Questions Clients Are Asking About COVID-19

US Outlook: Focus on Force Majeure in the Wake of Coronavirus and the Russia-Saudi Arabia Oil Price War

The U.S. oil industry is facing the dual shockwaves of falling demand and increased supply as a result of global efforts to slow the spread of the novel coronavirus (COVID-19) combined with an oil price war driven by Russia and Saudi Arabia. Major airlines are canceling thousands of flights due to international travel bans, demand from China has dropped dramatically, domestic fuel sales have fallen due in part to widespread "shelter in place" orders in California and other states, and many businesses have had to curtail operations or close entirely due to the outbreak. As a result, the International Energy Agency has predicted that global oil demand will decline for the first time since 2009.[1]

At the same time, Russia and Saudi Arabia have cut costs and increased supply as part of an oil price war that escalated in early March 2020. The price war, in combination with the global reduction in demand, has pushed prices to as low as $20 per barrel for the first time in eighteen years.[2] U.S. oil producers and midstream companies have responded by cutting their capital budgets and ceasing drilling activities, and are considering supply reductions to help end the price war.[3]

In this turbulent environment, it is more critical than ever for businesses in the oil industry to assess their contractual rights and liabilities. As we discussed in detail in a prior memorandum addressing the coronavirus outbreak,[4] businesses must consider the applicability of various escape hatches recognized in contract law, including force majeure and the common law doctrines of frustration of purpose and impossibility. As parties in the U.S. oil industry seek to invoke force majeure provisions based on circumstances related to the COVID-19 pandemic, questions will arise not only as to whether the pandemic qualifies as a force majeure event, but whether the pandemic is being used as a pretext to avoid contracts made uneconomical by the oil price war. This memorandum provides a summary of certain key legal considerations facing the U.S. oil industry in these uncertain times.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Patty Tomasco
pattytomasco@quinnemanuel.com
(713) 221-7227

Patrick King
patrickking@quinnemanuel.com
(713) 221-7222

Chris Porter
chrisporter@quinnemanuel.com
(713) 221-7007

Jonathan Bunge
jonathanbunge@quinnemanuel.com
(312) 705-7476

Diane Cafferata
dianecafferata@quinnemanuel.com
(213) 443-3666

Mike Lyle
mikelyle@quinnemanuel.com
(202) 538-8166

Benjamin Finestone
benjaminfinestone@quinnemanuel.com
(212) 849-7341

Sage Vanden Heuvel
sagevandenheuvel@quinnemanuel.com
(213) 443-3657

Eric Winston
ericwinston@quinnemanuel.com
(213) 443-3602

I. FORCE MAJEURE

As the economic challenges facing energy companies grow, so does the risk that commercial contracts affecting their businesses may become burdensome, impractical, or impossible to perform. The party seeking to avoid or delay performance will likely rely upon the contract's force majeure provision. These provisions are commonplace in energy contracts.

The applicability of force majeure to any given contractual dispute will vary depending on the specific language within the contract, the unique set of facts affecting performance, as well as the governing law. While force majeure provisions within oil and gas contracts have been litigated extensively for the past century, the confluence of current events—a global pandemic, an oil price war, government-imposed travel restrictions, localized quarantines, and a likely economic downturn—will undoubtedly present complex issues of first impression. In particular, litigation will focus on whether an invocation of force majeure is simply cover for a party's desire to avoid contractual obligations that may have become far less favorable due to the dramatic collapse in oil prices.

