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## Contract as Emergency Law

### Cover Page Footnote

Xuan-Thao Nguyen, Contract as Emergency Law, 30 WASH. INT'L L.J. 420 (2021).

## Contract as Emergency Law

Xuan-Thao Nguyen<sup>†</sup>

*Abstract:* This Article offers a new perspective of contract law as emergency law. Doctrines of impossibility, supervening events, force majeure, and good faith performance are core principles resiliently allowing parties to address contract nonperformance under state of emergency crises. Comparatively, China prefers drastic measures to confront contract nonperformance problems by issuing Certificates of Force Majeure, permitting Chinese companies to escape contract liability and forfeiting the resiliency of contract law as emergency law. The Article argues that the pandemic reaffirms the role of contract law as emergency law and urges governments to solidify the freedom to contract.

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### INTRODUCTION

COVID-19 brought a state of emergency to the United States and the world. President Donald Trump signed several Executive Orders. At the state level, governors issued their Executive Orders to respond to the emergency.<sup>1</sup> Legislatively, Congress addressed the COVID-19 pandemic by passing financial packages to rescue the economy from precipitous freefall. For instance, the Coronavirus Aid, Relief and Economic Security Act

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<sup>†</sup> Gerald L. Bepko Chair in Law, Director of the Center for Intellectual Property & Innovation, Indiana University McKinney School of Law. Special thanks to Michelle Swinney and Malissa Magiera for their valuable assistance. Thank you to my Chinese students for their research assistance. I dedicate the series of law review articles on Contracts and COVID-19 to my 1L students at the University of Washington School of Law and Indiana University McKinney School of Law.

<sup>1</sup> See Benjamin Della Rocca et al., *State Emergency Authorities to Address COVID-19*, LAWFARE (May 4, 2020, 3:03 PM), <https://www.lawfareblog.com/state-emergency-authorities-address-COVID-19> (providing state by state analysis of emergency laws and responses); *COVID-19 Emergency Powers and Constitutional Limits*, AKIN GUMP (Mar. 23, 2020), <https://www.akingump.com/en/news-insights/COVID-19-emergency-powers-and-constitutional-limits.html> (identifying federal authority, state authority, and various constitutional limits on due process and the takings clause when governments force a business to close, commandeer a business or factory, or confiscate a private property); see also ANNA PRICE & LOUIS MYERS, LIBR. OF CONG., UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 (2020), <https://www.loc.gov/law/help/COVID-19-responses/federal-state-local-responses.pdf> (detailing the various responses from governments).

(CARES Act) enacted on March 27, 2020, protects renters in low income housing properties and tenants in units and buildings receiving federally backed mortgages from evictions.<sup>2</sup> The federal moratorium lasted 120 days until August 23, 2020, and was later extended to June 30, 2021.<sup>3</sup> Cities and local governments also extended protection to renters through emergency orders and ordinances.<sup>4</sup> Of the emergency laws invoked, none addressed the millions of cases concerning contract nonperformance due to the government shutdown, shelter-in-place, and social distancing orders by governors in forty-three states.<sup>5</sup> As infection and death tolls continued to rise, businesses closed, and the economy faltered, parties in contractual agreements faced an unprecedented crisis. These parties could not perform their obligations, which may cause them to breach their contracts and face substantial damages.

This Article offers a critique of state of emergency laws exposing how they are inadequate in ameliorating the massive contract nonperformance problems.<sup>6</sup> The Article turns to

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<sup>2</sup> See Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (last updated Apr. 26, 2021), <https://www.nolo.com/evictions-ban> (stating that the CDC's Agency Orders extends the residential eviction ban until at least March 31, 2021); Emma Platoff & Juan Pablo Garnham, *Eviction Proceedings and Debt Collections Can Resume This Month, Texas Supreme Court Orders*, TEX. TRIB. (May 14, 2020, 8:00 PM), <https://www.texastribune.org/2020/05/14/texas-evictions-debt-collections-resume-may-moratoriums-lifted/> (discussing the federal moratorium does not apply to tenants who do not reside in buildings with federally backed mortgages and that they will face evictions starting May 26).

<sup>3</sup> See *id.*

<sup>4</sup> *Protections for Texas Renters: COVID-19*, UNIVERSITY OF TEXAS SCHOOL OF LAW, <https://sites.utexas.edu/covid19relief/tenant-protections/> (last visited Feb. 24, 2021) (listing cities with emergency orders and emergency ordinances to assist renters).

<sup>5</sup> See Rachel Holliday Smith, *Debt Collectors Freeze Funds of New Yorkers Struggling in Pandemic*, CITY (May 1, 2020, 11:53 PM), <https://thecity.nyc/2020/05/debt-collectors-freeze-funds-of-struggling-new-yorkers.html>.

<sup>6</sup> As a nation, we are conditioned to think of emergencies as they related to national security and natural disasters crises. See, e.g., J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 1020 (2020); Mark P. Nevitt, *On Environmental Law, Climate Change, & National Security Law*, 44 HARV. ENV'T L. REV. 321 (2020); Elizabeth Trujillo, *An Introduction to Trade and National Security: New Concepts of National Security in a Time of Economic Uncertainty*, 30 DUKE J. COMPAR. &

normative contract laws' doctrines of impossibility, supervening events, frustration of purpose, force majeure, and duty to perform in good faith, as evidence of how contract law functions as emergency law. The resilience of contract law doctrines, however, in the face of a pandemic, may be insufficient. The Article looks beyond the U.S. border for a radical response implemented by China for further insights.

In response to the state of emergency, China adopted a novel approach to address the private contracts' problem.<sup>7</sup> The government declared, upon an application by the contracting party for force majeure certificate, that contract performance is excused as impossible due to the COVID-19 pandemic. Consequently, the nonperforming party is not in breach and can escape damages. As China is the center of the global supply chain, thousands of companies execute contractual agreements with international partners worldwide. Instead of allowing parties to adhere to private business ordering to decide for themselves or avail to the judicial system for recourse in breach of contract disputes, China's emergency approach allowed companies to invoke 5,600 contracts with a total value of \$72.47 billion.<sup>8</sup>

The Article proceeds as follows. Part I discusses emergency laws' framework and specific emergency laws invoked during the COVID-19 pandemic. Part II focuses on contract problems under the state of emergency caused by the pandemic. Part III explains contract law doctrines that solve arising problems during the state of emergency. Part IV examines and critiques the Chinese government's approach to uphold thousands of contracts in the international supply chain network. The Article concludes with observations for future contracts to adequately address pandemic-related supervening events that would wreak havoc to the daily functions of a normal economy.

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INT'L L. 211 (2020); Craig Martin, *Atmospheric Intervention? The Climate Change Crisis and the Jus Ad Bellum Regime*, 45 COLUM. J. ENV'T L. 331 (2020); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183 (2018).

<sup>7</sup> *China Force Majeure Certificate Issuance Pass 5,600 Amid Virus Outbreak - Trade Body*, REUTERS (Mar. 11, 2020, 7:53 AM), <https://www.reuters.com/article/health-coronavirus-china-force majeure/china-force majeure-certificate-issuance-pass-5600-amid-virus-outbreak-trade-body-idUSL4N2B43CK>.

<sup>8</sup> *See id.*

## I. EMERGENCY LAWS IN THE UNITED STATES

Emergency laws are legislation referring to a state of emergency empowering governments to take actions or impose policies that governments ordinarily would not be authorized to implement.<sup>9</sup> That means exigent circumstances must be present for governments to declare a state of emergency. Upon the declaration, governments can invoke specific powers in response to the multiple crises stemming from an emergency.<sup>10</sup>

### A. *Emergency Law Framework*

Circumstances that necessitate a government to declare a state of emergency generally include natural disasters, civil unrests, armed conflicts, and medical or public health crises.<sup>11</sup> With respect to the legal framework for the declaration, there are three different ways the federal government can declare a state of

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<sup>9</sup> In the words of Justice Pound, concurred by Justice Cardozo, emergency laws are always present. *See People ex rel. Durham Realty Corp. v. La Fetra*, 130 N.E. 601, 606 (N.Y. 1921) (“Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war, earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions. Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war, an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised.”).

