contracts.[121]

A similar situation occurred in India. In March 2020, Indian liquefied natural gas importers issued force majeure notices to suppliers.[122] LNG firms cited a lack of domestic gas demand and lack of port operations due to the spread of the COVID-19 as reasons for issuing notices.[123] Gujarat State Petroleum Corp ("GSPC"), one of India's largest oil firms, issued force majeure notices to its liquefied natural gas suppliers due to overwhelmingly full storage tanks and depleted domestic demand.[124]

On the domestic front, in April 2020, Continental Resources declared force majeure on at least one of its contracts to a fuel producer.[125] This

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118. *China's CNOOC declares force majeure on some prompt LNG deliveries*, Reuters (February 6, 2020), https://www.reuters.com/article/china-health-lng-cnooc/chinas-cnooc-declares-force-majeure-on-some-prompt-lng-deliveries-sources-idUSL4N2A61RX.

119. Jessica Jaganathan & Chen Aizhu, *China's biggest liquefied gas importer suspends some contracts as virus spreads*, REUTERS (Feb. 6, 2020), https://www.reuters.com/article/us-china-health-lng-cnooc/chinas-biggest-liquefied-gas-importer-suspends-some-contracts-as-virus-spreads-idUSKBN2000UN.

120. Stephen Stapczynski, *Shell, Total reject China's force majeure on LNG shipments*, WORLD OIL (Feb. 7, 2020), https://www.worldoil.com/news/2020/2/7/shell-total-reject-china-s-force-majeure-on-lng-shipments.

121. Bate Felix & Jessica Jaganathan, *France's Total rejects force majeure notice from Chinese LNG buyer*, REUTERS (Feb. 6, 2020), https://www.reuters.com/article/us-china-health-total/frances-total-rejects-force-majeure-notice-from-chinese-lng-buyer-idUSKBN2001XQ.

122. .Nidhi Verma & Jessica Jaganathan, *Indian LNG importers issue force majeure notices as gas demand slumps*, REUTERS, (Mar. 25, 2020), https://www.reuters.com/article/india-lng-imports/update-3-indian-lng-importers-issue-force-majeure-notices-as-gas-demand-slumps-sources-idUSL4N2BI2YF.

123. *Id*.

124. *Id*.

125. Jennifer A. Dlouhy & Rachel Adams-Heard, *Continental Resources declares force majeure on some oil deliveries*, WORLD OIL (Apr. 24, 2020), https://www.worldoil.com/news/2020/4/24/continental-resources-declares-force-majeure-on-some-oil-deliveries#:~:text=Continental%20Resources%20declares%20force%20majeure%20on%20some%20oil%20deliveries,-By%20Jennifer%20A&text=WASHINGTON%20(Bloomberg)%20%2D%2DShale%20explorer%20Continental%20Resources%20Inc.&text=In%20the%20document%2C%20Continental%20said,at%20negative%20prices%20constitutes%20waste.

declaration came a day after the negative oil price plunge. Continental cited the pandemic as its reason for its subsequent declaration and that they "couldn't have foreseen the dramatic rout caused by the coronavirus outbreak" and that "selling oil at negative prices constitutes waste."[126] Continental Resources is the largest oil and gas producer in North Dakota.[127] As a result of the ongoing pandemic, however, Continental Resources suspended all drilling in North Dakota, shut-in wells, and ultimately issued force majeure notice.[128]

Introduction to Issue: Can COVID-19 Trigger Force Majeure in an Oil and Gas Contract?

Whether COVID-19 serves to excuse an oil and gas lease depends on answering Kuntz's three questions: (1) whether the obligation or performance is covered by an applicable force majeure clause, (2) whether COVID-19, or pandemic related language is described within the force majeure clause, and (3) whether performance was effectively prevented by COVID-19.[129]

Is the Performance or Obligation Covered?

Determining performance within a lease is straightforward. Essentially, Kuntz's first question boils down to two elements: (1) whether a force majeure provision exists; and (2) whether the contract describes the performance or obligation at issue.[130] Given force majeure provisions typically exist within oil and gas contracts, the first element is likely satisfied.[131] Absent a force majeure provision, parties may retain alternate relief. The following section discusses such relief at length. Upon determining the first element, the second element is simple. If the performance in question is bargained-for and precisely outlined within the

126. Jennifer A Dlouhy & Rachel Adams-Herd, *Negative Oil Has Hamm's Continental Invoking 'Act of God' Clause*, BLOOMBERG (Apr. 23, 2020), https://www.bloomberg.com/news/articles/2020-04-23/hamm-s-shale-explorer-invokes-force-majeure-citing-negative-oil.

127. Liz Hampton et al., *U.S. oil firm Continental draws anger with decision to cancel sales*, REUTERS (Apr. 24, 2020), https://www.reuters.com/article/us-continental-resources-shale-north-dak/u-s-oil-firm-continental-draws-anger-with-decision-to-cancel-sales-idUSKCN22631U.

128. *Id*.

129. *See* Kuntz, *supra* note 6 at §53.5 (discussing the analysis of three questions in determining force majeure).