A. Basics of Force Majeure

The purpose of a force majeure clause is to "relieve a party from penalties for breach of contract when circumstances beyond the party's control render performance untenable or impossible."[5] Generally, force majeure does not excuse nonperformance where the critical event was within the nonperforming party's actual or presumed knowledge or control.[6] A force majeure clause also does not typically excuse nonperformance by a party who failed to exercise due diligence or explore viable alternative performance.[7]

As we discussed in detail in a prior article addressing force majeure as it applies more broadly to commercial contracts,[8] courts consider the following elements when assessing a force majeure defense:

1. Does the contract contain an applicable force majeure clause?
2. Was the force majeure foreseeable?

3. Was performance rendered impossible?

4. Was it the force majeure event that rendered performance impossible?

5. Have all contractual pre-requisites been met?

Parties who are considering invoking force majeure, or who have recently received notice from a counterparty seeking to delay or excuse performance based on a force majeure provision, should carefully assess each of the above issues with the assistance of counsel before acting.

B. Analyzing a Force Majeure Clause

When assessing a claim of force majeure, courts will first determine whether the force majeure clause of the contract allocated the risk of the intervening event to either party at the time of contracting.[9] While force majeure clauses vary, they typically include a combination of specific examples and catch-all language. For example, a force majeure clause in a gas supply contract might read:

> The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accidents to machinery or lines of pipe, the necessity for making repairs to or alterations of machinery or lines of pipe, freezing of wells or lines of pipe, the failure of production facilities for causes other than depletion of the source of gas supply, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension.[10]

If the event asserted as a force majeure is one of the specific examples provided in the force majeure clause—for example, "epidemics"—some courts will enforce the provision regardless of whether the specific event was foreseeable.[11] As the Fifth Circuit Court of Appeals has noted, "the 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract."[12] In general, a party is not excused from performance unless the force majeure clause specifically identifies the event alleged to have prevented performance.[13]

If the specific event is not identified, but the force majeure clause contains a broad "catch-all" provision, courts may turn to the canons of contract construction to determine whether the alleged event is captured by the force majeure clause. The rule of *ejusdem generis* – "of the same kind" – may apply if the force majeure clause has a list of specific potential events followed by a catch-all phrase: in such cases courts may limit the reach of the catch-all phrase to only events similar to those specifically identified.[14] In one case, a district court in the Southern District of New York found that "a public calamity such as war, riot, epidemic, insurrection, or earthquake" was of the same character as the specific examples provided in the force majeure provision (fire, strike).[15] Similarly, courts may apply the doctrine of *noscitur a sociis*—"a word is known by the company it keeps"—in instances where the force majeure provision contains a general description followed by specific examples.[16] In either case, where the event falls only under the catch-all provision, the court will likely require the force majeure event to have been unforeseeable at the time the contract was executed.[17]

If the force majeure clause only contains broad catch-all language (e.g., any event outside the control of either party), and does not list any specific events, a court will look carefully at the

foreseeability of the claimed force majeure event. If the event was foreseeable at the time of contracting such that the parties should have specifically bargained for it, courts are unlikely to find that the force majeure clause captures the claimed event.[18]

C. Is the Reduction in Market Prices Caused by Russia-Saudi Arabia Price War a Valid Force Majeure Event?

The price war between Russia and Saudi Arabia, which escalated following failed talks in early March 2020, has caused oil prices to fall precipitously. Oil prices have collapsed by more than half this year, with West Texas Intermediate Crude falling below $30 per barrel.[19] As the fall in prices causes serious financial challenges for U.S. oil producers, the potential for parties to turn to contractual escape hatches such as force majeure provisions will only increase.

Courts are wary of treating market fluctuations as an unforeseeable force majeure.[20] As one district court stated, "[a] force majeure provision would not include . . . a situation where a supplier failed to deliver gas solely for economic reasons. . . . [S]uch a provision would effectively reduce a supplier's obligation to supply gas on a firm supply basis to a best efforts basis."[21] In interpreting a force majeure provision for a take-or-pay contract, the Tenth Circuit Court of Appeals wrote as follows:

> [Defendant]'s interpretation of the force majeure provision is antithetical to the take-or-pay provision. Under its interpretation, [Defendant] could be expected to take only when the demand for gas resulted in a resale price at or above the contract price. [Defendant] could never be expected to take or pay when the demand for gas resulted in a resale price below the contract price. Rather than taking or paying under the take-or-pay provision, [Defendant] would rely on the force majeure provision. Thus, [Plaintiff] would be shut in during any drop in demand, for up to twenty years, without any ability to sell in other markets. Such a one-sided interpretation is suspect.[22]

While some force majeure provisions do reference acts taken by governments, courts have generally found government-run trade wars to be outside the scope of force majeure. This is particularly the case where a successful claim of force majeure would allow a party to avoid the risks inherent in the contract itself.

