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### Contracts and COVID-19

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## ESSAY

## Contracts and COVID-19

Andrew A. Schwartz\*

## Introduction

The COVID-19 pandemic of 2020—as well as government orders to contain it—has prevented countless people, babysitters to basketball players, from fulfilling their contracts. Are all of these parties legally liable for breaching their contracts? Or are they excused due to this extraordinary event? What about payments made in advance, such as tickets bought for a concert that has now been canceled, or a dorm room leased at a college that is now closed?

This coronavirus is new, but wars, floods, and even other pandemics have upset innumerable contracts over the years. In response, our courts have established a fairly clear set of legal rules—most importantly the doctrines of ‘Impossibility’ and ‘Restitution’—to answer these questions. Beyond that, contracting parties can, and often do, “contract around” these legal doctrines by including a ‘Force Majeure’ clause, which specifies what should happen in case of an ‘Act of God’ like the coronavirus.<sup>1</sup>

Part I of this Essay will describe the legal doctrines of Impossibility and Restitution and how they might apply to a contract undermined by the COVID-19 pandemic. Part II will explain how a Force Majeure clause alters those background doctrines to give—or withhold—relief to a party whose performance has been thwarted by the pandemic.

Finally, Subpart II.C will peer into the future and predict that many parties will likely revise their Force Majeure clauses to ensure they cover a pandemic like this. While such a revision may seem obvious from a legal perspective, it may not be optimal from a business perspective, as it may lead counterparties to greatly lower the price they are willing to pay—or even refuse entirely to

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\* Professor of Law, University of Colorado Law School. For helpful research assistance, I thank Ming Lee Newcomb. This Essay is dedicated to my parents on the occasion of the 50th anniversary of their wedding contract.

1. See generally Andrew A. Schwartz, *A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLAL REV. 789, 794 (2010) (“[A] primary function of contract law is to establish ‘default’ or background terms that apply in the absence of an express term on point . . . . But if the parties so desire . . . they may vary from (contract around) any given default term, and courts will give effect to their derogation.”).

make a deal. Indeed, some parties may conclude that the default Impossibility doctrine provides better protection than a Force Majeure clause, as it covers any and all unexpected cataclysms, not just those expressly listed in the contract.

## I. Impossibility and Restitution

### A. In General

Contracts are legally enforceable promises—and they remain enforceable even if performance turns out to be more challenging than expected.<sup>2</sup> However, if contractual performance becomes impossible due to an extraordinary and exogenous event, the legal doctrine of Impossibility will excuse the party from performing and will not count the nonperformance as a breach of contract.<sup>3</sup> The same rule applies if performance has suddenly become so much more difficult and dangerous than expected as to be “impracticable” (meaning effectively impossible).<sup>4</sup> And the outcome remains the same if a new law or government order prohibits the party from doing what she promised; this might be called “legal impossibility.”<sup>5</sup>

The Impossibility doctrine is given a narrow scope and rarely applied, as it undermines the very nature of a contract as a legally enforceable promise.<sup>6</sup> If courts regularly excused parties from their contracts when performance turned out to be tougher than expected, then parties would lose faith that contracts

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2. *Dermott v. Jones*, 69 U.S. (2 Wall.) 1, 7 (1864) (“[I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good . . . . Unforeseen difficulties, however great, will not excuse him.”); RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).
  3. *Dermott*, 69 U.S. at 7 (“[I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, *unless its performance is rendered impossible by the act of God . . .*” (emphasis added)). By “exogenous” event, I simply mean that the supervening event was outside the control of the parties.
  4. *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916) (“A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.” (quoting CHARLES FISK BEACH, JR., 1 A TREATISE ON THE MODERN LAW OF CONTRACTS § 216 (1896))); UNIFORM COMMERCIAL CODE § 2-615(a) (AM. LAW INST. 2017); RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981) (“Discharge by Supervening Impracticability”).
  5. *Dermott*, 69 U.S. at 7 (“[I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, *unless its performance is rendered impossible by . . . the law . . .*” (emphasis added)).
  6. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (observing that the Impossibility doctrine has “been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances”).

really are legally enforceable.<sup>7</sup> For this reason, a “mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.”<sup>8</sup> “Furthermore, a party is expected to use reasonable efforts to surmount obstacles to performance, and a performance is impracticable only if it is so in spite of such efforts.”<sup>9</sup>