<sup>10</sup> Scholars often discuss national security crisis and abrogation of civil liberties when governments invoke specific powers to respond to emergencies. *See, e.g.*, RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 *STAN. L. REV.* 605 (2003); Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and ‘Special Interest’ Hearings*, 55 *RUTGERS L. REV.* 741, 741 (2003) (“The strength of this country’s commitment to civil liberties is most often tested in times of war or other national emergencies.”); David Greenberg, *Lincoln’s Crackdown*, *SLATE* (Nov. 30, 2001, 11:58 AM), <http://www.slate.com/id/2059132> (detailing Abraham Lincoln’s suspension of habeas corpus).

<sup>11</sup> A federal court has defined a state of emergency as “the condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent.” *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971).

emergency.<sup>12</sup>

First, the President possesses the authority to declare a national emergency under the National Emergencies Act (NEA).<sup>13</sup> The NEA imposes procedural requirements on the President to declare a national emergency.<sup>14</sup> Congress can limit the President's emergency authority if it gathers necessary votes to overturn a veto. For example, on February 15, 2019, President Trump invoked the NEA to issue Proclamation 9844 which declares a "National Emergency Concerning the Southern Border of the United States."<sup>15</sup> Both the House and the Senate voted to overturn the President's declaration but failed to obtain sufficient votes to override the veto.<sup>16</sup>

Second, the Secretary of Health & Human Services (HHS) possesses the power to declare a national public health emergency. The Public Health Act, 42 U.S.C. §247d, empowers the HHS Secretary with that authority. The Secretary may determine that "a disease or disorder presents a public health emergency" or "a public health emergency, including significant

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<sup>12</sup> There is another legal framework for the President to declare a national emergency pursuant to 22 U.S.C. § 2318(a)(1) ("(A)n unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization; and (B) the emergency requirement cannot be met under the authority of the Arms Export Control Act [22 U.S.C §§ 2751 *et seq.*] or any other law except this section."). For purposes of this Article, only three emergency frameworks are in discussion. *See also* James G. Hodge, Jr., & Kim Weidenaar, *Public Health Emergencies as Threats to National Security*, 9 J. NAT'L SECURITY L. & POL'Y 81, 82–83 (2017) (identifying relevant laws authorizing the President to declare a state of emergency and the Secretary of the Department of Health and Human Services to declare a national public health emergency).

<sup>13</sup> 50 U.S.C. §§ 1601–51.

<sup>14</sup> 50 U.S.C. § 1621(a) ("With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register."); Kim Lane Scheppelle, *Small Emergencies*, 40 GA. L. REV. 835, 847 (2006) ("The National Emergencies Act is the blanket statute that covers a myriad of separate grants of congressional power to the President to be used when he deems there is an emergency.").

<sup>15</sup> Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—and What to Do About It*, 44 HARBINGER 95, 95 (2020).

<sup>16</sup> *See id.* (noting "the emergency remains in place" as Congress failed to override the veto).

outbreaks of infectious disease or bioterrorist attacks, otherwise exists.”<sup>17</sup> In addition, instead of being the first to declare a public health emergency, the Secretary could follow a presidential memo instructing the Secretary to declare a national public health emergency or a presidential proclamation declaring a national emergency with respect to a national public health crisis. For example, the “President Memo Combatting the National Drug Demand and Opioid Crisis” that was released on October 26, 2017 instructed the HHS Secretary to declare a public health emergency to combat the opioid crisis.<sup>18</sup> Likewise, the Presidential Proclamation 8443 declared a national emergency with respect to the 2009 H1N1 flu pandemic on October 23, 2009.<sup>19</sup> Upon the declaration of a national public health emergency, the Secretary can make grants; provide awards for expenses; enter into contracts; and conduct and support investigations into the cause, treatment, or prevention of the disease.<sup>20</sup> The Secretary can also waive or modify requirements during the emergency.<sup>21</sup>

Lastly, the Robert T. Stafford Disaster Relief & Emergency Assistance Act enables a governor to petition the President for a declaration of a major disaster or emergency.<sup>22</sup> A

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<sup>17</sup> 42 U.S.C. § 247d; *See also Public Health Emergency Declarations*, DEPARTMENT OF HEALTH & HUMAN SERVICES, (Apr. 16, 2021), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx> (listing all Public Health Emergency Declarations).

<sup>18</sup> *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE (Apr. 24, 2020), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

<sup>19</sup> *Proclamation 8443—Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic*, AMERICAN PRESIDENCY PROJECT (Oct. 24, 2009), <https://www.presidency.ucsb.edu/documents/proclamation-8443-declaration-national-emergency-with-respect-the-2009-h1n1-influenza>.

<sup>20</sup> *See id.*

<sup>21</sup> *Waiver or Modification of Requirements Under Section 1135 of the Social Security Act*, DEPARTMENT OF HEALTH & HUMAN SERVICES (Oct. 27, 2009), [https://www.phe.gov/emergency/news/healthactions/section1135/Documents/1135WaiverSigned\\_H1N1.pdf](https://www.phe.gov/emergency/news/healthactions/section1135/Documents/1135WaiverSigned_H1N1.pdf)

<sup>22</sup> 42 U.S.C. § 5170. The Act’s predecessors were both known as the “Disaster Relief Act,” enacted in 1950 and 1974. The framework under the Stafford Act allows state and federal government to address bio attacks and other disasters. *See* Barry Kellman, *Responding to Biological Attacks*, 20 DEPAUL J. HEALTH CARE L. 1, 11 (2018) (stating

governor submits such a petition upon a finding that a “disaster is of such severity and magnitude that an effective response is beyond the capabilities of the State and affected local governments and that Federal assistance is necessary.”<sup>23</sup> Presidents have declared national emergencies under this Act upon governors’ requests on an average of nine times per year.<sup>24</sup>

Each of these tools are options for the federal government to take swift action during emergencies. Absent these laws, responses to emergencies would likely be insufficient to address the situations.

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that responses to bio-attacks and other catastrophe are “part of the normal National Response Framework.”).

<sup>23</sup> 42 U.S.C. § 5170. 42 U.S.C. § 5122 (defining an emergency under this chapter as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”). Also, a major disaster under this chapter is defined as “any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven [sic] water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby” *Id.* Illustratively, Hurricane Katrina in 2005 caused Louisiana governor Kathleen Blanco to request that President Bush to declare a federal state of emergency for Louisiana, activating federal assistance and federal troops to rescue people and protect property. Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 482 (2015); see Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 168–69 (2017) (stating that in response to the Flint’s contaminated water crisis, on January 14, 2016, Governor Rick Snyder “declared a state of emergency and requested federal aid. On January 16, 2016, President Barack Obama declared a state of national emergency in Flint. On January 21, 2016, the EPA issued an Emergency Order pursuant to the SWDA compelling state officials to take specific steps to assure the safety of the public water system.”).

<sup>24</sup> *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE (Apr. 24, 2020), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>; see Bruce R. Lindsay & Francis X. McCarthy, CONG. RSCH. SERV., R42702, STAFFORD ACT DECLARATIONS 1953-2014: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS 7 (2015).

### *B. Emergency Law Invoked During COVID-19*

During the early months of 2020, as COVID-19 tormented the nation by shutting down the economy, the HHS Secretary first declared a national public health emergency under the Public Health Act.<sup>25</sup> The President then proclaimed a national emergency and issued three executive orders pursuant to the NEA.