- In *Langham-Hill Petroleum Inc. v. Southern Fuels Company*, the Fourth Circuit Court of Appeals rejected a fuel buyer's attempt to invoke a force majeure clause to avoid performance after Saudi Arabia flooded the world oil markets and caused a collapse in the price of crude oil. The court wrote: "[i]f fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated."[23]

- In *Kyocera Corp. v. Hemlock Semiconductor*, the plaintiff sought to excuse its performance of a take-or-pay contract on the grounds that a China-led trade war in the solar panel market caused prices to drop such that its business strategy was unsustainable. The Michigan court wrote: "[P]laintiff did not (although, again, it could have) negotiate a contractual force-majeure clause that by its terms would have excused contractual performance resulting from unprofitability due to governmental market manipulation. Having failed to do so, plaintiff cannot now, through judicial action, effectively reform the contract to

include a provision that was not negotiated for by the parties…. [A]llowing a force-majeure clause to provide a party with relief from an unprofitable market downturn would defeat the purpose of a take-or-pay contract, under which a party (in this case, plaintiff) obligates itself to purchase a set amount of a product at a set price per year, or pay the other party the difference between the amount of product it purchases and the contractual amount."[24]

- In *TEC Olmos, LLC v. ConocoPhillips Co.*, an oil company argued that it was excused from performing under a farmout agreement because a significant drop in the price of oil caused it to lose its financing. The company relied on the "catch-all" provision of the force majeure clause, which included any other cause "beyond the reasonable control of the Party whose performance is affected." Oil prices, the company argued, were beyond its control. But the Texas Court of Appeals denied the force majeure claim, writing "[b]ecause fluctuations in the oil and gas market are foreseeable as a matter of law, it cannot be considered a force majeure event unless specifically listed as such in the contract."[25]

D. Is the Reduction in Oil Demand Caused by the COVID-19 Pandemic a Valid Force Majeure Event?

Global demand for oil has declined rapidly due to the efforts to restrict the spread of the coronavirus, including international and domestic travel restrictions that have grounded thousands of planes, halted trains, and reduced car and bus travel. This has already had an impact across the oil supply chain, affecting upstream followed by midstream and even downstream. Parties claiming force majeure in today's circumstances will likely cite the COVID-19 pandemic, and not the price war, as the unforeseen event excusing performance. With the price war and its immense consequences visible for all to see, however, courts will undoubtedly have to determine whether parties are using the pandemic as pretext to void contracts made uneconomical by the drop in oil prices.

In general, courts have been disinclined to view a drop in market demand as a force majeure event, because parties to contracts assume the risk that market demand may deteriorate over the course of a contract.[26] Where market demand dries up due to an otherwise valid force majeure event, however, such as a global pandemic or government intervention, it is possible that courts may take a different view. As one district court stated, "[n]either [plaintiff]'s briefing nor the Court's research could identify a single case where a mere decline in market demand—***absent some major, unpredictable event which caused the shift***—constituted force majeure so as to excuse performance."[27]