130. *Id*.

131. *Id*.

four corners of the contract, asserting force majeure is possible, therefore prompting discussion of the second question.

Are Pandemic Related Terms Within the Force Majeure Provision?

Pandemics, epidemics, and other related global events sometimes surface within contracts. Whether COVID-19 is a force majeure event largely depends on bargained-for terms within an individual contract.[132] When contracts expressly contain pandemic considerations, the court's interpretation is simple, but this is rarely the case.[133] Instead, it may be permissible to measure COVID-19's impact on typical force majeure events or a catchall provision, if applicable. To determine whether COVID-19 modifies standard force majeure events requires this section to analyze COVID-19's relevance to (1) market failure, (2) government action, and (3) acts of God.

COVID-19 & Market Failure

Undoubtedly, COVID-19 substantially impacts global markets. Among the most impacted is the global market for oil and gas. Drastic reductions in the international energy demand coupled with a flood of storage concerns fueled a frenzied producer panic.

Asserting force majeure in contemplation of market failure will likely face difficulty in court. Though it is undisputed that a global pandemic weighs substantially on domestic and foreign markets, such weight isn't given much deference in court. Absent express enumeration of an economic downturn as a force majeure event, courts are unlikely to find for excusal of performance. This is especially true where the applicable force majeure clause enumerates multiple force majeure events.[134] Additionally, courts will not presume changes in economic conditions as a force majeure event where it is not enumerated.[135]

Whether COVID-19's market impact furnishes parties with a solid basis to mitigate performance depends largely on whether their contract contemplated an economic downturn as a force majeure event. If the contract contains language indicating an economic downturn as a

132. Sun Operating Ltd. v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998) (specific terms control).

133. Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN L. REV. ONLINE 48, 56-57 (2020).

134. Great Lakes Gas Transmission Ltd. v. Essar Steel Minnesota, LLC, 871 F. Supp. 2d 843, 853 (D. Minn. 2012).

135. *Id*.

consideration in the invocation of force majeure, then the likelihood of potential contractual relief increases. Additionally, the enumeration of market considerations generally spares parties from having to prove foreseeability. This holding is reflected in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp*, where the court stated, "when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable."[136] Absent such an enumeration, the likelihood of success based on economic considerations is low. However, that does not mean that it is not possible.

COVID-19 & Government Action

Is government action relating to COVID-19 sufficient to invoke force majeure claims? Again, that depends on several factors. A government order, construed as a "stay-at-home order," likely classifies as an act of the government subject to force majeure consideration. Beginning in March 2020, government officials commenced statewide shutdowns. In Oklahoma, Governor Kevin Stitt issued an executive order effectively closing non-essential businesses for an indefinite period throughout all seventy-seven state counties.[137] Within this directive, Governor Stitt collated essential businesses to remain open during the shutdown period.[138] Various sectors like chemical, commercial and professional services, construction and infrastructure, energy, healthcare and social assistance, are among "essential industries" precluded from a shutdown.[139]

Under Governor Stitt's executive order, energy is an essential industry in Oklahoma.[140] Within the sector, functions like mining, oil and gas extraction, pipeline transportation, electrical equipment manufacturing, and machinery manufacturing are deemed essential, thereby retaining the ability to remain open during a shutdown period.[141]

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136. Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 992 (5th Cir. 1976).

137. Okla. Exec. Order No. 2020-20 3rd Amended (July 30, 2020), https://www.sos.ok.gov/documents/executive/1953.pdf.

138. *Id*.

139. *Oklahoma Essential Industries List*, OKLAHOMA DEPARTMENT OF COMMERCE (July 27, 2020), https://www.okcommerce.gov/wp-content/uploads/Oklahoma-Essential-Industries-List.pdf.

140. *Id*.

141. *Id*.

A similar result ensued in Texas. In March 2020, Texas Governor Greg Abbott issued an executive order closing non-essential businesses.[142] Under the executive order, Sectors like essential retail, healthcare, energy, and transportation were essential, thereby allowing operational functionality with heightened safety restrictions.[143]

Like Governor Stitt's Executive Order, Governor Abbott's executive order classified energy as an essential sector.[144] Within the energy sector, workers involved in electricity, petroleum, natural gas, and water and wastewater generally retained work during the shutdown.[145] Under the executive order, oil and gas exploration and production activities, like drilling, extraction, production, refining, and transportation were essential and were allowed to remain in operation.[146]

Thus, whether a government directive addressing COVID-19 classifies as a force majeure event depends on the industry in question. *In re Hitz Restaurant Group* demonstrates how non-essential businesses have a demonstrated likelihood to invoke success force majeure.[147] This is due to the restriction on in-person gatherings mandated by state executive orders.[148] In Illinois, non-essential business owners, due to the state-imposed restrictions, shut down businesses and subsequently sought relief due to the inability to pay rent to respective landlords.[149] The court ultimately granted a partial excusal of contractual performance.[150] This is because the restaurant industry, through executive order, was not completely shut-down, but rather drastically limited to take-out and off-premises consumption.[151] In sum, the survivable force majeure claim consisted of a valuation of space usable in light of state-imposed restrictions.[152] The court determined that the restaurant owner was not liable for rent payment reflecting the square footage of the restaurant implicated

142. *Id*.