The first person documented with the COVID-19 infection in the United States occurred on January 20, 2020.<sup>26</sup> The viral contagion first detected in Wuhan, China, quickly transmitted through symptomatic and asymptomatic individuals in 213 countries and territories around the world.<sup>27</sup> The World Health Organization declared COVID-19 a pandemic on March 11, 2020.<sup>28</sup> As the news reports on COVID-19 spreading and killing infected individuals in Wuhan, governments in different countries responded with different measures.<sup>29</sup> In the United States, under the emergency law framework, the HHS Secretary declared a national public health emergency as the result of COVID-19 on

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<sup>25</sup> Press Release, Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

<sup>26</sup> See Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 *NEW ENG. J. OF MED.* 929 (Mar. 5, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191>; Karen Weise et al., *Why Washington State? How Did It Start? Questions Answered on the U.S. Coronavirus Outbreak*, *N.Y. TIMES* (Mar. 6, 2020), <https://www.nytimes.com/2020/03/04/us/coronavirus-in-washington-state.html>.

<sup>27</sup> See generally *Countries Where Covid-19 Has Spread*, *WORLDOMETER* (Apr. 28, 2021), <https://www.worldometers.info/coronavirus/countries-where-coronavirus-has-spread/> (as of June 14, 2021, the world witnessed 176,895,871 confirmed Covid-19 cases, along with 3,822,394 deaths).

<sup>28</sup> See *Timeline: WHO's Covid-19 Response*, *WORLD HEALTH ORG.*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline> (last visited Feb. 27, 2021); Press Release, New ICD-10-CM Code for the 2019 Novel Coronavirus (COVID-19), *Ctr. for Disease Control & Prevention* (Mar. 18, 2020), <https://www.cdc.gov/nchs/data/icd/Announcement-New-ICD-code-for-coronavirus-3-18-2020.pdf>.

<sup>29</sup> See Helen Regan et al., *January 29 Coronavirus News*, *CNN* (Jan. 29, 2020, 11:44 P.M.), <https://www.cnn.com/asia/live-news/coronavirus-outbreak-01-29-20-intl-hnk/index.html> (explaining how Japan, Malaysia, China, and South Korea addressed the spread of Covid-19 in the early months).

January 31, 2020.<sup>30</sup>

The HHS Secretary subsequently renewed the national public health emergency declaration on April 21, 2020.<sup>31</sup> The last time the HHS Secretary made a similar declaration due to a viral outbreak was during the H1N1 pandemic.<sup>32</sup> Upon declaration, the HHS Secretary may waive or modify the application of health care items and services furnished by health care providers, certifications, licensure requirements, sanctions, and other provisions as necessary to supply public health services during the emergency period.<sup>33</sup>

By March 13, 2020, COVID-19's devastation in the United States required a new response: President Trump issued Proclamation 9994, which declared a national emergency

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<sup>30</sup> See U.S. Dept. of Health & Human Services, *Determination that a Public Health Emergency Exists*, (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (“As a result of confirmed cases of 2019 Novel Coronavirus (2019-nCoV), on this date and after consultation with public health officials as necessary, I, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby determine that a public health emergency exists and has existed since January 27, 2020, nationwide.”). President Trump, on March 18, 2020, issued Executive Order 13,909 to delegate the HHS Secretary the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID-19. See Exec. Order No.13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020). On March 23, 2020, Trump signed Executive Order 13,910 to delegate to the HHS Secretary the authority to prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States. See Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (Mar. 23, 2020).

<sup>31</sup> See U.S. Dept. of Health & Human Services, *Renewal of Determination that a Public Health Emergency Exists*, (Apr. 21, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-21apr2020.aspx> (“As a result of the continued consequences of Coronavirus Disease 2019 (COVID-19) (formerly called 2019 Novel Coronavirus (2019-nCoV)) pandemic, on this date and after consultation with public health officials as necessary, I, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby renew, effective April 26, 2020, my January 31, 2020, determination that a public health emergency exists and has existed since January 27, 2020, nationwide.”).

<sup>32</sup> On April 26, 2009, HHS Secretary declared a public health emergency under section 319 of the Public Health Service Act, 42 U.S.C. 247d, in response to the 2009 H1N1 influenza virus. The Secretary then renewed that declaration twice, on July 24, 2009, and October 1, 2009.

<sup>33</sup> See 42 U.S.C. § 1320b-5.

retroactively as of March 1, 2020.<sup>34</sup> Generally, most presidential proclamations are aimed at those outside the government containing neither force nor effect of law because they are merely ceremonial in nature.<sup>35</sup> However, with the proclamation to declare a national emergency, the President may authorize the Secretary of the Treasury to prescribe, “the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work” under the Emergencies statute, 19 U.S.C. § 1318(a).<sup>36</sup> Under the Emergencies statute, the Treasury Secretary is further authorized to eliminate, consolidate, or relocate port of entry, or take any other action that may be necessary to respond to a specific threat.<sup>37</sup> Also, the statute authorizes the Commissioner of U.S. Customs and Border Protection to close ports of entry as necessary to “respond to the

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<sup>34</sup> Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (invoked in response to the spread of the novel coronavirus). See *Pimentel-Estrada v. Barr*, 458 F.Supp.3d 1226, 1233 (W.D. Wash. 2020) (including Proclamation No. 9994 along with state and local governments’ “stay home” orders).

<sup>35</sup> *Executive Order, Proclamation, or Executive Memorandum?*, LIBR. OF CONG., <https://guides.loc.gov/executive-orders/order-proclamation-memorandum> (last visited Feb. 27, 2021).

<sup>36</sup> See 19 U.S.C. § 1318(a).

<sup>37</sup> See 19 U.S.C. § 1318(b) (providing that “. . . the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act . . . or to a specific threat to human life or national interests” is authorized to take additional actions on a temporary basis. Secretary of the Treasury may eliminate, consolidate, or relocate any office or port of entry of the Customs Service; modify hours of service, alter services rendered at any location, or reduce the number of employees at any location; or take any other action that may be necessary to respond directly to the national emergency or specific threat. *Id.* The Treasury Secretary works in consultation with the Secretary of Department of Homeland Security who then limited travel to prevent the spread of Covid-19. See Exec. Order No. 13,916, 85 Fed. Reg. 22,951 (Apr. 23, 2020) (the Treasury “Secretary shall consult with the Secretary of Homeland Security or his designee before exercising, as invoked and made available under this order, any of the authority set forth in section 1318(a) of title 19, United States Code.”). The Secretary of Homeland Security later extended the travel limitations until May 20, 2020. See Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 31,059 (May 22, 2020). For the Travel Restrictions between the United States and Mexico due to Covid-19, see Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547 (Mar. 20, 2020).

specific threat to human life or national interests.”<sup>38</sup> Indeed, the Department of Homeland Security invoked the Emergencies statute to limit travels at the U.S. land ports of entry with Canada and Mexico, in response to the spread of the novel coronavirus.<sup>39</sup>

After the proclamation of COVID-19 as a national emergency, on March 27, 2020, President Trump signed Executive Orders 13,911 and 13,912, invoking his authority under the National Emergencies Act.<sup>40</sup> In Executive Order 13,911, the President delegated “additional authority” under the Defense Production Act with respect to health and medical resources, such as personal protective equipment and ventilators, to respond to the COVID-19 spread. Specifically, President Trump delegated the authority “to guarantee loans by private institutions, make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore domestic industrial based capabilities to produce such resources.”<sup>41</sup> Further, the President delegated the authority “to enable greater cooperation among private businesses in expanding production of and distributing such resources . . . and to provide for the making of voluntary agreements and plans of action by the private sector.”<sup>42</sup>

For Executive Order 13,912, President Trump invoked a national emergency authority to order the “Selected Reserve and Certain Members of the Individual Ready Reserve of the Armed Forces” to active duty in response to the spread of the novel

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<sup>38</sup> See 19 U.S.C. § 1318(b)(2).

