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NARROW, NARROWER, NARROWEST: APPROPRIATE FORCE MAJEURE SPECIFICITY

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Imagine you are the owner of a small construction company and are contracted to build a large office building. As is customary, you signed a contract agreeing to complete the building by a specific deadline for a set amount of money. Included is a brief force majeure clause, which allows you to be relieved of the contract in the case of “unforeseeable circumstances” that might prevent completion of the project. During construction, heavy tariffs affect your main suppliers, exponentially increasing the projected cost of completing the project. Your company cannot afford the supplies necessary to complete the building, and you wonder if you can void the contract under the force majeure clause. As it stands, is this perfunctory clause sufficient to excuse you from your contract?

Force majeure protections are inherently broad by nature, causing them to vary by state, situation, and jurisdiction.³ Thus, determining what protections can be granted to contracting parties relies heavily upon the specific verbiage and phrasing within

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3 Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, Pillsbury Winthrop Shaw Pittman LLP, (2003), <https://www.pillsburylaw.com/images/content/3/9/v2/3990/BylinedArticleForceMajeureinTumultuousTimesJournalofWorldInvestm.pdf>.

said clause.⁴ However, minimalistic or overparticular specific force majeure clauses may induce more problems than they would otherwise solve. The solution we propose therefore is two-fold: first, each party must be informed about potential unforeseen events that could damage said party's infrastructure, capital, or ability to perform⁵; then, aware of these potential dangers, parties should apply the necessary location and industry-specific specificity to their contracts. Instead of cutting and pasting generic force majeure clauses, we suggest that contracting parties draft explicit, location-specific force majeure clauses.

We will examine force majeure clauses at three varying levels of specificity: those contracts with no force majeure clause, an overly specific clause, or one that is too broad. Both the benefits and dangers of each level of specificity will be assessed, along with and how price changes or tariffs are managed in each varying case.

I. BACKGROUND

Force majeure clauses serve as a sort of contractual safeguard. When written into a contract, they allow one party to “suspend or terminate the performance of its obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.”⁶ In the ever-changing world of contract law, unexpected circumstances often arise, making contracts difficult to fulfill. However, the line between difficult and impracticable can be blurred. In Restatement 2d, a legal treatise on contract common law, defines impracticable contract performance

4 Carol K. Watson, *Should Construction Contracts Include Force Majeure Contracts* 38 Ass'n Gen. Contractors of Cal. 15, 15-16 (2008).

5 Janice M. Ryan, *Understanding Force Majeure Clauses*, Venable (Feb. 2011), <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses>.

6 Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 N. Va. L.R. 552, 554-567 (2007).

as involving “extreme and unreasonable difficulty, expense, injury or loss to one of the parties.”⁷

Examples include shortages of supplies due to war, embargo, local crop failures, and unforeseen shutdowns. Such causes can natural disasters like earthquakes, tornadoes, hurricanes; man-made problems like riots, strikes, and government intervention can also be incorporated.

Because risk varies by region and industry, each party should be aware of the possible area specific risks that could hinder their ability to fulfill a contract within differing states. Attorneys Mark Augenblick & Alison B. Rousseau recognize that “There is no universally accepted definition of the requirements to successfully invoke force majeure. Different laws and jurisdictions take different approaches.”⁸ This is in part what makes force majeure clauses so difficult to interpret, as the challenge of determining what is impracticable or when a contract becomes void is left to the determination of the presiding judge. Consequently, each state and jurisdiction lead to differing results, creating inconsistency and uncertainty when dealing with contractual parties residing in different states.

To help mitigate this variance, parties will often take two different approaches. Some try to protect against every imaginable catastrophe in the included text, while others take the catch-all approach with general language, hoping for a generous reading in court. Which approach is preferable? It depends on the party’s industry and the region. For example, a housing contractor in Tornado Alley is much more concerned about defending against tornadoes than a contractor living on the coast. So, when drafting a contract, the first contractor will be sure to include defense against tornadoes specifically, rather than some ambiguous line about natural disasters. This

7 Restatement 2d § 261, comment d, *as quoted in* Contempo Design, Inc. v. Chicago & Northeast Ill. Dist. Council of Carpenters, 1998 U.S. Dist. LEXIS 8357, at *15 (N.D. Ill. May 20, 1998).

8 Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, Pillsbury Winthrop Shaw Pittman LLP, (2003), <https://www.pillsburylaw.com/images/content/3/9/v2/3990/BylinedArticleForceMajeureinTumultuousTimesJournalofWorldInvestm.pdf>.

way, the damages are more likely to fall under the scope of force majeure.

For this reason, contract drafters have the options of including no force majeure clause, a narrow one, or a broad one. As the following examples show, trained experts still experience difficulties in determining adequate amounts of risk when drafting industry and region-specific force majeure clauses.