Finally, there is the question of foreseeability. Courts often suggest that only ‘unforeseeable’ events can be the grounds for excuse under the Impossibility doctrine.<sup>10</sup> The intuitive idea here is that “[b]ecause the purpose of a contract is to place the reasonable risk of performance upon the promisor . . . it is presumed to have agreed to bear any loss occasioned by an event that was foreseeable at the time of contracting.”<sup>11</sup>

Despite its intuitive appeal, however, the Impossibility doctrine cannot really contain a strict requirement that the event at issue was unforeseeable. For one thing, the types of events that typically give rise to an Impossibility defense are natural disasters (“Acts of God”) that have happened many times in the past and will surely happen again in the future, such as fires, floods, or earthquakes.<sup>12</sup> For another, anything and everything is foreseeable, at least to those with good imaginations. If aliens from outer space land on Earth, that might not be *foreseen*, but it is certainly *foreseeable*—after all, countless books and movies specifically entertain that very possibility.<sup>13</sup> But if an alien invasion were to render contractual performance impossible, it seems clear that the Impossibility doctrine should apply.

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7. See *Mineral Park Land*, 156 P. at 460 (“We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them.”).

8. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981).

9. *Id.* (citation omitted).

10. *E.g.*, *Waldinger Corp. v. CRS Grp. Eng’rs, Clark Dietz Div.*, 775 F.2d 781, 786 (7th Cir. 1985) (“The applicability of the defense of commercial impracticability, then, turns largely on foreseeability.”); *Bank of Am., N.A. v. Shelbourne Dev. Grp.*, 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010) (“If a contingency is foreseeable, however, the commercial-impracticability defense is not available . . . .”); *E. Capitol View Cmty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1039 n.5 (D.C. Cir. 2008) (“A party claiming that performance is impossible must prove that . . . the circumstances which made performance impossible were not reasonably foreseeable at the time the contract was made.” (quoting Standardized Jury Instruction for the District of Columbia, No. 11-12 (1998))); *Kel Kim*, 519 N.E.2d at 296 (“[T]he impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.”).

11. *Waldinger Corp.*, 775 F.2d at 786.

12. See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981) (“Events that come within the rule stated in this Section are generally due . . . to ‘acts of God . . . .’”).

13. *E.g.*, *E.T.: THE EXTRA-TERRESTRIAL* (Universal Studios 1982).

Perhaps the best way to understand the role foreseeability plays in the Impossibility analysis is that it is “a relevant, but not dispositive, factor.”<sup>14</sup> The rule apparently followed in Florida seems sensible: “The doctrine of impossibility of performance should be *employed with great caution* if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement.”<sup>15</sup> Thus if the parties enter into a contract after a hurricane has been spotted offshore, difficulties in performance due to that particular hurricane will likely not lead to a successful invocation of the Impossibility doctrine.

Finally, if a party has been excused from her contract on the basis of Impossibility, that is not the end of the story. Under the legal doctrine of Restitution, which prohibits unjust enrichment at the expense of another,<sup>16</sup> the excused party would have to return any payments received in advance.<sup>17</sup> The excused party has not breached the contract, but neither has he performed, so it would be unjust for him to keep that money. (Pure reliance damages, by contrast, are generally not recoverable in Impossibility cases, since those were not paid over to the other side.<sup>18</sup> Thus, in the seminal case of *Taylor v. Caldwell*, where a promoter rented a music hall that was subsequently destroyed by an accidental fire, the promoter could not recover the money he had spent on advertising the event prior to the venue’s destruction.<sup>19</sup>)

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14. *United States v. Winstar Corp.*, 518 U.S. 839, 906 n.53 (1996); *see Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) (“Foreseeability or even recognition of a risk does not necessarily prove its allocation.”).
  15. *Am. Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. Dist. Ct. App. 1998) (emphasis added); *accord, e.g., Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008); *Home Design Ctr.—Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 769 (Fla. Dist. Ct. App. 1990).
  16. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”).
  17. RESTATEMENT (SECOND) OF CONTRACTS § 377 (AM. LAW INST. 1981) (“A party whose duty of performance . . . is discharged as a result of impracticability of performance . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance.”); *id.* cmt. a (“Furthermore, in cases of impracticability . . . the other party . . . is also entitled to restitution.”); Victor P. Goldberg, *After Frustration: Three Cheers for Chandler v. Webster*, 68 WASH. & LEE L. REV. 1133, 1161 (2011) (“[T]he majority position is that restitution should be made for work performed and money paid before the intervening event.”).
  18. RESTATEMENT (SECOND) OF CONTRACTS § 377 illus. 5 (AM. LAW INST. 1981) (showing by example that pure reliance damages are not recoverable); Goldberg, *supra* note 17, at 1161-62 (explaining—and criticizing—the rule that reliance damages are not recoverable).
  19. *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309, 312.