143. Briana Edwards, *LIST: All the essential businesses that will remain open during the stay-home-work-safe order*, KPRC 2 NEWS (Mar. 24, 2020), https://www.click2houston.com/news/local/2020/03/24/these-are-the-16-essential-business-sectors-that-will-remain-open-during-the-stay-home-work-safe-order/.

144. *Id*.

145. *Id*.

146. *Id*.

147. *In re* Hitz Restaurant Group, 616 B.R. 374 (Bankr. N.D. Ill. 2020).

148. *Id*.

149. *Id*.

150. *Id*.

151. *Id*.

152. *Id*.

by the shut-down order.[153] Instead, the business owner was liable for twenty-five percent of their rent, as that percentage signified the useable space within their restaurant.[154] The remaining majority percentage reflected dine-in space, subject to shut-down limitations.[155]

Therefore, contracts in non-essential industries likely face more success when asserting force majeure. Because essential industry, like oil and gas, is shielded from shutdown risk, unlike non-essential industry, they are less likely to succeed.

COVID-19 & Acts of God

Is COVID-19 an act of God? Some public officials seem to think so. Oklahoma Governor Kevin Stitt thought so, and on his belief, sent a letter to President Donald Trump requesting that he declare the pandemic an act of God.[156] Stitt sent the prayer for relief after the sharp decline in oil and gas prices.[157] Stitt claimed that such a determination is for the "narrow purpose of protecting the[] producers from actions to cancel leases held by production as a result of production stoppage."[158] No subsequent declaration from President Trump followed from this prayer.[159]

The incorporation of COVID-19 as an act of God recently began to surface among some state courts. In New York, courts have defined COVID-19 as a natural disaster like an act of God.[160] Here, courts contemplated COVID-19 as a natural disaster under a force majeure insurance provision.[161] In reaching their conclusion, the court turned to dictionary definitions of natural disasters.[162] The court, in accordance with Black's Law Dictionary, defined "natural" as "brought by nature as opposed to artificial means," and "disaster" as [a] calamity; a catastrophic

153. *Id*.
154. *Id*.
155. *Id*.
156. Kathryn Watson, *Oklahoma Governor calls on Trump to declare virus "act of God" to help oil and gas producers*, CBS NEWS (Apr. 27, 2020), https://www.cbsnews.com/news/kevin-stitt-oklahoma-governor-trump-declare-coronavirus-act-of-god-oil-gas/.
157. *Id*.
158. *Id*.
159. *Id*.
160. JN Contemporary Art LLC v. Phillips Auctioneers LLC, No. 20CV4370 (DLC), 2020 WL 7405262, at *7 (S.D.N.Y Dec. 16, 2020).
161. *Id*.
162. *Id*.

emergency."[163] On this reasoning, the court determined that "by any measure, the COVID-19 pandemic fits those definitions."[164]

Catch-All Provisions

If the applicable force majeure clause refrains from mentioning pandemic-related terms, does a broad, catchall provision exist? Catchall provisions provide relief without enumeration of specific events that qualify for invocation of force majeure. Catchall provisions are usually encapsulated in a phrase such as the following: "any other clause beyond control of the respective party."[165] Though catchall provisions serve to encompass more circumstances for exercising force majeure, courts remain hesitant to interpret them liberally.[166] Instead, courts look to events reasonably related by nature or within similar circumstances to the listed force majeure events within the contract when deciding whether an event not circumscribed renders excuse of contractual performance.[167]

Black's Law Dictionary defines foreseeability as "[t]he quality of being reasonably anticipatable."[168] Foreseeability is a critical component to force majeure when a claimant is relying upon a catchall provision. Courts generally require a showing of unforeseeability to relieve contractual performance.[169] Alternatively, when asserting force majeure under an event directly listed within the provision, courts are split in incorporating an element of foreseeability. Oklahoma courts generally read foreseeability as a loose requirement, meaning that where foreseeability isn't required by contract, Oklahoma courts refrain from imposing a strict foreseeability element.[170] Instead, Oklahoma courts favor a showing of control rather than a foreseeability requirement.[171]

Whether a pandemic like COVID-19 is foreseeable is up for debate, as it has yet to be judicially determined. On one hand, many argue that pandemics serve as a classic example of a force majeure event.[172] On the

163. *Id*. (citing Black's Law Dictionary (11th ed. 2019)).
164. *Id*.
165. Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 903, 519 N.E.2d 295(1987).
166. *Id*.
167. *Id*.
168. *Foreseeability*, BLACK'S LAW DICTIONARY (11th ed. 2019).
169. *TEC Olmos*, 555 S.W.3d at 176.
170. *Sabine*, 725 F. Supp. at 1170.
171. *Id*.
172. Andrew A. Schwartz, *COVID-19: Impossible Contracts and Force Majeure*, COLUMBIA: THE CLS BLUE SKY BLOG (Aug. 11, 2020), https://clsbluesky.law.columbia.edu/2020/08/11/covid-19-impossible-contracts-and-force-majeure/.

other hand, some argue that given various outbreaks in history, like SARS, or the Avian Flu, a pandemic is relatively foreseeable in its occurrence, therefore failing to account for it within one's contract amounts to waiver.[173] Whether one's approach is the former or latter, timing is still an important consideration. If a party contracted pre-pandemic, a claim of force majeure absent inclusion of pandemic-related language within a contract likely makes a better case for exercising force majeure, as opposed to parties contracting amidst the pandemic.