<sup>39</sup> On March 18, 2020, the U.S. and Canadian governments announced the closure of the international border to nonessential travel due to the COVID-19 pandemic. See Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547 (Mar. 20, 2020). In the announcement of the border closure, the Department of Homeland Security noted that, consistent with the President’s declaration of a national emergency, the spread of COVID-19 within the U.S. posed a “specific threat to human life or national interests,” justifying the travel restrictions under 19 U.S.C. § 1318. Only essential travels are permitted. *Id.*

<sup>40</sup> See Exec. Order No. 13,911, 85 Fed. Reg. 18,403 (Mar. 27, 2020). See also Exec. Order No. 13,912, 85 Fed. Reg. 18,407 (Mar. 27, 2020).

<sup>41</sup> Exec. Order No. 13,911, 85 Fed. Reg. 18,403.

<sup>42</sup> *Id.*

coronavirus.<sup>43</sup> Also, on April 18, 2020, the President issued Executive Order 13,916 to invoke a national emergency in providing additional authority to the Secretary of the Treasury in response to COVID-19.<sup>44</sup> Under this executive order, the Treasury Secretary possesses the authority to “temporarily extend deadlines” for certain estimated payments that importers were “suffering significant financial hardship because of COVID-19.”<sup>45</sup> According to the Temporary Final Rule issued by U.S. Customs and Border Protection and the Department of Treasury, importers with significant financial hardships relating to merchandise entered into the United States between March-April 2020, could postpone their payments for duties, taxes, or fees.<sup>46</sup>

In summary, at the U.S. national level, in response to the COVID-19 pandemic disrupting the nation and causing a shutdown of the economy, the President proclaimed a national emergency and issued three executive orders pursuant to the NEA. The President’s declaration and executive orders came after the HHS Secretary declared a national public health emergency.

At the state level, as of April 6, 2020, governors in forty-three states issued executive orders to direct stay-at-home or shelter-in-place for all with few exemptions.<sup>47</sup> About 300 million Americans, or more than 90% of the total population, were given orders to stay indoors.<sup>48</sup> The exemptions covered grocery shopping, limited outdoor exercise, and a narrow list of essential jobs. Consequently, the entire country abruptly came to a grinding halt.

The breadth of executive action demonstrates how serious

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<sup>43</sup> See 85 Fed. Reg. 18,407.

<sup>44</sup> See 85 Fed. Reg. 22,951.

<sup>45</sup> *Id.*

<sup>46</sup> See Temporary Postponement of the Time to Deposit Certain Estimated Duties, Taxes, and Fees During the National Emergency Concerning the Novel Coronavirus (COVID-19) Outbreak, 85 Fed. Reg. 22,349; see also Richard Newcomb et al., *US Takes Action to Abate Tariffs and Duties in Wake of COVID-19*, DLA PIPER (May 8, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/05/us-takes-action-to-abate-tariffs-and-duties-in-wake-of-covid-19/>.

<sup>47</sup> See Jason Silverstein, *43 States Now Have Stay-at-Home Orders for Coronavirus. These Are the 7 That Don't*, CBS NEWS (Apr. 6, 2020, 7:30 PM), <https://www.cbsnews.com/news/stay-at-home-orders-states/>.

<sup>48</sup> *Id.*

unprecedented COVID-19 was. A federalist society centralizing power in this way exemplifies the unprecedented nature that COVID-19 presented. However, none of these executive orders addressed what was to come of pre-existing contracts.

## II. CONTRACT PROBLEMS UNDER THE STATE OF EMERGENCY

COVID-19 upended the United States and the rest of the world. As of February 25, 2021, more than 500,000 Americans died of COVID-19 since February of 2020, when the first US recorded death occurred.<sup>49</sup> The contagious virus infected more than 28 million people in the United States.<sup>50</sup> As businesses either remained shut down or struggled to reopen, unemployment filings reached over 40 million in March 2020.<sup>51</sup> Outside the United States, the viral contagion wreaked havoc worldwide and forced businesses into deep uncertainty. A United Nations study found that “81% of the world workforce of 3.3 billion people experienced their place of work fully or partly closed because of

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<sup>49</sup> See *COVID-19 Tracker*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Feb. 28, 2021); see also Thomas Fuller & Mike Baker, *Coronavirus Death in California Came Weeks Before First Known U.S. Death*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-first-united-states-death.html>.

<sup>50</sup> See CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 49; see also *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Feb. 28, 2021, 2:36 P.M.), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>. Worldwide, more than 13 million people are infected by Covid-19 as of July 14, 2020, reflecting an increase of 10 million people since April 2020. See also Pablo Gutiérrez et al., *Covid World Map: Which Countries Have the Most Coronavirus Cases and Deaths?*, THE GUARDIAN (Feb. 25, 2021), <https://www.theguardian.com/world/2021/feb/25/covid-world-map-which-countries-have-the-most-coronavirus-vaccinations-cases-and-deaths>; *Pimentel-Estrada v. Barr*, 458 F.Supp.3d 1226, 1233 (W.D. Wash. 2020) (noting that at the end of April 2020 COVID-19 “has so far infected more than 3 million people globally and has killed more than 208,000. COVID-19 is ten times deadlier than a severe seasonal influenza.”).

<sup>51</sup> See Patricia Cohen, *‘Still Catching Up’: Jobless Numbers May Not Tell Full Story*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/05/28/business/economy/coronavirus-unemployment-claims.html> (stating that more than 40 million people or one out of every four American workers have filed for unemployment benefits); Patricia Cohen, *Many Jobs May Vanish Forever as Layoffs Mount*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/05/21/business/economy/coronavirus-unemployment-claims.html> (reporting 38.6 million Americans are without employment in May 2020 and 42% of those jobs may not return).

the outbreak.”<sup>52</sup> The pandemic caused unparalleled decline in many sectors of the economy.<sup>53</sup> The pandemic’s impact, as predicted by experts, will lead to “permanent shifts in political and economic power in ways that will become apparent only later.”<sup>54</sup>

As the United States joined other nations to flatten and control the curve of infection and death caused by COVID-19, the economy came to a sudden halt.<sup>55</sup> Consequently, contract

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<sup>52</sup> See *Coronavirus: Worst Economic Crisis Since 1930s Depression, IMF Says*, BBC (Apr. 9, 2020), <https://www.bbc.com/news/business-52236936>.

<sup>53</sup> See Sam Meredith, *IEA Says the Coronavirus Crisis Has Set in Motion the Largest Drop of Global Energy Investment in History*, CNBC (May 27, 2020, 9:24 AM), <https://www.cnbc.com/2020/05/27/coronavirus-iea-expects-historic-fall-in-global-energy-investment.html> (“The International Energy Agency believes the coronavirus pandemic has paved the way for the largest decline of global energy investment in history, with spending set to plummet in every major sector this year.”); Yen Nee Lee, *Global Economy May Not Fully Recover from the Coronavirus Crisis by 2021, IMF Chief Economist Says*, CNBC (Apr. 17, 2020, 12:16 AM), <https://www.cnbc.com/2020/04/17/coronavirus-global-economy-may-not-recover-fully-by-2021-imf-says.html>; Sergei Klebnikov, *IMF Warns Coronavirus Will Hurt Global Economy ‘Way Worse’ Than 2008 Financial Crisis*, FORBES (Apr. 3, 2020, 1:50 PM), <https://www.forbes.com/sites/sergeiklebnikov/2020/04/03/imf-warns-coronavirus-will-hurt-global-economy-way-worse-than-2008-financial-crisis/#15f8251f707e>.

<sup>54</sup> See John R. Allen et al., *How the World Will Look After the Coronavirus Pandemic*, FOREIGN POLICY (Mar. 20, 2020), <https://foreignpolicy.com/2020/03/20/world-order-after-coronavirus-pandemic/>.