B. Application to COVID-19

As a general matter, it seems clear that the doctrines of Impossibility and Restitution apply quite directly to contracts undermined by COVID-19 and the governmental response to it.

Whether the COVID-19 pandemic was ‘foreseeable’ does not really matter, for the reasons discussed above in Part I.A. Pandemics have happened before, such as the Spanish Flu of 1918, and scientists and others have repeatedly warned that a pandemic should be expected to eventuate one of these days.<sup>20</sup> But the same can be said of hurricanes, avalanches—or structures going up in flames, as was the case in *Taylor v. Caldwell*.<sup>21</sup> The mere fact that these natural disasters (or Acts of God) have happened in the past and will surely happen again in the future does not mean that the Impossibility doctrine ought not be applied in such cases.

So, if a babysitter promised to look after your children once a week for \$50, she is bound to the contract regardless of car trouble, the kids misbehaving, or other hardships. If the going gets tough and the babysitter gives up, that is a breach of contract and she is legally liable to you. This is what makes her contract a contract, and not an idle promise to give it a try.

But if the babysitter failed to show up because the COVID-19 pandemic made it physically dangerous for her to enter your house, the Impossibility doctrine will come to her aid. Because the COVID-19 pandemic is an Act of God and so radically different from the ordinary risks and challenges of babysitting, and because it makes her performance so much more difficult and dangerous than expected, the law will excuse her nonperformance pursuant to the doctrine of Impossibility.<sup>22</sup> The outcome is even clearer if the government has issued an order for the babysitter to remain home to avoid spreading the virus, as is, or was, the case in many states.<sup>23</sup> Such a state order makes it legally impossible for the babysitter to perform. Finally, as a matter of Restitution, the babysitter would have to return any payments you made in advance.

Consider another example: If you bought a \$100 ticket for a Pearl Jam concert, and the event has been cancelled, there is no breach of contract, although Pearl Jam would have to refund your \$100. What if you bought a nonrefundable \$50 train ticket to travel to the concert? That is an example of

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20. E.g., Victoria Y. Fan et al., *Pandemic Risk: How Large Are the Expected Losses?*, 96 BULL. WORLD HEALTH ORG. 129, 129 (Dec. 5, 2018) (“Few doubt that major epidemics and pandemics will strike again . . .”); Katherine Harmon, *What Will the Next Influenza Pandemic Look Like?*, SCI. AM. (Sept. 19, 2011), <https://perma.cc/JD39-JJR9> (reporting that “scientists and public health experts seemed to agree” that the relevant question regarding “the next influenza pandemic” “is *when*, not *if*,” it will occur).

21. *Taylor*, 122 Eng. Rep. at 312.

22. See generally RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

23. E.g., Cal. Exec. Order N-33-20 (Mar. 19, 2020), <https://perma.cc/FC3J-PETS> (requiring “all individuals living in the State of California to stay home or at their place of residence,” subject to certain exceptions).

reliance damages, and you would have to bear that loss yourself, since it was never paid over to Pearl Jam and thus not subject to restitution.

These cases are relatively simple, but more difficult cases could be imagined where COVID-19 renders performance much more difficult or expensive, but not literally or legally impossible. For instance, suppose that a supplier promises to deliver a thousand baseball gloves, but its factory in New York is shut down by government order. At first blush, it seems that performance has become legally impossible.

But what if those baseball gloves can be produced at another factory in Japan, with the result that the cost of production and shipping would be twice what the supplier expected? In that case, performance is probably merely more burdensome, and the courts would not relieve the supplier from the contract.<sup>24</sup> At some point, however, the added expense could rise to a level where a court would view performance as effectively Impossible. In one well-known case, the court granted relief where the cost of performance turned out to be ten times what was anticipated.<sup>25</sup> But what if it were five times as expensive? This will be the sort of difficult judgment call courts will be called upon to make in coming years and, as they do, other litigants will have a better idea of where the line for Impossibility will lie.