Many oil and gas contracts specifically identify epidemics within the force majeure clause; in such cases courts will likely view the COVID-19 outbreak as a force majeure event.[28] Where a force majeure clause does not list epidemics, pandemics, quarantines, or other analogous events, the courts will likely look to any specific events listed and determine whether the coronavirus outbreak is of the same kind or category. As discussed above, a district court in the Southern District of New York put "epidemic" in the same category as other public calamities such as fires, strikes, wars, riots, insurrections, and earthquakes.[29] In another case, a district court in the Southern District of Indiana acknowledged that an avian flu outbreak "may plausibly constitute an unforeseeable event precipitating a dramatic change in market conditions…."[30] One commentator, however, has suggested that an epidemic might no longer be considered an unforeseeable event by the courts, on the grounds

that the parties could have been expected to include it in the contract.[31] After all, this is not the first disease outbreak the world has seen: SARS, H1N1, ebola, and MERS outbreaks have occurred just in the last 20 years. That said, COVID-19 may be viewed differently. As the head of the World Health Organization has said, "we are in uncharted territory with [COVID-19]. We have never before seen a respiratory pathogen" like it.[32]

Some force majeure clauses also identify acts of the government as a force majeure event.[33] Whether government actions such as pandemic-related travel restrictions would excuse performance would depend on a variety of factors. For example, a government action generally only qualifies as a force majeure event when it renders performance illegal or impossible. As one Illinois court said, for a regulation to constitute a force majeure event it must "clearly direct or prohibit an act which proximately causes non-performance or breach of a contract."[34] This could be the case if federal or state governments imposed restrictions on the transport of oil or gas, or imposed such severe restrictions on the industry that alternative markets for these commodities were unavailable. Modifications in governmental regulations and policy which merely tend to render performance burdensome and unprofitable, meanwhile, are not likely to constitute force majeure.[35] Another factor is foreseeability, which would depend on the language of the contract, the specific government actions at issue, and the court's determination of whether government actions taken in response to a pandemic are foreseeable even if the pandemic is not.

Where a party alleges that the COVID-19 pandemic is the force majeure event, a reviewing court will look for evidence of a correlation between the occurrence of the pandemic and the obligation of the nonperforming party.[36] Given the concurrent price war, there will undoubtedly be arguments made that the pandemic is simply a pretext to avoid costly contracts. As a result, courts will engage in fact-specific analyses to determine whether the pandemic actually impeded contract performance, as opposed to another more foreseeable cause.

Even where changing market circumstances are caused by an unforeseen event, courts generally require that the nonperforming party be unable—not just unwilling—to perform. For example, in the case of a fixed price contract where the buyer finds that the demand for crude oil is a fraction of what it was when the contract was signed, the buyer would likely need to establish that the force majeure event made performance impossible, not merely difficult or unprofitable, though always depending on the language in the contract. As the First Circuit Court of Appeals wrote in a decision holding that the outbreak of the Korean War did not excuse performance:

> Certainly unexpected increases in cost is a risk every contractor takes in entering into a fixed price contract like the one under consideration here. And an increase in costs caused by the unexpected outbreak of a war does not constitute the intervention of a superior force which ends the obligation of a valid contract by preventing its performance.[37]

Some courts have suggested that parties can allocate market risk in a force majeure clause by specifically listing a decline in market demand or change in economic conditions as an intervening event.[38] If such a provision would undermine the purpose of the contract, however, courts may decline to enforce it unless it clearly and definitively expresses the parties' intention to contract for that particular allocation of risk. For example, if a party agrees to sell a product pursuant to a fixed price contract, a force majeure clause will not likely be read to allow the seller to avoid performance solely because market prices have changed and made the contract less favorable. Below are additional

instances where courts have construed force majeure provisions that appeared at odds with the requirements of the contract:

- In *Golsen v. ONG W.*, the Supreme Court of Oklahoma held that despite a reference to "failure of market" in the force majeure provision of the contract, an oil producer could not avoid performance under a take-or-pay contract based on a decline in market demand.[39] "Suspension of the obligation to take or pay for gas in the event of a partial failure of the market is contrary to the general purpose of the contract, and indeed, applying the phrase literally would transform the contract to another creature entirely."[40]