<sup>55</sup> Harry Stevens, *Why Outbreaks like Coronavirus Spread Exponentially, and How to “Flatten the Curve,”* WASH. POST (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator/>. Unfortunately, “the curve has come undone” due to lack of national leadership. *Opinion: Americans Sacrificed to Flatten the Curve. Their Leaders Have Let Them Down.*, WASH. POST (June 30, 2020), [https://www.washingtonpost.com/opinions/americans-sacrificed-to-flatten-the-curve-their-leaders-have-let-them-down/2020/06/30/4c442e72-baf0-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/opinions/americans-sacrificed-to-flatten-the-curve-their-leaders-have-let-them-down/2020/06/30/4c442e72-baf0-11ea-8cf5-9c1b8d7f84c6_story.html) (“The nation still needs a federal response. The virus is relentless and opportunistic — but the response has been patchwork and uneven. Unless that is fixed, we will be doomed to more suffering and terrible losses still to come.”). Economically, the United States collapsed and suffered a staggering loss. Alan Rappeport & Jim Tankersley, *Monthly U.S. Budget Deficit Soared to Record \$864 Billion in June*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/budget-deficit-coronavirus.html> (reporting the U.S. budget deficit grew to a record level “as the federal government pumped huge sums of money into the economy to prop up workers and businesses affected by the coronavirus” and the increased deficits are the “direct results of the economy’s swift collapse amid the pandemic.”); Annie Lowrey, *The Second Great Depression*, THE ATLANTIC (June 23, 2020),

problems escalated. The global supply chain management suffered severely because the viral disruption was “not part of supplier performance metrics” for many companies; therefore, suppliers failed to provide solutions addressing the outbreak.<sup>56</sup> The global supply chain disruption acutely affected local stores in the United States, as shelves in stores sat empty, and customers waited for arrival of shipments, production stoppages, shortages of raw materials and semi-finished goods unfolded in China and other countries.<sup>57</sup>

Meanwhile, due to government shelter-in-place orders, the demands for supplies in many sectors drastically decreased, devastating the supply chain ecosystem.<sup>58</sup> For example, in the automotive sector, “41 of the 44 auto assembly plants in the United States closed” by March 26, 2020, propelling many automotive suppliers into financial trouble, including “Aptiv, one of the world’s largest automotive suppliers, announced that it would draw down its entire \$1.4 billion credit facility.”<sup>59</sup> Another example is the food supply chain, which was severely disrupted by the pandemic, creating “shocks” to both supply and demand

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<https://www.theatlantic.com/ideas/archive/2020/06/second-great-depression/613360/> (“Three months ago, the pandemic and ensuing shelter-in-place orders caused mass job loss unlike anything in recent American history. A virtual blizzard settled on top of the country and froze everyone in place. Nearly 40 percent of low-wage workers lost their jobs in March. More than 40 million people lost their jobs in March, April, or May.”).

<sup>56</sup> See Thomas Y. Choi et al., *Coronavirus Is a Wake-Up Call for Supply Chain Management*, HARVARD BUS. REV. (Mar. 27, 2020), <https://hbr.org/2020/03/coronavirus-is-a-wake-up-call-for-supply-chain-management>.

<sup>57</sup> *Coronavirus and Supply Chain Disruption: What Firms Can Learn*, KNOWLEDGE@WHARTON (Mar. 17, 2020), <https://knowledge.wharton.upenn.edu/article/veeraraghavan-supply-chain/> (“Long stretches of empty supermarket shelves and shortages of essential supplies are only the visible impacts to consumers of the global supply chain disruption caused by the COVID-19 pandemic. Unseen are the production stoppages in locations across China and other countries and the shortages of raw materials, sub-assemblies and finished goods that make up the backstory of the impact.”); see also Adnan Seric et al., WORLD ECONOMIC FORUM (Apr. 27, 2020), *Managing COVID-19: How the Pandemic Disrupts Global Value Chains*, <https://www.weforum.org/agenda/2020/04/covid-19-pandemic-disrupts-global-value-chains/>.

<sup>58</sup> Tom Linton & Bindiya Vakil, *It’s up to Manufacturers to Keep Their Suppliers Afloat*, HARV. BUS. REV. (Apr. 14, 2020), <https://hbr.org/2020/04/its-up-to-manufacturers-to-keep-their-suppliers-afloat>.

<sup>59</sup> See *id.*

sides.<sup>60</sup> Giant companies like Walmart that leverage sophisticated algorithms, still struggled to manage their supply chains because COVID-19 “ha[d] thrown off the digital program that helps them predict how many diapers and garden hoses they need to keep on the shelves.”<sup>61</sup> In other words, the supply chain disruptions meant parties could not perform in accordance to the terms of their contracts because the agreement did not include provisions anticipating the changes caused by COVID-19.<sup>62</sup>

At a more granular level, contract problems involving individuals rose in staggering number. As students became unhappy with online learning environments, they brought contract class actions against public and private universities across the country.<sup>63</sup> Dentists, facing rapid losses in their practices because

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<sup>60</sup> See Ravi Anupindi, *COVID-19 Shocks Food Supply Chain, Spurs Creativity and Search for Resiliency*, MICH. BUS. REV. (Apr. 29, 2020), <https://news.umich.edu/covid-19-shocks-food-supply-chain-spurs-creativity-and-search-for-resiliency/> (discussing how COVID-19 has created multiple shocks to these supply chains deemed “demand” and “supply” shocks); see also Melissa Repko & Amelia Lucas, *The Meat Supply Chain Is Broken. Here’s Why Shortages Are Likely to Last During the Coronavirus Pandemic*, CNBC (May 7, 2020), <https://www.cnbc.com/2020/05/07/heres-why-meat-shortages-are-likely-to-last-during-the-pandemic.html> (identifying various pressures caused by Covid-19 on the meat supply chain in the United States that creates the meat shortages).

<sup>61</sup> See Nicole Wetsman, *The Algorithms Big Companies Use to Manage Their Supply Chains Don’t Work During Pandemics*, VERGE (Apr. 27, 2020, 1:25 PM), <https://www.theverge.com/2020/4/27/21238229/algorithms-supply-chain-model-pandemic-disruption-amazon-walmart>.

<sup>62</sup> See generally Tiffany D. Presley & Jamal Abdurashed, *Force Majeure: Navigating Coronavirus Supply Chain Disruptions*, NAT. L. REV. (Mar. 10, 2020), <https://www.natlawreview.com/article/force-majeure-navigating-coronavirus-supply-chain-disruptions> (providing an analysis of force majeure in supply chain contracts that require buyers and supplier to determine: “1) what events constitute a force majeure event under the contract, 2) should a qualifying event occur, does the provision totally relieve a party of an obligation to perform a contractual obligation or merely suspend or delay of performance until the conclusion of the force majeure event? 3) whether either or both parties are required to mitigate losses, and 4) whether counterparty notice is required and the form of such notice.”).