Another difficult type of case will be where performance is legally possible, perhaps because a state's stay-at-home order has expired, but the pandemic remains prevalent. For instance, in the babysitter example above, should the babysitter be excused if the stay-at-home order expired yesterday, but she is concerned for her health if she comes over to babysit? If the babysitter is eighty years old, and therefore at special risk from COVID-19,<sup>26</sup> then a court would likely excuse her on the basis of Impossibility. The physical danger of babysitting during the COVID-19 pandemic is so much higher than expected that her performance would be excused as effectively Impossible.

But what if she is a perfectly healthy eighteen-year-old? Early reports indicate that the risk COVID-19 poses to her health is quite low, and not much

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24. See RESTATEMENT (SECOND) OF CONTRACTS ch. 11 intro. note, at 311 (AM. LAW INST. 1981) (“In contracting for the manufacture and delivery of goods at a price fixed in the contract, for example, the seller assumes the risk of increased costs within the normal range.”).

25. *Mineral Park Land Co. v. Howard*, 156 P. 458, 459 (Cal. 1916) (describing “an expense of 10 or 12 times as much as the usual cost” as a “prohibitive cost” that justified relieving the promisor on the basis of Impossibility); RESTATEMENT (SECOND) OF CONTRACTS ch. 11 intro. note, at 311 (AM. LAW INST. 1981) (suggesting that if “a disaster results in an abrupt tenfold increase in cost to the seller, a court might determine that the seller did not assume this risk” and excuse the seller on the basis of Impossibility).

26. *People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/J4PC-4L46> (last updated May 14, 2020) (“Based on currently available information and clinical expertise, older adults and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19.”).

different than the usual hazards of babysitting, such as a car accident on the way over.<sup>27</sup> Assuming this scientific conclusion holds true, and recalling that the Impossibility doctrine is given a narrow scope, it seems likely that the eighteen-year-old babysitter would probably remain bound to her contract, even if she is honestly worried about the danger she would face. That is the sort of self-imposed impossibility that does not count as “exogenous.”<sup>28</sup> (It is worth noting, however, that the law would never order her to actually babysit; rather, she would be liable for damages based on any increased cost of hiring a substitute babysitter.<sup>29</sup> That might well be an “efficient breach” from her perspective.<sup>30</sup>)

## II. Force Majeure Clauses

### A. In General

“Freedom of contract” allows private parties to change or shape the default rules of contract law that would otherwise apply.<sup>31</sup> When it comes to the Impossibility doctrine, parties routinely include a standard clause known as a Force Majeure clause to “contract around” the rules described above in Part I.A.<sup>32</sup> In other words, “the Force Majeure clause addresses the same issues that the default [Impossibility] doctrine would address, and it resolves those issues in the manner expressly described” in the parties’ contract.<sup>33</sup> When a contract

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27. Soumya Karlamangla, *What’s the Risk of COVID-19 for a Healthy Young Person?*, L.A. TIMES, (Mar. 11, 2020, 4:00 AM), <https://perma.cc/VU9C-9MMU> (reporting that the risk of serious illness due to COVID-19 for a teenager is very low).

28. *See supra* note 3.

29. “A court will refuse to grant specific performance of a contract for service or supervision that is personal in nature. The refusal is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing what might seem like involuntary servitude.” RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a (AM. LAW INST. 1981); *see, e.g.*, Fla. Panthers Hockey Club, Ltd. v. Miami Sports & Exhibition Auth., 939 F. Supp. 855, 858 (S.D. Fla. 1996), *aff’d sub nom.* Fla. Panthers v. City of Miami, 116 F.3d 1492 (11th Cir. 1997) (“[A] personal services contract cannot be enforced by injunction or specific performance . . . .”); N. Del. Indus. Dev. Corp. v. E. W. Bliss Co., 245 A.2d 431, 434 (Del. Ch. 1968) (“[P]erformance of a contract for personal services, even of a unique nature, will not be affirmatively and directly enforced . . . .”); RESTATEMENT OF EMPLOYMENT LAW § 9.04 cmt. b (AM. LAW INST. 2014) (“It is a longstanding rule of equity that specific performance of promises to work . . . will not be granted.”); RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. LAW INST. 1981) (“A promise to render personal service will not be specifically enforced.”).

30. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 128-38 (9th ed. 2014) (explaining the concept of “efficient breach”).

31. Schwartz, *supra* note 1, at 794.

32. *Id.* at 801.

33. *Id.*



includes a Force Majeure clause, the precise terms of that clause will control the outcome.

There is no ‘boilerplate’ Force Majeure clause, as each one is the subject of negotiation between the parties.<sup>34</sup> That said, they commonly follow a certain pattern that can be illustrated by quoting the Force Majeure clause at issue in one well known New York case, *Kel Kim v. Central Markets*:

If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.<sup>35</sup>

Using this clause as an example, we can see that it addresses the elements of the Impossibility doctrine, such as the requirement of exogeneity (“through no fault of their own”; “beyond the control of such party”), and includes a specific list of which types of extraordinary events will relieve a party from her legal obligations under the contract. As is common, it includes a catch-all provision (“other similar causes”) at the end of the list of specific events.

Force Majeure clauses are strictly and narrowly construed for the same reason that courts demand a strong showing under the Impossibility doctrine.<sup>36</sup> The essence of a contract is that it is legally enforceable, through thick and thin, and only a cause that is specifically listed in the Force Majeure clause will excuse a party from his contract.<sup>37</sup> Likewise, even the Force Majeure clause’s catch-all provision is interpreted narrowly to only cover “things of the same kind or nature as the particular matters mentioned.”<sup>38</sup>

It should therefore come as no surprise that courts frequently reject claims of Force Majeure and only rarely hold that a party should be excused from the contract on this basis.<sup>39</sup> It would be a mistake, however, to take this as evidence

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34. *But see* Gideon Parchomovsky et al., *Of Equal Wrongs and Half Rights*, 82 N.Y.U. L. REV. 738, 786 (2007) (reporting that “force majeure clauses generally take the form of boilerplate language that simply parrots the default rules of impracticability”).

35. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 n.\* (N.Y. 1987).

36. *See supra* text accompanying notes 6-9.

37. *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 N.W.2d 445, 451 (Mich. Ct. App. 2015) (“Force-majeure clauses are typically narrowly construed, such that the clause ‘will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified.’” (quoting *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012))); *Kel Kim*, 519 N.E.2d at 296 (“Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.”).

38. *Kel Kim*, 519 N.E.2d at 296-97.

39. *See, e.g., id.* at 296 (“[C]ontractual force majeure clauses . . . provide a . . . narrow defense.”); NEW YORK PRACTICE SERIES: COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 114:36 (Robert L. Haig ed., 4th ed. 2019) (observing that the force majeure clause is “rarely successfully relied upon”); Harold Alexander Lewis, Comment,

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that parties rarely succeed in backing out of their contracts based on Force Majeure. The only time a Force Majeure clause would be litigated is when a party makes a baseless claim of Force Majeure and the other side is forced to sue, or in close cases where the proper meaning of the clause is unclear. Surely there are many instances where one party claims that the Force Majeure clause clearly applies to a certain situation, and the other side concurs. In such a scenario, the concurring party would simply allow the other party to be released from the contract, and the courts would never hear the case. The point is that while Force Majeure clauses are construed narrowly and rarely successful *in court*, they are likely invoked with some frequency outside the public eye. After all, it costs time, money, and goodwill to negotiate a Force Majeure clause, yet parties continue to do so.<sup>40</sup> We should therefore conclude that Force Majeure clauses have utility and are successfully invoked more frequently than the reported cases would indicate.

#### B. Application to COVID-19

Does COVID-19, or the governmental response thereto, qualify as a Force Majeure event? The answer would depend on the specific Force Majeure clause at issue, especially the specific causes listed in the clause, as well as the actual impact the exogenous event had on the party claiming Force Majeure. That said, it is possible to make some general points that would likely be applicable to a typical Force Majeure clause, like the one from *Kel Kim* quoted above.<sup>41</sup>

The term “pandemic” appears to be totally absent from Force Majeure clauses drafted prior to the current outbreak. A recent Westlaw search returned zero cases that involved a Force Majeure clause that include the term “pandemic.”<sup>42</sup> A similar search for Force Majeure clauses that include the term