- In *Phillips Puerto Rico Core v. Tradax Petroleum*, the Second Circuit Court of Appeals held that the detention of cargo by the U.S. Coast Guard did not excuse the buyer's obligation to pay for the goods, despite reference in the force majeure clause to "delay[ed] reception of the goods by the buyer".[41] The court held that under the "costs and freight" contract at issue, the seller's duty was fulfilled when the cargo was turned over to the carrier.[42] The court explained that allowing delays in delivery to the buyer to excuse performance after the seller fulfilled his duty would be to radically change the terms of the contract.[43]

Parties seeking to excuse performance due in part to the drop in demand for oil should carefully scrutinize the force majeure clause in their contracts. Courts are most likely to permit a force majeure defense where the contract specifically identifies the event alleged to be a force majeure *and* that event has rendered performance impossible. Finally, parties seeking to claim force majeure based on the COVID-19 pandemic or related events should be prepared for challenges arguing that purely financial concerns, including the oil price war, were the true motivating factor for nonperformance.

II. ALTERNATIVES TO FORCE MAJEURE

While a force majeure provision is the most common route to excusing performance, parties may also turn to the common law doctrines of frustration of purpose and impossibility. While these defenses are less common in energy industry disputes, given that oil and gas contracts invariably contain force majeure provisions, they can be useful alternatives when the force majeure provision does not include the intervening event that is hindering performance and the contract does not otherwise address the contingency. Another rare but potentially useful defense is Uniform Commercial Code Section 2-615, adopted by every state except Louisiana, which codifies the doctrines of impossibility and frustration of purpose to excuse a seller from delays in delivery or non-delivery of goods (including oil and gas) caused by unforeseen circumstances.

A. Frustration of Purpose

"Frustration of purpose excuses performance when a virtually cataclysmic, *wholly unforeseeable event* renders the contract valueless to one party."[44] Some courts have adopted the approach set forth in Section 265 of the Restatement (Second) of Contracts, and require the following elements to be met before performance is excused: "(1) the party's principal purposes in making the contract is frustrated; (2) without that party's fault; (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made."[45] Although similar to force majeure on the issues of control and foreseeability, frustration of purpose does not strictly require performance to be made impossible. As a result, frustration of purpose may release both parties from a contract in

circumstances where one party could still perform, but that party's performance would not make sense because it would not receive its benefit of the bargain due to unforeseen events.[46]

B. Impossibility and UCC 2-615

"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. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[47] Impossibility usually excuses both parties to the contract.[48] The common law doctrine of impossibility has been codified in UCC 2-615, which states that a seller's delay or non-delivery of goods is not a breach "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made."[49]

As with force majeure, the mere fact that a contract is no longer of economic advantage to one of the contracting parties does not make it impossible to perform.[50] However, courts have found that government orders prohibiting future performance of the contract may qualify for an impossibility defense,[51] although they have noted in the past that market disruption caused by an energy crisis does not.[52] The impossibility doctrine typically would apply in the absence of a force majeure clause, or where the unforeseen event was not captured by the force majeure clause but still renders performance impossible.[53]

III. CONCLUSION

The challenges facing the U.S. oil industry today are severe and unprecedented, and will undoubtedly lead to numerous challenges to contracts that are no longer profitable or sustainable. While claims of force majeure will become commonplace, this is just one of the contractual issues potentially implicated by the spread of coronavirus and the current Saudi Arabia-Russia price war. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

***

[1] *Global Oil Demand to Decline in 2020 as Coronavirus Weighs Heavily on Markets*, INT'L ENERGY AGENCY (Mar. 9, 2020), https://www.iea.org/news/global-oil-demand-to-decline-in-2020-as-coronavirus-weighs-heavily-on-markets.