Additional Considerations & Contract Choice

While it is imperative to consider the lease language within the contract, other considerations worthy of examination manifest. Courts generally recognize that the application of force majeure is dependent upon the express terms outlined in individual agreements.[174] Courts tend to refrain from acting as gatekeepers in this realm to avoid rewriting contracts or interpreting agreements beyond the parties' intentions.[175]

Choice of law is among one of the most relevant considerations when determining force majeure. State court interpretation varies with respect to defining certain force majeure events, notice requirements, and foreseeability requirements. Undoubtedly, state courts tend to interpret force majeure clauses differently based on their own established bodies of case law. However, most courts have an overarching tendency to interpret force majeure on a per-lease basis.[176]

Type of contract is also a relevant consideration when determining whether to exercise force majeure. Base Contracts for the Sale and Purchase of Natural Gas, or NAESB Contracts, prepared by the North American Energy Standards Board, are among the most frequently used within the industry, given their standard uniformity.[177] Standard NAESB contracts consist of three parts: (1) a base contract containing terms and conditions, (2) a transaction confirmation form, allowing parties to add details specific to their agreements, and (3) a special provision addendum, which allows for

173. Melvin See, *Wuhan Coronavirus (2019-nCOV) – A Frustrating Event?*, JD SUPRA (Feb. 3, 2020), https://www.jdsupra.com/legalnews/wuhan-coronavirus-2019-ncov-a-54336/.

174. *Sun Operating*, 984 S.W.2d at 283.

175. *Id*.

176. *Id*.

177. Blake Baxter, *Natural Gas Contracts 101*, WASB: WISCONSIN SCHOOL NEWS (Sept. 2016), https://wasb.org/wp-content/uploads/2017/03/Natural_Gas_Contracts_101_Sept_2016.pdf.

modification of the standard terms and conditions.[178] The distinction in the type of contract spurs from the idea that force majeure may be treated differently among various contracts. The following is an example of a force majeure provision in a standard NAESB contract:

> Force Majeure shall include but not be limited to the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes113, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe114; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing115 or failure of wells or lines of pipe; (iii) interruption of firm transportation and/or storage by Transporters; (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars; and (v) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, or regulation promulgated by a governmental authority having jurisdiction. Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance.[179]

Further, the force majeure provision within a standard NAESB contract includes notice as a subcomponent to exercising force majeure.[180]

Texas courts interpreted the standard NAESB force majeure provision above in *Virginia Power Energy Marketing, Inc. v. Apache Corp*. Here, Apache invoked force majeure after hurricanes Katrina and Rita damaged the production pipeline and prevented their contractual performance.[181] Given significant damage to the pipeline associated with the contract, Apache notified Virginia Power of its inability to deliver gas.[182] Upon receiving notice, Virginia Power requested Apache's gas delivery at an

178. Hess Corp v. ENI Petroleum US, LLC, 435 N.J. Super. 39, 42, 86 A.3d 723, 724 (App. Div. 2014).

179. *Base Contract for Sale and Purchase of Natural Gas*, NORTH AMERICAN ENERGY STANDARDS BOARD https://naesb.org/pdf/cs012102w2.pdf (last visited May 19, 2021).

180. *Id*.

181. Virginia Power Energy Mktg., Inc. v. Apache Corp., 297 S.W.3d 397, 402 (Tex. App. 2009).

182. *Id*. at 401.

alternate location, but Apache declined.[183] Virginia Power subsequently sought judicial action, alleging that Apache failed to use reasonable efforts to deliver under the contractual terms.[184] Ultimately, the court found for partial excusal under the NAESB contract relying on its base terms.[185]

At the outset, force majeure also commonly requires a control element.[186] To prevail, the event must be beyond the control of either party.[187] When the asserting party possesses control over the event, a force majeure assertion is likely unsuccessful.[188] NAESB force majeure clauses also require a lack of causal nexus.[189] The standard NAESB contract signifies force majeure to not be "any cause not reasonably within the control of the party claiming suspension."[190] The narrow construction of force majeure provisions within NAESB contracts serves to provide a higher bar to recovery.

Question One Conclusion

The inclusion of pandemic-related terms within a lease serves to induce a simplistic avenue of relief. Though rare in the meantime, it may be increasingly common to include express terms incorporating such terms in future contract drafting. Absent explicit language or enumeration, it remains possible to incorporate COVID-19 under certain blanket force majeure events. Though COVID-19 undoubtedly impacts the market, a claim of force majeure under a market failure theory may not lead to contractual relief.