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*Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense?*, 42 SW. L.J. 1047, 1061 (1989) (“[I]n virtually all decisions addressing force majeure claims based on an inability to make a profit because of some cause beyond a party’s control, courts have rejected the [claim and refused to] excuse the party from its contractual obligation.”); Jacqueline McCormack, Note, *Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States*, 37 INT’L J. LEGAL INFO. 1, 11 (2009) (explaining how under American law, “there is a strict standard for force majeure that is difficult to meet”); see also Michael Polkinghorne & Charles Rosenberg, *Expecting the Unexpected: The Force Majeure Clause*, 16 BUS. L. INT’L 49, 59 (2015) (“International arbitrators have a tendency to construe force majeure clauses narrowly.”).

40. See generally Schwartz, *supra* note 1, at 801 (“[F]reedom of contract allows private parties to arrange their transactions in almost any way they wish. But, given the relatively high rates charged by attorneys, actually doing so is rather expensive.”).

41. See *supra* text accompanying note 35.

42. On April 19, 2020, a search of Westlaw’s “All State & Federal” database for (“force majeure” & pandemic) returned three cases, none of which mentioned a Force Majeure clause with the term “pandemic.” One was a 2020 case dealing with the COVID-19 pandemic that noted the absence of a force majeure clause in the contract

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“epidemic”<sup>43</sup> returned only 74 cases.<sup>44</sup> By comparison, a simple Westlaw search for “Force Majeure” returned more than 2,000 cases.<sup>45</sup> As such, very few contracting parties will be able to point to a specific term in their Force Majeure clause that covers the present situation.

This leaves two possibilities for a party seeking to be excused based on a Force Majeure clause: The “governmental laws” term or the “Act of God” provision. The former would depend on the precise order in place. If a state has ordered people to stay home and businesses to cease operations, this would fall squarely within the Force Majeure clause, at least for the duration of the order. Once the order is lifted, the party would no longer be excused and would have to perform as promised. If a state has made a less-restrictive order, or recommendations without the force of law, that would likely not come within the “governmental laws” Force Majeure clause.

Turning to the “Act of God” provision, the question will be whether the COVID-19 pandemic is viewed as akin to other types of natural disasters, like hurricanes, earthquakes, or avalanches. This is a delicate question, and reasonable minds may differ. Some commentators have tentatively suggested that the COVID-19 pandemic would likely not qualify as an Act of God because its severity depends on human action or inaction.<sup>46</sup> Other commentators, likewise tentative, have taken the opposite position.<sup>47</sup>

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at issue. *Tracey v. Recovco Mortg. Mgmt. LLC*, No. CV 20-3298 (MAS) (TJB), 2020 WL 1666603, at \*3 (D.N.J. Apr. 3, 2020). The second was a notable case involving a Material Adverse Change clause, which is not really a Force Majeure clause, as it alters the Frustration doctrine, not the Impossibility doctrine. *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at \*1, \*57 (Del. Ch. Oct. 1, 2018) (quoting and following Schwartz, *supra* note 1). And the third is a case where the relevant contract did not include a Force Majeure clause; the reference to “pandemic” is in the name of a statute. *NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 774 F. Supp. 2d 277, 300, 305 (D.D.C. 2011).

43. An epidemic is a localized outbreak of disease; thus, a pandemic, which is a global outbreak of disease, would count as an epidemic as well. The upshot is that a Force Majeure clause that included the term “epidemic” would be triggered by either an epidemic or a pandemic.
44. On April 19, 2020, a search of Westlaw’s “All State & Federal” database for (“force majeure” & epidemic) returned 74 cases. A quick review indicates that many of these do indeed reference a Force Majeure clause that included the term “epidemic.”
45. On April 19, 2020, a search of Westlaw’s “All State & Federal” database for (“force majeure”) returned 2,393 cases.
46. David B. Saxe & Michael Mix, *Contractual Force Majeure Provisions and the Spreading Coronavirus*, N.Y. L.J. (Mar. 9, 2020, 1:32 PM), <https://perma.cc/77D4-XJ53> (“[C]oronavirus might not be considered an act of God . . .”); Glenn D. West, *Impossibility, Impracticability, Frustration, Force Majeure, Efficient Breach, and COVID-19*, GLOBAL PRIV. EQUITY WATCH (Mar. 23, 2020), <https://perma.cc/QW6W-BQ6H> (“[I]t is far from clear whether the term ‘act of God’ encompasses epidemics and pandemics even though they are the result of natural causes.”).
47. Stephen Wright et al., *Is Coronavirus a Force Majeure Event?*, DLA PIPER, (Mar. 30, 2020), <https://perma.cc/G2K3-C42F> (“[A]n ‘act of god’ will probably include COVID-19 . . .”).