[2] *See* Natasha Turak, *Oil Nose-Dives as Saudi Arabia and Russia Set Off 'Scorched Earth' Price War*, CNBC (last updated Mar. 8, 2020), https://www.cnbc.com/2020/03/08/opec-deal-collapse-sparks-price-war-20-oil-in-2020-is-coming.html; Avi Salzman, *Oil Prices Just Fell Below $30 for the First Time Since 2016*, BARRON'S (Mar. 16, 2020), https://www.barrons.com/articles/oil-prices-brent-west-texas-intermediate-saudia-arabia-productiona-51584368518; Pippa Stevens, *Oil Drops More Than 6% to 18-Year Low as Global Demand Evaporates*, CNBC (last updated Mar. 30, 2020), https://www.cnbc.com/2020/03/30/oil-falls-to-back-to-18-year-lows-below-20-as-global-demand-evaporates.html; Clifford Krauss, *Oil Companies on Tumbling Prices: 'Disastrous, Devastating'*, N.Y. TIMES (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/business/energy-environment/crude-oil-companies-coronavirus.html.

[3] Summer Said & Benoit Faucon, *OPEC, U.S. Shale Producers Open Talks Amid Oil Rout*, WALL ST. J. (last updated Mar. 20, 2020), https://www.wsj.com/articles/opec-u-s-shale-producers-open-talks-amid-oil-rout-11584719936; Matthew DiLallo, *Oil Companies Are Rapidly Adjusting to Lower Oil Prices*, THE MOTLEY FOOL (Mar. 14, 2020), https://www.fool.com/investing/2020/03/14/oil-stocks-are-rapidly-adjusting-to-lower-oil-pric.aspx; Fed. Reserve Bank of Dallas, *Oil Price Collapse Reverberates With Job, Capital Expenditure Cuts*, DALLAS FED. ENERGY SURVEY (Mar. 25, 2020), https://www.dallasfed.org/research/surveys/des/2020/2001; Rania El Gamal, et al., *Russia, Saudi to Debate Oil Output Cuts as U.S. Resists Joining*, REUTERS, (last updated April 8, 2020), https://www.reuters.com/article/us-global-oil-opec/russia-saudi-to-debate-oil-output-cuts-as-u-s-resists-joining-idUSKCN21R00R.

[4] Christopher Kercher et al., *Novel Legal Challenges From the New Coronavirus: Force Majeure*, N.Y. L.J. (Mar. 13, 2020), https://www.law.com/newyorklawjournal/2020/03/13/novel-legal-challenges-from-the-new-coronavirus-force-majeure.

[5] *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 438–39 (2015); *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) ("The primary purpose of a force majeure clause is to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated." (internal quotation marks omitted)); *see also Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 154 (2015) ("Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance.").

[6] Joan Teshima, *Gas and Oil Lease Force Majeure Provisions: Construction and Effect*, 46 A.L.R. 4th 976 (2016).

[7] *Id.*; *but see Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 284 (Tex. App. 1998) (refusing to imply into a force majeure clause the requirement that a party exercise diligence to overcome the effects of the force majeure event).

[8] *See* Kercher, *supra* note 4.

[9] *See Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) (explaining that courts "should look to the language that the parties specifically bargained for in the contract to determine the parties' intent concerning whether the event complained of excuses performance").

[10] *Gulf Oil Corp. v. F. P. C.*, 563 F.2d 588, 613 (3d Cir. 1977).

[11] Allison R. Ebanks, *Force Majeure: How Lessees Can Save Their Leases While the War on Fracking Rages On*, 48 ST. MARY'S L.J. 857, 888 (2017); *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App. 2018) ("We agree that when parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."); *but see Gulf Oil Corp., v. Fed. Energy Regulatory Comm'n*, 706 F.2d 444, 454 (3d Cir. 1983) (requiring a showing of unforeseeability, even though the alleged force majeure event was specifically listed in the force majeure clause).

[12] *Perlman*, 918 F.2d at 1248.

[13] *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 903 (1987).

[14] *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, No. 7:16cv00489, 2018 WL 4008993, at *10 (W.D. Va. Aug. 22, 2018); *Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942–43 (2007).