COVID-19 and subsequent government action as a force majeure event may carry a greater likelihood of survivability. This contention, however, largely depends on the industry affected by the government action and subsequent restrictions imposed thereof. For an essential industry, like oil and gas, government action may not give rise to a successful invocation of a force majeure claim. This is because the oil and gas industry, unlike a non-essential industry, does not face severe operational restrictions resulting from government directives, like stay-at-home orders. In fact, many industry-related operational facilities remained open during state-wide

183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*.
187. Kuntz, *supra* note 6, at §53.5.
188. *Id*.
189. Hess Corp, 435 N.J. Super. at 42.
190. *Id*.

shutdowns. However, a different outcome may ensue when raising a claim within an industry classified as non-essential.

Asserting COVID-19 as an act of God may also give rise to a potentially successful claim. Though litigation surrounding this issue is sparse at this point, as we continue to live in the age of COVID-19, more issues surrounding this precise determination may follow.

When explicit enumeration of pandemics-related language does not exist, and blanket force majeure events, like acts of the government, cannot provide a solid basis for reliving contractual performance, catchall provisions may remedy non-performance relating to COVID-19. This statement, however, relies upon the existence of an applicable catchall provision within the contract. Further, whether COVID-19 could fall under a catchall provision depends on if it's reasonably related to other enumerated terms within the force majeure clause. Absent a showing of reasonable relation, COVID-19 may not serve to defend non-performance under a catchall provision, as courts refrain from liberal interpretation.

Other considerations serve an equally important function in determining the applicability of force majeure. Choice of law and type of contract are also important considerations in deciding whether to invoke force majeure due to COVID-19. After considering these factors and determining whether COVID-19 serves as an applicable force majeure event, we can then ask the final question: whether COVID-19 effectively prevents performance.

Did COVID-19 Effectively Prevent Performance?

The third question in this analysis centers around whether COVID-19 effectively prevented performance. There mere existence of a pandemic will not shield parties from non-performance.[191] Instead, parties must prove an element of causation as to the event and their non-performance.[192] Simply put, parties must ask: but-for the pandemic, would contractual performance occur? This essentially develops into a but-for causation test.

The existence of the pandemic, without more, will not likely excuse performance even if the agreement includes pandemic-related terms. To prevail, parties must show that the pandemic effectively prevented contractual performance. For example, if parties were unable to fulfill lease obligations due to a restrictive government action barring oil and gas operations in the wake of the pandemic, parties would then have a chance at asserting force majeure to relieve lease obligations. However, this

191. Kuntz, *supra* note 6 at §53.5.
192. *Id*.

doomsday situation remains highly unlikely considering the classification of oil and gas as an essential industry.

Alternative Relief

Absent an applicable force majeure provision, parties may retain alternate avenues of relief. The suggested methods of relief rely both on common law and statute. The statute-based approach depends on the usage of the Uniform Commercial Code. The two common-law approaches are the Doctrine of Frustration and the Doctrine of Impracticability.

UCC §2-615

The Uniform Commercial Code provides a method of relief absent an express force majeure clause. The Code provides that a seller is excused "from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting."[193] In order for the UCC provisions to apply, the contract must adhere to the requisite standards, that is, the contract's purpose being for the commercial sale of goods.[194] Like contractual force majeure, statutory force majeure adheres to the same standards. Notice remains an important consideration when claiming relief.[195] Similarly, an exercise of due diligence to mitigate the circumstance is also a thoughtful consideration when claiming relief from non-performance.[196] Contractual relief cannot be granted to a party that fails to exercise due care.[197]It is important to note that contractual terms do in fact trump the employment of the relevant UCC provisions.[198]

Like contractual force majeure, statutory force majeure is limited in its usage. The UCC dictates that changes in price or cost alone cannot substantiate the usage of statutory force majeure.[199] Market failure is also considered within the UCC.[200] Market failure, like price fluctuations, don't warrant relief, as market shifting constitutes a "business risk which business

193. U.C.C. §2-615 (AM. LAW INST. & UNIF. LAW COMM'N 2020).
194. *Id*. at Comment 1.
195. *Id*. at Comment 9.
196. *Id*. at Comment 5.
197. *Id*.
198. *Id*. at Comment 8.
199. *Id*. at Comment 4.
200. *Id*.

contracts made at fixed prices are intended to cover."[201] However, drastic and unprecedented circumstances may render a different outcome. The UCC contemplates circumstances of severe shortages of supply in the event of an unforeseen shutdown of major sources of supply.[202] In the event of such a shutdown, the seller must be barred from procuring materials requisite to one's performance.[203] Further considerations as to weight of non-performance must be made. Where the failure to deliver only amounts to a small portion of the contract, the failure is not fully excused.[204] Instead, the contracting party must fulfill their contractual obligations to the extent allowed by the supervening event.[205] Oklahoma codified the UCC statutory force majeure provision in 1961.[206] Subsequent case law provides similar results to contractual force majeure. Relating to oil and gas contracts, Oklahoma courts have held that statutory force majeure is inapplicable where a substantial deviation between contract prices and the market value of gas beyond control of the parties exists.[207] Circumstances like increased government regulation on the market that render a contract more difficult to fulfill do not justify statutory-imposed relief, because government regulation, Oklahoma courts conclude, is foreseeable as a matter of law.[208]