<sup>63</sup> See Michelle G. Kurilla, *Student Files Class Action Lawsuit Against Harvard Following Coronavirus Closure*, HARV. CRIMSON (May 22, 2020), <https://www.thecrimson.com/article/2020/5/22/harvard-coronavirus-class-action/> (the student’s class action alleges that Harvard “provided inadequate education after sending students home due to the COVID-19 outbreak”); Karen Sloan, *‘Subpar in Every Aspect’: Harvard Law Student*

patients were too afraid to visit dental offices for fear of contracting the viral disease, sought to enforce insurance policy contract terms to cover their losses by filing contract class actions against insurance companies.<sup>64</sup> Families of loved ones in nursing homes suffered incalculable losses, felt the despair, and brought torts and contract actions against nursing homes as death tolls in those facilities constituted the largest segment of elderly people negatively impacted by the disease.<sup>65</sup> Employees, independent contractors, speakers, airline passengers, cruise passengers, festival ticketholders, among others, filed contract actions against

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*Sues Over Online Classes*, LAW.COM (June 23, 2020, 3:08 PM), <https://www.law.com/2020/06/23/subpar-in-every-aspect-harvard-law-student-sues-over-online-classes/?sreturn=20200614161231> (noting that at least 100 universities have faced lawsuits brought by students to seek tuition reimbursements amid the pandemic); Andrew Keshner, *At Least 100 Lawsuits Have Been Filed by Students Seeking College Refunds — and They Open Some Thorny Questions*, MARKETWATCH (May 22, 2020, 8:23 AM), <https://www.marketwatch.com/story/unprecedented-lawsuits-from-students-suing-colleges-amid-the-coronavirus-outbreak-raise-3-thorny-questions-for-higher-education-2020-05-21>.

<sup>64</sup> See Anne Bucher, *Dental Clinic Class Action Lawsuit Filed Over Covid-19 Losses*, TOP CLASS ACTIONS (Apr. 23, 2020), <https://ca.topclassactions.com/lawsuit-settlements/lawsuit-news/dental-clinic-class-action-lawsuit-filed-over-covid-19-losses/> (noting the class members “paid for business interruption insurance in the expectation that the defendant would honour its contractual obligations in good faith if and when an unforeseen and unintentional occurrence were to take place resulting in an interruption of business”); Bill Rankin, *Cobb Dentist Files Class-Action Suit over Lost Coronavirus Business*, ATLANTA J.-CONST. (May 9, 2020); <https://www.ajc.com/news/local/cobb-dentist-files-class-action-suit-over-lost-coronavirus-business/LdcgmYmpKQuInxG6jRLJEM/>; Erin Shaak, *Dentist Claims Farmers, Foremost Insurance Cos. Wrongfully Denied Business Interruption Claim Amid COVID-19*, CLASSACTION.ORG (June 16, 2020), <https://www.classaction.org/news/dentist-claims-farmers-foremost-insurance-cos-wrongfully-denied-business-interruption-claim-amid-covid-19>.

<sup>65</sup> See Matt Hamilton, *Her Father Had COVID-19 for Weeks. The Nursing Home Told Her the Day Before He Died*, L.A. TIMES (July 9, 2020, 5:00 A.M. P.T.), <https://www.latimes.com/california/story/2020-07-09/her-father-had-covid-19-for-weeks-the-nursing-home-told-her-the-night-before-he-died> (chronicling the alleged conduct that caused nursing home resident death and noting that 3,176 nursing home residents died of Covid-19); Abigail Abrams, *'A License for Neglect.' Nursing Homes Are Seeking — and Winning — Immunity Amid the Coronavirus Pandemic*, TIME (May 14, 2020, 2:40 P.M. E.D.T.) (reporting on lawsuits brought against nursing homes “for neglect, abuse and wrongful death” during the pandemic).

businesses for canceling events, projects, flights, and cruises due to COVID-19.<sup>66</sup> In these suits, claimants asserted breach of contract and unjust enrichment,<sup>67</sup> claiming that the businesses failed to pay or failed to refund as promised.<sup>68</sup>

Overall, the COVID-19 pandemic rendered parties unable to fulfill contracts.<sup>69</sup> Lawsuits related to nonperformance, suspension, breach, and damages in connection with COVID-19 are now entering court dockets across the United States.<sup>70</sup> Parties

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<sup>66</sup> See Diana Fassbender et al., *COVID-19 Class Action Lawsuits: Defending Against Alleged Breach of Contract Over Decisions During Uncertain Times*, LAW.COM (Apr. 20, 2020, 4:31 P.M.), <https://www.law.com/corpocounsel/2020/04/20/covid-19-class-action-lawsuits-defending-against-alleged-breach-of-contract-over-decisions-during-uncertain-times/> (identifying contract cases “have been filed against airlines for refund claims arising out of flight cancellations; against ticket sellers and marketplaces for refunds following cancelled events; against gyms and fitness facilities for the charging of monthly membership fees while facilities are closed; and against universities and other facilities providing room and board.”).

<sup>67</sup> See *COVID-19 Class Actions: Refund Disputes Rage Over Membership Fees & Event Tickets*, CROWELL MORING (Apr. 17, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/COVID-19-Class-Actions-Refund-Disputes-Rage-Over-Membership-Fees-Event-Tickets>.

<sup>68</sup> See Bob Sechler, *Coronavirus in Austin: SXSW Sued Over No-Refund Policy After Cancellation*, AUSTIN AM.-STATESMAN (Apr. 25, 2020), <https://www.statesman.com/business/20200425/coronavirus-in-austin-sxsw-sued-over-no-refund-policy-after-cancellation>.

<sup>69</sup> See generally Samuel Lanier Felker & Matthew S. Mulqueen, *Tidal Wave of COVID-19 Lawsuits on the Way*, BAKER DONELSON (Apr. 21, 2020), <https://www.bakerdonelson.com/tidal-wave-of-covid-19-lawsuits-on-the-way> (“As the ‘new normal’ sinks in with social distancing and government-imposed shutdowns, some businesses are struggling to stay afloat. Now, many are about to be slammed with a tidal wave of litigation as consumers and injured parties seek compensation for COVID-related losses. A recent flurry of class action and other mass filings gives us a hint of what lies ahead—and they appear to be only the tip of the iceberg.”).

<sup>70</sup> See *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, PIERCE ATWOOD (Nov. 9, 2020), <https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases> (providing lists of cases filed against “airlines seeking the refund of payments for cancelled flights based on breach of contract,” against “fitness clubs, ski resorts, amusement parks, and other organizations seeking the refund of season passes and membership fees based on breach of contract, consumer protection, and other theories,” against “nursing and residential care facilities [that] may face class action litigation based in contract or tort relating to their response to the COVID-19 pandemic,” against insurers for “breach of contract and declaratory

must wait for years to obtain results through the judicial system as none of the emergency laws address contract crisis caused by COVID-19. Based on the experience the world now has with the COVID-19 pandemic, parties should from this point forward include provisions addressing the alternatives that will take place in the event of a future pandemic.

### III. CONTRACT LAW AND STATE OF EMERGENCY

The contemporary debate on the law of contracts centers on transactional justice—who gets what and whether the deal is fair.<sup>71</sup> Contracts scholars often focus on freedom of contracts, efficiency, social practice and social trust to justify different outcomes, but not on whether transactions are fair.<sup>72</sup> The debate, however, does not frame contract law as the law of emergency.

Generally, we do not turn to the government to solve private ordering problems regardless of whether or not a nation is in a state of emergency. The unprecedented magnitude of the COVID-19 crisis generates two different approaches to the unsurmountable contract problems. On the one hand, parties utilize existing contract law doctrines to solve COVID-19 related nonperformance problems. On the other hand, government intervention solves the contract nonperformance problems and absolves damages, as seen in China. Preferably, governmental intervention should not be used, as it creates uncertainty in future contract negotiations. Additionally, the government is not as familiar with the goals of the contract as the parties to the contract. Perhaps most importantly, government intervention undermines the parties' freedom to contract.

This section focuses on the first approach by evaluating how contract law's doctrines—force majeure, impossibility, and duty of performing in good faith—address contract issues during a state of emergency.

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judgment claims against insurers for failure to cover losses from forced business closures as a result of the COVID-19 pandemic and state executive orders” and against educational institutions, among others).

<sup>71</sup> See Todd D. Rakoff, *The Five Justices of Contract Law*, 2016 WIS. L. REV. 733 (2016).

<sup>72</sup> See *id.* at 734.