[15] *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, No. 82 Civ. 2770, 1984 WL 677, at *4 (S.D.N.Y. Aug. 2, 1984), *aff'd*, 782 F.2d 314 (2d Cir. 1985).

[16] *Drummond*, 2018 WL 4008993, at *10.

[17] *See* Ebanks, *supra* note 11 at 888–90 (2017); *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 990 (5th Cir. 1976) ("Exculpatory provisions which are phrased merely in general terms have long been construed as excusing only unforeseen events which make performance impracticable."); *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658, 660 (Tex. App.—Houston [1st Dist.] 1987, no writ).

[18] *Id.*; *see also Watson Labs. v. Rhone-Poulenc Rorer*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) ("[I]ncluding in the contract a standard, boilerplate, catch-all force majeure provision [ ] invokes a body of common law doctrine that is largely indistinguishable from the doctrine of impossibility (or impracticability)." (citation omitted));

[19] *See* Stevens, *supra* note 2; Carmen Reinicke, *Oil Surges 12% on Hopes That a Deal to Cut Production is Coming Soon From OPEC and Its Allies*, BUSINESS INSIDER (last updated April 8, 2020), https://markets.businessinsider.com/commodities/news/oil-price-gains-hope-opec-production-cut-coming-soon-coronavirus-2020-4-1029077498.

[20] *See, e.g.*, *United States v. Panhandle E. Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988), *aff'd*, 868 F.2d 1363 (3d Cir. 1989) ("While the Court has found no New York case directly on point, American courts have routinely refused to excuse performance [based on market fluctuation], even where the force majeure clause, unlike the one in question here, presents potential ambiguities.") (applying New York law); *Valero*, 743 S.W.2d at 663 ("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.").

[21] *Kansas Mun. Gas Agency v. Vesta Energy Co.*, No. 92-2350-JWL, 1994 WL 171566, at *2 (D. Kan. Apr. 1, 1994).

[22] *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 566 (10th Cir. 1989).

[23] *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1330 (4th Cir. 1987); *see also Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234, 1240 (La. Ct. App.) (adverse economic conditions and modifications in governmental regulations and policy which tend to render performance burdensome and unprofitable do not constitute force majeure).

[24] *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 450 (2015).

[25] *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182-185 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

[26] 30 WILLISTON ON CONTRACTS § 77:36 (4th ed.) ("Force majeure clauses generally do not insulate against declines in market demands and the resulting inability to make a profit because of the disparity between a high contract price and a low market price."); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1171 (W.D. Okla. 1989) ("[A] loss of market demand which, as opposed to absolute demand, is a function of price, and the inability to resell gas at a profit, does not render a party 'unable' to take gas.").

[27] *Rexing Quality Eggs v. Rembrandt Enters., Inc.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018) (emphasis added).

[28] This will depend on the jurisdiction, of course, since different courts apply different standards when determining whether a particular event specified in the contract qualifies as a force majeure.

[29] *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, No. 82 Civ. 2770, 1984 WL 677, at *4 (S.D.N.Y. Aug. 2, 1984), *aff'd*, 782 F.2d 314 (2d Cir. 1985).

[30] *Rexing*, 360 F. Supp. 3d at 841–42.

[31] Kristin Choo, *The Avian Flu Time Bomb: The Legal System Will Play A Key Role in Planning the Response to A Possible Onslaught of the Virus*, 91-NOV A.B.A. J. 36, 41 (2005).

[32] Joshua Berlinger, *WHO Chief Warns 'We Are In Uncharted Territory' as Number of Coronavirus Cases Worldwide Passes 90,000*, CNN (last updated Mar. 3, 2020), https://www.cnn.com/2020/03/03/asia/novel-coronavirus-covid-19-intl-hnk/index.html.

[33] *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 448 (2015) (force majeure clause included "acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; [or] equipment breakage....").