States like Texas consider the applicability of the UCC as a gap-filler in interpreting force majeure.[209] However, the protection awarded by the usage of the UCC is limited.[210] The protection afforded by the usage of the UCC must not be used to vary bargained-for contractual terms.[211]

Whether UCC §2-615 is applicable depends again upon the contract in question and the party seeking to assert statutory force majeure. The language of §2-615 indicates applicability to parties represented as sellers rather than buyers. However, commentary within the statutory provision may indicate the extension of protection to buyers.[212] As to subject-matter applicability, COVID-19 may serve as a defense to non-performance if the contract in question meets the requirements of applicable UCC standards. If

201. *Id*.
202. *Id*.
203. *Id*.
204. *Id.* at Comment 7.
205. *Id*. at Comment 11.
206. 12A O.S. §2-615 (OSCN 2021).
207. *Sabine*, 725 F. Supp. at 1157.
208. *Id*. at 1174.
209. *TEC Olmos*, 555 S.W.3d at 181.
210. Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1415 (5th Cir. 1983).
211. *Id*.
212. U.C.C. § 2-16 at Comment 9.

the contract surrounds the sale of commercial goods, the determination then becomes whether performance is commercially impracticable because of COVID-19. Further, showings of both notice and due diligence must be proven in accord with the code. Non-performance resulting from COVID-19-related government action may face a higher bar to recovery. This is due to the notion that difficulty placed upon the market by government action is outlaid as foreseeable, and a mere increase in difficulty to perform does not excuse performance under the UCC. However, Market Contentions and COVID-19 under UCC §2-615 face similar difficulties in defending non-performance under contractual force majeure. Ultimately, where a contract refrains from the inclusion of a force majeure provision, statutory force majeure under UCC may act as a vessel to mitigate performance or lack thereof.

Doctrine of Impracticability

The doctrine of impracticability refers to nonperformance without fault where such performance is impracticable.[213] The Second Restatement of Contracts defines existing impracticability as:

> [w]here, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.[214]

Courts have interpreted this excerpt from the restatement to reflect three components requisite to determining existing impracticability.[215] The first element asks whether there was fault.[216] The second element asks whether the occurrence was foreseeable.[217] Finally, the third element asks whether assumption of the risk is present, effectively barring recovery.[218] Usually, the timing of the circumstance giving rise to impracticability is difficult to determine.[219] To determine impracticability, the Restatement offers a two-

213. RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981).
214. *Id*.
215. Sunflower Elec. Co-op, Inc., v. Tomlinson Oil Co., 7 Kan. App. 2d 131, 138, 638 P.2d 963, 969 (1981).
216. *Id*.
217. *Id*.
218. *Id*.
219. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 172.

factor analysis.[220] The first factor asks whether the affected party knew or had reason to know of the factors contributing to impracticability.[221] To assert impracticability, the asserting party must lack formidable awareness of causal circumstances.[222] The second factor asks whether the impracticability prevented duty from arising or whether an arisen duty should be worthy of discharge.[223] The latter of the two distinctions awards restitution to remedy partial performance after the discovery of impracticability.[224]

Impracticability is usually measured in objective terms. Objective impracticability may relieve performance whereas subjective impracticability, without more, may not.[225] Common-law impracticability in oil and gas contractual dealings usually operates together with commercial impracticability within the UCC. In *Sunflower Elec. Co-Op v. Tomlinson Oil Co.*, parties sought excusal of performance under theories of impossibility and impracticability after failing to deliver gas agreed upon.[226] The court in *Sunflower* contemplated the interrelatedness of the Restatement's definition of the doctrine of impracticability and commercial impracticability within the UCC.[227] Ultimately, the court determined that impracticability in this case was merely subjective, therefore diminishing excusal of contractual performance.[228]

Whether COVID-19 serves to excuse contract performance on the grounds of impracticability depends not only on the foreseeability of the circumstances involved but also the objectivity of impracticability as determined by the court. If performance is hindered by COVID-19, the party seeking relief under impracticability must determine: (1) whether their performance, or lack thereof, is attributable to their fault, (2) whether the occurrence of COVID-19 and its impact on performance was foreseeable, and (3) whether an assumption of risk was included within the contract. If a party's performance failed to occur through no fault of their own, COVID-19's impact on the performance was unforeseeable, and no assumption of any risk associated with the performance was apparent from

220. *Id*.
221. *Id*. at Comment a.
222. *Id*.
223. *Id*.
224. *Id*.
225. *Sunflower Electric*, 638 P.2d at 970.
226. *Id*. at 965.
227. *Id*. at 969.
228. *Id*. at 964.

the agreement, then a potential defense may give rise to relieving contractual non-performance.