As for the present author, I expect that the COVID-19 pandemic will likely qualify as an Act of God (subject, of course, to the phrasing of the specific clause at issue). An earthquake is still an Act of God, whether or not the factory has been built to be earthquake-proof. A hurricane is still an Act of God, even if it is partially a consequence of human-caused climate change. And a pandemic is still an Act of God, even if it was spread by people flying in human-built airplanes or exacerbated by human behavior (e.g., attending church or taking a cruise). Nor does it matter that pandemics are foreseeable and, in fact, have been predicted. The same is true of all Acts of God. (That said, a party to a contract made today, following the start of the COVID-19 pandemic, would not be excused on the basis of this event.)

Finally, even if the COVID-19 pandemic or a government order qualifies as a Force Majeure event, a party would only be excused under a *Kel Kim*-like clause if the pandemic or a subsequent order actually “delayed or prevented” the party from performing.<sup>48</sup> In some cases, such as an arena closed by government order, a band who promised to play a concert there is clearly prevented from performing and would thus be excused. In many cases, however, performance would likely not be prevented but merely rendered more difficult or expensive, as in the baseball glove example discussed above.<sup>49</sup> As discussed there, the relevant question would be whether the additional expense or difficulty is so great as to make it effectively impossible for the party to perform.

### C. Drafting for Future Pandemics

This will not be the last pandemic that renders performance more difficult than anticipated. Pandemics have happened in the past and will certainly return, just like hurricanes, earthquakes, floods, and war. Now that the risk of pandemics has become salient, we are certain to see parties add terms like ‘epidemic’ and ‘pandemic’ to Force Majeure clauses in future contracts, as many commentators are now recommending.<sup>50</sup>

The same thing happened after the terrible terrorist acts of September 11, 2001.<sup>51</sup> Prior to that date, there appears to be only one reported case involving

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48. *Kel Kim*, 519 N.E.2d at 296 n.\*.

49. See *supra* text accompanying notes 24-25.

50. See, e.g., Saxe & Mix, *supra* note 46 (“[G]oing forward, parties should insist that their contracts include ‘epidemic’ as a force majeure event in case performance becomes impossible due to coronavirus or a future epidemic.”).

51. See, e.g., Mark B. Baker, “A Hard Rain’s A-Gonna Fall”—Terrorism and Excused Contractual Performance in a Post September 11th World, 17 TRANSNAT’L LAW. 1, 33 (2004) (“[C]ontracting parties should . . . address risks involved with terrorism expressly in their contractual agreements. This may be done by adding a force majeure clause, including excuse of performance for terrorist acts and activity . . . .”); David Gurnick & Tal Grinblata, *Be Prepared—Managing Catastrophic Risks in Franchise Systems*, 21 FRANCHISE L.J. 128, 132 (2002) (“By now, it is obvious that terrorism should be included in a force majeure clause.”); see also Jodi Fedor, *Riots! Pandemics! Active footnote continued on next page*

a Force Majeure clause that included the term “terrorism,” indicating that the practice was quite rare.<sup>52</sup> Since then, there have been dozens of cases that quote Force Majeure clauses including the terms “terrorism” or “terrorist,” suggesting that use of these terms has become much more common.<sup>53</sup>

From a lawyer’s perspective, then, it seems obvious to add “pandemic” to all Force Majeure clauses from here on out. From a business perspective, however, things are more complicated. Contract negotiations are dynamic, and your counterparties will respond if you seek to include “pandemic” to the Force Majeure clauses contained in future contracts. All else being equal, they will offer a lower price, because you are foisting the risk of nonperformance on to them.