II. CONTRACTS WITH NO FORCE MAJEURE CLAUSE

To avoid the complication inherent with force majeure clauses, some seek to avoid them entirely. If no force majeure clause is included, there remains two ways in which the contracting parties may be excused from their obligations.⁹ First, the doctrine of “impracticability” relieves a contracting party from carrying out tasks deemed “impracticable.”¹⁰ Nationally, tasks that have been classified as impracticable are understood to be impossible to carry out or to complete. The second doctrine that relieves a party from a contract is “frustration of purpose.” The “frustration of purpose” occurs when circumstances do not allow for a contract to be carried out due to unforeseen events.

Leanne Krawchuk, an attorney specializing in mining law, explains, “the parties should also stipulate the specific [force majeure] events that they agree neither party should bear the risk of in the context of their particular contract.”¹¹ Of course, the potential pitfalls in the mining industry are vastly different than the dangers of other industries. She also explains the need to pay attention to the “specific circumstances surrounding the contract and its subject matter (such as the services to be provided, the nature of the product to be

9 Timothy Murray, “Drafting Advice: Avoiding Disastrous Force Majeure Clauses”, *Lexis Practice Advisor Journal* (Feb. 28, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/drafting-advice-avoiding-disastrous-force-majeure-clauses>.

10 *Id.*

11 Leanne Krawchuk, *Don't Let a Force Majeure Clause Become Boilerplate*, *Mining Law Canada Blog* (Jan. 22, 2019), <http://www.dentonsmininglaw.com/dont-let-a-force-majeure-clause-become-boilerplate>.

transported, the location of the mining project, the type of equipment and labor used in performing the services).¹² Across a wide range of industries, firms face a wide range of dangers. A boilerplate force majeure clause is simply unable to effectively cover all bases. Mary McCormick, a business attorney at the McCormick international law firm, warns against creating boilerplate force majeure clauses. She argues that, “A good force majeure clause should be customized to fit the parties, the industry and type of goods, and the specific type of contract.”¹³ Thus, region and industry-specific force majeure clauses are necessary to account for the individual circumstances of one’s work.

III. OVER-SPECIFIC FORCE MAJEURE CLAUSES

To avoid the problems mentioned in the previous section, it is usually preferred to include even a standard force majeure clause. Additionally, force majeure provisions should be treated less like shopping lists of immunity and more like wish lists because simply listing every imaginable threat does not guarantee protection.¹⁴ In some cases, it may do the opposite. For this reason, listing every possible danger may result in a catch-22—that is the specific language, while meant to increase protection, actually narrows the realm of availability. The innate reaction would therefore be to broaden the language as much as possible, but this in and of itself presents its own set of issues.

One such example is *Publiker Industries v. Union Carbide Corp.* Union Carbide Corporation had agreed to sell a specialized type of ethanol to the plaintiff for a fixed number of years. Within that time, conflict in the Middle East caused production costs to spike well past

12 *Id.*

13 Mary McCormick, *Force Majeure Clauses: Buried in Boilerplate But Important*, Martindale (Jun. 15, 2009), https://www.martindale.com/business-law/article_McCormick-International_707604.htm.

14 Timothy Murray, “Drafting Advice: Avoiding Disastrous Force Majeure Clauses”, *Lexis Practice Advisor Journal* (Feb. 28, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/drafting-advice-avoiding-disastrous-force-majeure-clauses>.

that specified in the contract. Notwithstanding the circumstance, Union Carbide remained locked into the contract, obliged to provide ethanol at a below-market price. In search of emergency relief, the Union Carbide invoked protection under the contract's force majeure clause, which reads: "Neither party shall be liable for its failure to perform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations."¹⁵ They were hoping to apply the clause specifically under the line "any occurrence beyond [the parties'] reasonable control."¹⁶ However, the clause in question then narrows from "any occurrence" to a specific list of hypotheticals (fires, floods, etc.). This is an example of *ejusdem generis*, specific language that narrows the broad introductory language that precedes it.¹⁷ Due to this interweaving, the defendant can no longer claim protection against unlisted events (e.g. price increases). As a result, the court ruled that Union Carbide could not find protection in the force majeure clause.¹⁸

IV. OVERLY BROAD FORCE MAJEURE CLAUSES

While widening the language may seem optimal, the ambiguity may actually work to the parties' disadvantage. For example, it fails to recognize smaller events that might cause damage to contracting parties' contracts. This, again, is due to the fact that broad language is left to the judge's interpretation if taken to court.