### A. *Force Majeure*

Contract law resiliently evolves through the test of time, withstanding plagues, wars, and natural disasters. The cornerstone of contract law requires courts to respect and enforce what parties agree upon within the four corners of their agreement.<sup>73</sup> Courts do not redraft or add new terms to agreements that parties already conclusively executed.<sup>74</sup> Parties have the freedom to contract and freedom from contracts.<sup>75</sup> Parties know best their business, circumstances, risks, and benefits when they execute agreements.<sup>76</sup> Emergencies caused by natural disasters, epidemics, armed conflicts, and terrorism are among changes of events that parties typically anticipate and include in a contract's force majeure provision.<sup>77</sup>

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<sup>73</sup> See Todd D. Rakoff, *Is Freedom from Contract Necessarily a Libertarian Freedom?* 2004 WIS. L. REV. 477, 479–80 (2004) (“[M]en of full age and competent understanding shall have the utmost liberty of contracting, and [] their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”).

<sup>74</sup> See *Owens v. Church*, 675 S.W.2d 178, 185 (Tenn. Ct. App. 1984) (“The freedom and sanctity of contract are cornerstones of our system of commercial law and order. Regardless of where our sympathies might lie in a given case, once it has been determined that a valid agreement is in existence the courts must enforce that contract.”); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95 (Tex. 2011) (“As a fundamental matter, Texas law recognizes and protects a broad freedom of contract”); *Bernstein v. TrackManager, Inc.*, 953 A.2d 1003, 1010 n.23 (Del. Ch. 2007) (“the concept of freedom on contract, which is a core concept recognized by Delaware law”).

<sup>75</sup> See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263, 280–83 (1999) (discussing the individual autonomy of the parties in the two ideas of freedom of contract and freedom from contract); *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 281 (7th Cir. 1996) (Cudahy, J., concurring) (“Freedom not to contract should be protected as stringently as freedom to contract.”).

<sup>76</sup> See *Emerald International Corp. v. WWMV, LLC*, 2016 WL 4433357, at \*3 (E.D. Ky. Aug. 15, 2016) (“Parties are free to agree that specified events will excuse nonperformance of their obligations.”).

<sup>77</sup> *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 N.W.2d 445, 448–49 (Mich. Ct. of App. 2015) A force majeure in a long-term, commercial contract can be comprehensive, as follows:

Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party's control, including without limitation: acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine

Force majeure clauses excuse a party's nonperformance when a specific, extraordinary event occurs that prevents the party from meeting obligations as described in the contract. In analyzing whether a party is excused under a force majeure, courts determine: (1) an event occurred meeting the contract's definition of force majeure event, and (2) that event caused the party's failure to perform.<sup>78</sup> The party invoking the force majeure clause carries the burden of proof at trial.<sup>79</sup>

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restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage (which is beyond the affected Buyer's or Seller's reasonable control and the affected Buyer or Seller shall promptly use all commercially reasonable efforts to remedy) that prevents Seller's ability to manufacture Product or prevents Buyer's ability to use such Product in Buyer's manufacturing operations for solar applications; or, in the case of Seller only, a default of a Seller supplier beyond Seller's reasonable control (in each case, a "Force Majeure Event"). In the event of any such delay or failure of performance by Buyer or Seller, the other party shall remain responsible for any obligations that have accrued to it but have not been performed by it as of the date of the Force Majeure Event. When the party suffering from the Force Majeure Event is able to resume performance, the other party shall resume its obligations hereunder. The Term of this Agreement may be extended for a period not to exceed three (3) years so as to complete the purchase and delivery of Product affected by a Force Majeure Event. The party suffering a Force Majeure Event shall provide the other party with prompt written notice of (i) the occurrence of the Force Majeure Event, (ii) the date such party reasonably anticipates resuming performance under this Agreement and, if applicable, (iii) such party's request to extend the Term of this Agreement.

In addition, if due to a Force Majeure Event or any other cause, Seller is unable to supply sufficient goods to meet all demands from customers and internal uses, Seller shall have the right to allocate supply among its customers in any manner in which Seller, in its sole discretion, may determine.

<sup>78</sup> *Emerald International Corp.*, 2016 WL 4433357, at \*3 ("To invoke this provision, a party would need to show: (1) that an event occurred meeting the contract's definition of [force majeure event], and (2) that event caused the party's failure to perform.").

<sup>79</sup> *See Kyocera Corp.*, 886 N.W.2d at 446 (finding that plaintiff failed to adequately plead, according to force-majeure clause terms that its "delays or failure in performance of its obligations under [the] Agreement," i.e., plaintiff's inability to pay,

The clause must contain specific events to excuse nonperformance caused by an event occurring.<sup>80</sup> Illustratively, the force majeure clause in a natural gas sale and purchase agreement provides that contracting parties are released from their obligations “in cases of force majeure or chance events affecting the facilities used for the performance of this contract, such as, in particular: fire, flood, atmospheric disturbances, storm, tornado, earthquake, washout, landslide, lightning, epidemic, war, riot, civil war, insurrection, acts of public enemies, act of government, strike, lockout.”<sup>81</sup> Only the occurrence of events specifically identified in the force majeure clause will excuse the party invoking it from nonperformance. If market conditions change and cause a drop in demand for natural gas, these events fall outside the scope of the clause and do not excuse nonperformance.<sup>82</sup>

Consequently, when parties specify certain force majeure events in the contract, some courts do not require a showing that the event’s occurrence was unforeseeable, while other courts impose that requirement.<sup>83</sup> The Fifth Circuit, for instance, does not

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“ar[o]se out of or result[ed] from . . . acts of the [Chinese] Government,” such that its performance should have been excused.”); *see also* *Gulf States Protective Coatings, Inc. v. Caldwell Tanks, Inc.*, 2019 WL 7403970, at \*9 (W.D. Kentucky, June 18, 2019) (“The party claiming force majeure has the burden to prove the defense at trial.”).

<sup>80</sup> *In re Cablevision Consumer Litig.*, 864 F.Supp.2d 258, 264 (E.D.N.Y., 2012) (citing *Reade v. Stoneybrook Realty, LLC*, 434, 882 N.Y.S.2d 8 (2009)) (holding that force-majeure clauses “will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified”).

<sup>81</sup> *U.S. v. Panhandle Eastern Corp.*, 693 F.Supp. 88, 96 (D. Del 1988).

<sup>82</sup> *See id.* (finding the force majeure Article XIII “contemplates such events as strikes, lockouts or epidemics, which might affect access to the facilities. However, alleged economic hardship resulting from market fluctuations is certainly not within the ambit of Article XIII.”).

<sup>83</sup> *Compare, e.g., TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182 (Tex. Ct. of App. 2018) (noting an ongoing “debate regarding whether common-law notions of foreseeability have any place in the interpretation of modern-day force majeure clauses. The Third Circuit and the Fifth Circuit have reached differing results regarding whether, and under what circumstances, a showing of unforeseeability is required to show a force majeure event”), *with Gulf Oil Corp., v. Fed. Energy Regulatory Comm’n*, 706 F.2d 444, 454 (3d Cir. 1983) (holding that even if the Gulf’s routine mechanical repairs fell under the force majeure clause, their frequent occurrence disqualifies the force majeure

require unforeseeability if the contract explicitly specifies force majeure events.<sup>84</sup> As long as the parties have anticipated the events and included them in the force majeure clause, the party invoking the clause should be relieved of liability for the occurrence regardless of whether the occurrence was foreseeable or unforeseeable.<sup>85</sup>

If a force majeure clause contains a catch-all phrase at the end of a list of specific events, courts typically scrutinize whether an occurrence is reasonably within the scope.<sup>86</sup> Courts decline

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nonperformance excuse); *see also* *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d at 264 (noting how, under New York law, force majeure clauses are “construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event”).

<sup>84</sup> *See TEC Olmos*, 555 S.W.3d at 183 (“[W]hen parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable.”).