If a baseball glove manufacturer demands an expanded Force Majeure clause that includes pandemics, its buyers might offer only \$8 per glove, rather than the \$10 per glove they paid in the past.<sup>54</sup> Accepting the lower price might be a good idea—or it might not. It depends on the chances of a pandemic hitting in any given year, as well as the cost of other alternative ways for the manufacturer to protect itself. If the manufacturer can buy insurance that would cover the contract damages for \$1 per glove, then it seems prudent to use the same old Force Majeure clause, get the full \$10 per glove price, and buy insurance for \$1 per glove. This way, it would get the same protection and also a higher price (\$9 per glove). But what if the insurance company goes bankrupt and fails to pay out when you need it? This is another risk that must be

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*Shooters!: Thinking About the Unthinkable When Negotiating Real Estate Documents (with Sample Provisions)*, PRAC. REAL EST. LAW., Mar. 2017, at 5 (“After 9-11, New York leases addressed security measures related to terror events and revisited force majeure clauses . . .”).

52. On April 19, 2020, a search of Westlaw’s “All State & Federal” database for (“force majeure” /p terror!) returned four cases decided prior to September 11, 2001, and only one of those cases (*R & B Falcon Corp. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001)) actually included a Force Majeure clause that included the word “terrorism” or “terrorist.” *Accord* Gurnick & Grinblata, *supra* note 51, at 132 (“Reported decisions [prior to 2002] concerning force majeure clauses in franchise disputes indicate that parties have not often considered the threat of terrorism in drafting the clauses.”).
53. On April 19, 2020, a search of Westlaw’s “All State & Federal” database for (“force majeure” /p terror!) returned 69 cases decided after September 11, 2001, and a brief review shows that most of these are quoting Force Majeure clauses that include terms like “terrorism” or “terrorist act.” *E.g.*, *Elavon, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F. Supp. 2d 1298, 1302, 1307 (N.D. Ga. 2011) (quoting a Force Majeure clause from a 2002 contract that includes the term “acts of terrorism”).
54. At the extreme, the buyer might even walk away from the deal and find another supplier who promises to perform, no matter the difficulty. *See, e.g.*, *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 78 N.W.2d 80, 82 (Neb. 1956) (president of newspaper company testified that he switched from one newsprint supplier to another because the latter promised to deliver paper “come hell or high water”).

considered. In the end, there is not a simple legal answer to the risk of pandemics—rather, it is a nuanced decision that requires business judgment.<sup>55</sup>

Thinking more broadly, the savvy business move may be to delete the Force Majeure clause entirely and rely on the default Impossibility doctrine for protection. Pandemics are top of mind right now, just as terrorism was in 2001, but to insist on those terms in future Force Majeure clauses is to fight the last war. There are countless other disasters that might come to pass in the future and make performance more difficult, from super-volcanoes to meteors colliding with the earth. If you try to list all of these in a Force Majeure clause, they will be interpreted narrowly, and you may well fail to include the one that eventuates.<sup>56</sup> If you add ‘meteor collision with the earth,’ but a comet, rather than a meteor, ends up hitting the earth, a court would likely hold that calamity not to be covered. If you exclude the Force Majeure clause entirely, the court would likely treat a comet collision the same as it would a meteor crash. On the other hand, a court might view the excision of a Force Majeure clause as an agreement to accept all risks of nonperformance. In the end, the solution calls for careful legal and business judgment.

### Conclusion

The COVID-19 pandemic of 2020 has upset contractual expectations around the country and the world. As with other natural disasters, the common law doctrines of Impossibility and Restitution will apply to contracts upended by the coronavirus pandemic and related government orders. If a contract contains a Force Majeure clause, however, the terms of that clause will control. Looking forward, we should expect that future Force Majeure clauses will commonly include a specific reference to pandemics (or epidemics), although some parties may decide that they are better off without a Force Majeure clause at all.

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55. See Rufus Calhoun Young, Jr. & Dwight H. Merriam, Commentary, *Homeland Security Begins at Home: Local Planning and Regulatory Review to Improve Security*, LAND USE L. & ZONING DIG., Nov. 2003, at 3 (2003) (“In future contracts, or amendments, specify that ‘acts of terrorism’ are included, or excluded, from the definition of force majeure, depending on how and to whom this risk is to be assigned.” (emphasis added)). Pursuant to the “business judgment rule” of corporate law, business decisions made by the board of directors “will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment.” See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

56. See P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 234-35 (1995) (“Should the drafter spend his/her time thinking of possible events that might occur and list them all in the contract? This article submits that the drafter should not. Instead of listing as many events as possible, the drafter should focus on the effects that force majeure events are likely to have on the performance of the contract.” (emphasis omitted)).