This can be seen in the case of *Perlman vs. Pioneer Ltd. Partnership*, where William Perlman (plaintiff), signed an oil and gas lease agreement with Pioneer Limited Partnership and Kendrick Cattle Company (defendants). The contract contained a force majeure

15 Publicker Industries v. Union Carbide Corp., 17 UCCRep.Serv. 989 (E.D.Pa.1975).

16 *Id.*

17 Joseph M. Perillo, *Calamari and Perillo on Contracts* 476 (2009).

18 Publicker Industries v. Union Carbide Corp., 17 UCCRep.Serv. 989 (E.D.Pa.1975).

clause that would excuse Perlman from performance if he was “prevented or hindered by...inability to obtain governmental permits.”¹⁹ As Perlman sought to execute the agreement, a Wyoming state commission requested permission to investigate his work. Instead of complying, Perlman filed for a declaratory judgment to determine if he could be excused from performance under force majeure protection, claiming that his work was being hindered by the government. However, the court found that disruptions from state regulations were not specifically listed within Perlman’s force majeure clause. The court ruled 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.”²⁰ Due to the broad nature of the force majeure clause in question, it was up to the determination of the judge if new state regulations were sufficient to void the contract. The court ruled in behalf of the defendants, establishing a statute stating that courts should not “interject terms that the parties did not bargain for.”²¹ Because Perlman did not choose to include state regulations under the force majeure provision, he was denied protection.

Tariffs did not directly affect the Perlman vs. Pioneer Ltd. Partnership, but tariffs have become an increasingly familiar challenge among modern companies and businesses. Even if *Perlman* brought forth force majeure claims under the guise of tariffs, the court would again rule the same. This being due to the fact that Perlman and Pioneer Ltd. Partnership did not choose to include tariffs as an unforeseen event in their force majeure clause, their contract could not be void under force majeure provisions. However, under the new precedent, if Perlman had included tariffs in their force majeure clause, they would have been released from their contract. So, as can be seen in *Perlman*, there is simply too much risk to rely on generous interpretations of open-ended clauses.

19 *Perlman v. Pioneer*, 918 F.2d 1245 (5th Cir. 1991).

20 *Id.*

21 *Id.*

V. PROPOSAL

To the untrained eye, the subtle differences between an overly narrow and an overly broad force majeure clause can be difficult to detect. Even small differences in language can make a significant difference in a contract's interpretation. For example, a clause that reads "included" has vastly different meaning than "included, but not limited to." In some cases, boilerplate provisions may be sufficient to mitigate both parties' risk. In other cases, a customized clause may be appropriate. Unless a contract drafter is aware of these details, he or she risks exposure to unexpected liability.

We therefore propose that businesses draft force majeure clauses with the adequate level of specificity depending on the inherent risk in a specific industry and the regional issues where the businesses are located. For many small businesses and inexperienced negotiators, this process may be unclear. We suggest that contract drafters familiarize themselves with the industry and region-specific language that might be found in similar force majeure contracts. Using this historical method will allow drafters to assess what should and should not be included in the final contract. Ultimately, a well-constructed force majeure provision can provide protection against even the worst of circumstances. In situations between a company's life or death, the impact of one force majeure provision cannot be overstated. Our previous examples demonstrate the challenges that even experienced legal counsel can face when seeking enforcement of their force majeure clauses.

One alternative solution to this problem is the creation of a standard force majeure provision for universal use in every contract. Proponents might suggest that this would remove ambiguity in how much protection a company can expect.²² We disagree, however, because each contract should represent a unique agreement with unique region-specific risks. The Lexis Practice Advisor Journal

22 Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, Pillsbury Winthrop Shaw Pittman LLP, (2003), <https://www.pillsburylaw.com/images/content/3/9/v2/3990/BylinedArticleForceMajeureinTumultuousTimes-JournalofWorldInvestm.pdf>.

explains that even a generic force majeure clause, if not drafted carefully, “can leave the parties with fewer protections than they would have under the law without it.”²³ As mentioned previously, each state classifies unforeseeable events differently, so a general “catch-all” force majeure clause is untenable in practice, due to the varying interpretations in each jurisdiction. For this reason, we reject proposing standardized force majeure clauses. We also do not suggest dramatic changes in legislation to force standardization of all force majeure clauses.

VI. CONCLUSION

A proper understanding of force majeure clauses gained through historical analysis will allow businesses to apply the necessary specificity to their contracts. By applying too little or too much detail, or failing to include such a clause at all, businesses may lose protection against unforeseeable events. However, careful consideration of the amount of risk that each party is willing to accept make it possible to determine the level of specificity that each contract requires according to the specific industry and region the party is located. The financial implications could mean the difference between profitability and bankruptcy.

23 Timothy Murray, “Drafting Advice: Avoiding Disastrous Force Majeure Clauses”, *Lexis Practice Advisor Journal* (Feb. 28, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/drafting-advice-avoiding-disastrous-force-majeure-clauses>.