Frustration of Purpose

Frustration of purpose is also a potential avenue of relief. Frustration of Purpose is a common-law doctrine predicated on contractual performance.[229] Parties enter into contracts for an objective purpose.[230] While both parties may enter into such agreements for separate reasons, parties generally have a "common object" between them.[231] Unlike the doctrine of impracticability or impossibility, the doctrine of frustration doesn't wholly depend on either the impossibility or difficulty in performance.[232] Simply put, the doctrine of frustration applies where parties lack any reason for the continuance of the contract.[233] Though the doctrines of impossibility, impracticability, and frustration are fundamentally different, supervening events, like an act of God or market failure, similarly give rise to claims of all three. Frustration of purpose favors buyers and lessees, while impossibility or impracticability favors lessors and sellers.[234] Courts tend to interpret this doctrine differently. Some courts grant relief if frustration occurs out of a "common object" to the contracting parties jointly, while others grant relief on a more one-sided basis.[235]

To evaluate frustration, The Second Restatement of Contracts sets out three requirements.[236] The first requirement is that the frustrated purpose must be a principal purpose of one of the parties contracting.[237] That principal purpose must be fundamental to the party contracting.[238] The second requirement is that the frustration must be severe.[239] The severity of the frustration must go beyond any assumable risk.[240] The final requirement is that the parties could not have considered the frustration's occurrence.[241]

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229. CORBIN, *supra* note 22.
230. *Id*.
231. *Id*.
232. *Id*.
233. *Id*.
234. *Id*.
235. *Id*.
236. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 172, at § 265.
237. *Id*.
238. *Id*.
239. *Id.*
240. *Id*.
241. *Id*.

Instead, parties must have assumed the opposite.[242] Considering foreseeability, the Restatement signifies that a frustrating event does not necessarily need to be unforeseeable, though court interpretation and resulting case law may dictate otherwise.[243]

Frustration of purpose sometimes manifests in oil and gas contracts. Events that have caused parties to invoke the doctrine of frustration include state-imposed moratoria on hydraulic fracturing.[244] Here, parties sought relief due to a lack of productivity caused by the imposed restrictions on drilling within the state of New York.[245] In this case, the producers attempted to use the doctrine of frustration to extend the subsequent leases beyond their primary terms.[246] The producers contended that hydraulic fracturing was the only viable method to obtain oil and gas from the leased lands, and the usage of traditional methods would be irresponsible and unprofitable.[247] Ultimately, the court found that the lease failed to specify specific unconventional drilling methods and that the state directive was foreseeable, the producers were not entitled to relief.[248]

Whether COVID-19 frustrates contractual performance depends in part on jurisdiction and factual matters within individual cases. To determine applicability, answering the three requirements of the Restatement as they relate to COVID-19 may shed light on the survivability of a frustration claim. To survive the first requirement, a party must assert that a contested purpose is of principle. For purposes of analysis, envision two parties contracting for the sale and delivery of oil or gas. Hypothetically, if a drastic reduction in global transportation coupled with an insurmountable decline in oil demand manifested during the execution of a contract, then the purpose of sale and delivery likely faces a contractual challenge. Consider port closure, for example. If ports indefinitely closed due to the ongoing pandemic, the purpose of a hypothetical delivery of oil or gas would likely be frustrated. The delivery serves as principal purpose of the contract, and the inability to deliver and receive the goods likely frustrates both contracting parties. The second element requires severity of frustration. Undoubtedly, indefinite port closure is an exemplary illustration of extremity. Considering global trading, that indefinite port closure due to

242. *Id*.
243. *Id*.
244. *Aukema*, 904 F.Supp.2d at 213.
245. *Id*. at 219.
246. *Id*. at 221.
247. *Id*. at 220.
248. *Id*. at 221.

a pandemic goes beyond any level of reasonable risk assumption. When parties agree and contract for the sale and delivery of oil or gas, they assume the product will reach them. The parties contract under the assumption of product delivery. Therefore, that assumption likely establishes the third element of frustration, thus giving rise to a commendable claim. This example, though extreme, serves to highlight the ramifications of a rampant global pandemic.

Remedy, Looking On, & Conclusion

Deducing a solution or an avenue of relief centers on the notion of reading your contract thoroughly. Looking on, it may become increasingly important to include a force majeure provision including pandemic and epidemic verbiage. Though these events in real-time are unprecedented, they now establish a floor for future contract drafting. The following force majeure provision demonstrates the incorporation of pandemic related language:

> FORCE MAJEURE. Neither Party will be liable for any failure or delay in performing an obligation under this Agreement that is due to any of the following causes, to the extent beyond its reasonable control: acts of God, accident, riots, war, terrorist act, epidemic, pandemic, quarantine, civil commotion, breakdown of communication facilities, breakdown of web host, breakdown of internet service provider, natural catastrophes, governmental acts or omissions, changes in laws or regulations, national strikes, fire, explosion, generalized lack of availability of raw materials or energy.
>
> For the avoidance of doubt, Force Majeure shall not include (a) financial distress nor the inability of either party to make a profit or avoid a financial loss, (b) changes in market prices or conditions, or (c) a party's financial inability to perform its obligations hereunder.[249]

A provision, like the one above, including language relating to epidemics, pandemics, and quarantine restriction better adheres to future events. The inclusion of verbiage relating to pandemics and epidemics affords contracting parties better protection for unforeseen events in the future.