[34] *N. Ill. Gas Co. v. Energy Co-op., Inc.*, 122 Ill. App. 3d 940, 951 (1984); *see also Am. Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 586 N.W.2d 325, 334 (Iowa 1998) (government regulation prohibiting ability to fulfill supply contract was force majeure event excusing performance).

[35] *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234, 1240 (La. Ct. App. 1988); *see also Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150 (2015) (force majeure clause in oil and gas leases did not modify the primary term of the habendum clause, and therefore did not extend the leases on the basis of a state moratorium on the use of horizontal drilling and high-volume hydraulic fracturing); *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227 (2001) (financial hardship caused by environmental regulations not a force majeure event, particularly where plaintiff was aware of the regulations before entering into the contract).

[36] *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 455 (3d Cir. 1983); *see also Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 320 (2d Cir. 1985) (even if detention of ship by Coast Guard constituted force majeure, that detention did not frustrate purpose of "costs and freight" contract or prevent buyer from carrying out its obligation).

[37] *Peerless Cas. Co. v. Weymouth Gardens*, 215 F.2d 362, 364 (1st Cir. 1954).

[38] *See, e.g.*, *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817, 842 (S.D. Ind. 2018) ("[T]he parties had every opportunity to negotiate for a force majeure clause that would excuse performance if demand for cage-free eggs dropped. They did not do so, and no evidence suggests that an unreasonably anticipatable event led to the alleged drop in demand."); *see also In re Old Carco LLC*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011) ("Therefore, while courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse. Express inclusion of the clause "change to economic conditions" as an excusing event in the 2000 Agreement evidences the intention of the Parties to use a broader force majeure concept.").

[39] *Golsen v. ONG W., Inc.*, 756 P.2d 1209, 1214 (Okla. 1988).

[40] *Id.*

[41] *Phillips*, 782 F.2d at 319–20.

[42] *Id.*

[43] *Id.*

[44] *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 221 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (internal quotation marks and citation omitted) (emphasis in original).

[45] *Convenience Store Leasing & Mgmt. v. Annapurna Mktg.*, 388 Wis. 2d 353, 363 (2019); *see also United States v. Moulder*, 141 F.3d 568, 571–72 (5th Cir. 1998) (citing Restatement (Second) of Contracts § 265 (1981)).

[46] *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 211 (N.D.N.Y. 2012) (government directive barring fracking was foreseeable) ("[With frustration of purpose,] [b]oth parties can perform, but as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place."); *Alfred Marks Realty Co. v. "Churchills,"*, 90 Misc. 370, 371, (N.Y. App. Term 1915) (advertiser not liable for cost of souvenir booklets for upcoming yacht race that is cancelled due to war); *but see Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 339 (Tex. App. 2009) ("The impossibility defense has been referred to by Texas courts as impossibility of performance, commercial impracticability, and frustration of purpose."); *Tractebel Energy Mktg., Inc. v. E.I. DuPont De Nemours & Co.*, 118 S.W.3d 60, 64–65 & n.6 (Tex. App. 2003) (citing Richard A. Posner & Andrew M. Rosenfield, *Impossibility & Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 86 (1977) (stating that no functional distinction exists among doctrines of impossibility, impracticability, and frustration of purpose)).

[47] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).

[48] *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 964 (8th Cir. 2006).

[49] U.C.C. § 2-615 (2002).

[50] *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 768 n.12 (1983) ("Economic necessity is not recognized as a commercial impracticability defense to a breach of contract claim.").

[51] *See Ask Mr. Foster Travel Serv. v. Tauck Tours*, 181 Misc. 91, 92 (N.Y. Sup. Ct. 1943) (future performance excused after government order restricting operation of sightseeing businesses).

[52] *Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975) (holding that the OPEC-led energy crisis was reasonably foreseeable).

[53] Christopher J. Costantini, *Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense?*, 42 SW. L.J. 1047, 1048 (1989).