249. The Bureau of National Affairs, *Pandemic Force Majeure Clause*, BLOOMBERG LAW: PRACTICAL GUIDANCE, https://www.bloomberglaw.com/product/health/document/X3NNK6S4000000 (last visited May 21, 2021).

Similar additions arose after the terrorist attack on 9/11 and, depending on geographic relevance, after significant natural disasters like hurricane Katrina, Rita, and Harvey. In the future, contracting parties may not get to debate foreseeability. Given the precedent this pandemic has presented us with, the forthcoming of similar events may give rise to less protection. Therefore, being more proactive in the future requires an understanding of the likelihood of occurrence of events, like COVID-19. As the oil and gas industry takes slow steps to return to normalcy, the increasing importance of contract language remains. Now more than ever, it is important to consider the terms of one's contractual agreement, as a remedy in the future considering the occurrence of drastic events like COVID-19 may become sparingly limited.

Industry Conclusion & Outlook

In conclusion, 2020 was nothing short of an interesting year. Though global oil demand fell by roughly 25% in April 2020, demand has since rebounded a considerable amount, though not to pre-pandemic levels.[250] Despite the chaos that has ensued upon the oil and gas industry due to COVID-19, analysts predict trends of restorative growth in 2021.[251] The final months of 2020 provided the oil and gas industry with a more promising outlook than expected.[252]

Additionally, The United States government commenced remedial action to combat the encumbrance of economic hardship. In the wake of the pandemic, President Trump signed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act into law.[253] The Act aims to relieve domestic industry due to the impact of COVID-19.[254] Although the Act refrains from targeting direct relief to domestic oil and gas companies, it indirectly benefits many companies within the energy sector.[255] This indirect benefit is applauded by the department of energy, yet faces harsh

250. *2021 Oil and Gas Industry Outlook*, DELOITTE, https://www2.deloitte.com/us/en/pages/energy-and-resources/articles/oil-and-gas-industry-outlook.html (last visited May 21, 2021).

251. *Id.*

252. *Id.*

253. Roland Backhaus et al., *CARES Act: Key Takeaways for Energy Companies*, JD SUPRA (Apr. 3, 2020), https://www.jdsupra.com/legalnews/cares-act-key-takeaways-for-energy-78680/.

254. *Id*.

255. *Department of Energy Applauds Passage of the CARES Act*, DEPARTMENT OF ENERGY (Mar. 27, 2020), https://www.energy.gov/articles/department-energy-applauds-passage-cares-act.

opposition from critics and politicians outside of the industry.[256] The criticism spurs from the Act's tax relief measures.[257] The Act purports to give companies within the energy sector tax breaks due to economic hardship and uncertainty generated as a result of the pandemic.[258] The tax relief afforded to the industry includes payroll tax deferral, expanded write-offs, accelerated refunds, and loss carrybacks.[259] Payroll tax deferral grants employers broader discretion to delay FICA tax payments.[260] Loss carrybacks serve to benefit the oil and gas industry from the economic uncertainty provided by the ongoing global pandemic. The CARES act gives struggling businesses the opportunity to deduct losses in one year from previous years' profits.[261] This relief provides for greater liquidity and cash flow to increase survivability within industries challenged during the pandemic.[262]

In addition to positive industry forecasts and stimulus-based relief, the introduction of the coronavirus vaccine led to an increase in oil futures out of optimism.[263] This signals promise in the efforts of recovery to pre-pandemic levels of both demand and output.[264] Though many reputable individuals maintain that COVID-19 is here to stay for the foreseeable future, the oil and gas industry nevertheless remains adaptive to change.

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256. *Id*.

257. Lydia O'Neal, *Energy Companies Reap Tax Breaks as they Brace for Virus Impact*, BLOOMBERG TAX (May 22, 2020), https://news.bloombergtax.com/daily-tax-report/energy-companies-reap-tax-breaks-as-they-brace-for-virus-impact.

258. *Id*.

259. *Id*.

260. Emily Murphy et al., *Payroll tax deferral: Deferred payments can lead to deferred tax deductions*, PLANTE MORAN (Dec. 4, 2020), https://www.plantemoran.com/explore-our-thinking/insight/2020/12/payroll-tax-deferral-deferred-payments-can-lead-to-deferred-tax-deductions.

261. .*Tax Treatment of Net Operating Losses (NOLs) in the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, CONGRESSIONAL RESEARCH SERVICE (Oct. 6, 2020), https://crsreports.congress.gov/product/pdf/IN/IN11296.

262. *Id*.

263. .Alex Longley, *Oil Hits Two-Month High With Vaccine Hope Offsetting Demand Fear,* BLOOMBERG LAW (Nov. 10, 2020), https://news.bloomberglaw.com/mergers-and-acquisitions/oil-rises-above-40-with-vaccine-buoying-hope-of-demand-recovery?context=search&index=6.

264. *Id*.