<sup>85</sup> *See Kodiak 1981 Drilling Partnership v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 716, 721 (Tex. App.—San Antonio 1987, *writ ref’d n.r.e.*) (quoting *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976)) (“[W]hen the promisor has anticipated a particular event by [] providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.”); *see also* *Rowan Companies, Inc. v. Transco Exploration Co., Inc.*, 679 S.W.2d 660, 664 (Tex.App.—Houston 1984, *writ ref’d n.r.e.*) (“We hold, as a matter of law, that the rig’s inability to perform was solely due to an event of force majeure as defined in the contract. Therefore, the force majeure clause controls the rights of the parties. . . . A fire beyond the control of Transco is within the contractual definition of a force majeure event.”).

<sup>86</sup> Here is a sample of a force majeure with a catch-all phrase in italics:

Should either Party be prevented or hindered from complying with any obligation created under this Agreement, other than the obligation to pay money, by *reason of* fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is *beyond the reasonable control of the Party whose performance is affected*, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided the affected Party exercises all reasonable diligence to remove the cause of force majeure. The requirement that any force majeure be remedied with all reasonable diligence does not require the settlement of strikes, lockouts or other labor difficulties by the Party involved.

*TEC Olmos*, 555 S.W.3d at 179. *See also* *Langham-Hill Petrol., Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1329–30 (4th Cir. 1987) (holding that downturn in market was foreseeable and

overly broad interpretations and apply the precept of *ejusdem generis* to ensure proper results.<sup>87</sup> *Ejusdem generis* dictates that “words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.”<sup>88</sup>

Parties to a contract may not be able to anticipate all changes of events to be included in a force majeure clause, and they instead may choose a clause with broad scope. Contract interpretations of broadly worded force majeure clauses generally side with a narrow approach.<sup>89</sup> Consider, this broadly worded

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outside the scope of “catch-all” force majeure clause); Benjamin Horney, *Why Force Majeure Isn't A Golden Ticket Out of M&A Deals*, LAW360 (Apr. 20, 2020, 7:34 P.M. E.D.T.), <https://www.law360.com/articles/1265259/why-force-majeure-isn-t-a-golden-ticket-out-of-m-a-deals?> (cautioning that force majeure clauses that “end by noting something akin to ‘anything else that's unforeseeable’[] make[] performance impossible. Such language serves to modify every word before it.”).

<sup>87</sup> See *TEC Olmos*, 555 S.W.3d at 181–82 & n.1 (finding “fluctuation in the commodities markets” cannot qualify as force majeure under the “catch-all” provision of this force majeure clause for two reasons: “First, it is unreasonable to interpret the “catch-all” provision as broadly as suggested by Olmos. Second, application of the *ejusdem generis* doctrine compels the conclusion that a decline in oil and gas prices is not the sort of event covered by the force majeure clause.”).

<sup>88</sup> See *Kel Kim Corp. v. Cent. Mkts., Inc.*, 516 N.Y.S.2d 806, 809 (App. Div. 3d Dep't 1987), *aff'd*, 519 N.E.2d 295 (N.Y. 1987). See also *Team Marketing USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (App. Div. 2007) (quoting *Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900, 903, (1987) (finding that “[n]one of the specifically enumerated events in the clause at issue—strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints on public authority—are similar in nature to Toyota's actions in rescheduling or cancelling the promotion schedule. Rather, the enumerated, unforeseeable events in the force majeure clause ‘pertain to a party's ability to conduct day-to-day commercial operations,’ while the cancellation clause provided plaintiff with ‘bargained-for protection of [its] . . . economic interests’ if the promotional events were rescheduled or cancelled.”); *R&B Falcon Corp. v. Am. Expl. Co.*, 154 F.Supp.2d 969, 974–75 (S.D.Tex. 2001) (stating that the force majeure “lists ‘riots, strikes, wars, insurrection, rebellions, terrorist acts, civil disturbances, dispositions or order of governmental authority . . . inability to obtain equipment, supplies or fuel’ as other items reasonably beyond the control of the parties.”).

<sup>89</sup> See *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296–97 (N.Y. 1987) (noting force majeure clauses are narrowly construed and contract nonperformance excuse is available “only if the force majeure clause specifically includes the event that actually

force majeure provision: “Any delay or failure of either party to perform its obligations under this Agreement shall be excused if, and to the extent that the delay or failure is caused or materially contributed to by force majeure or other acts or events beyond the reasonable control of a party hereto.”<sup>90</sup> Interpreting this particular force majeure provision narrowly means the scope of the force majeure may cover the dramatic change in market conditions caused by an influenza epidemic as the occurrence was beyond the reasonable control of the party to excuse contract nonperformance.<sup>91</sup> Yet, the interpretation cannot extend to “a change in purchaser demand—even a substantial change” because such a change is “a foreseeable part of doing business,” unable to excuse contract nonperformance.<sup>92</sup>

In summary, there are no uniform court interpretations with respect to force majeure provisions and foreseeability, but courts generally embrace narrow interpretations to respect parties’ freedom to contract and avoid rewriting agreements for the parties.

### *B. Force Majeure and Epidemics*

There are few reported cases involving contracts containing force majeure clauses covering epidemics or pandemics occurring in the past one hundred years. Notably, during the Spanish influenza of 1918, only one case, *Citrus Soap Co. v. Peet Bros. Mfg. Co.*, was reported and penned by a lower court in California.<sup>93</sup>

In that case, the plaintiff brought an action to recover damages for breach of contract against the defendant for the sale

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prevents a party’s performance”); In re Cablevision Consumer Litig., 864 F. Supp. 2d at 264 (under New York law, force majeure clauses are “construed narrowly”).

<sup>90</sup> See *Rexing Quality Eggs v. Rembrandt Enters.*, 360 F.Supp.3d 817, 840 (S.D. Ind. 2018).

<sup>91</sup> *Id.* at 840–41.

<sup>92</sup> *Id.* at 841.

<sup>93</sup> *Citrus Soap Co. v. Peet Bros. Mfg. Co.*, 194 P.2d 715 (Cal. Dist. Ct. App. 1920); see Russell Lewis, et al., *Covid-19: Force Majeure to the Rescue?*, THE HOUS. LAW. 42–43 (Mar./Apr. 2020), [https://issuu.com/leosur/docs/thl\\_marapr20/42](https://issuu.com/leosur/docs/thl_marapr20/42) (“Despite the history of the Spanish Flu, we could find no reported cases from any U.S. jurisdiction that addressed force majeure in the context of an epidemic, pandemic or disease outbreak in the human population.”).

of glycerine merchandise.<sup>94</sup> The parties entered into a contract dated November 7, 1918, wherein the plaintiff seller sold eleven to twelve drums of crude glycerine to defendant, and the goods were to be delivered “as made, but entire delivery to be completed prior to December 31, 1918.”<sup>95</sup> Glycerine as sold by the plaintiff was the by-product for the defendant to manufacture soap.<sup>96</sup> The contract contained the following force majeure clause:

“This contract is made subject to suspension in case of fire, flood, explosion, strike or unavoidable accident to the machinery or the works of the producers or receivers of this material, or from any interference in plant by reason of which either buyers or sellers are prevented from producing, delivering or receiving the goods and in such event the delivery thus suspended is to be made after such disabilities have been removed; otherwise to be fulfilled in good faith. Notice, with full particulars and the probable term of the continuance of such disability, shall be given to the other party hereto, within ten days of the date of the occurrence of such disability.”

The defendant accepted the delivery of the first three drums but refused to accept the subsequent deliveries of the remaining nine drums. The plaintiff brought the breach of contract action to recover the difference between the agreed price per the contract and the market price when the defendant refused delivery.<sup>97</sup> The trial court found that the plaintiff performed in accordance with the contract terms, and the defendant appealed.<sup>98</sup>

During the contract time period of November and December 1918, the city of San Diego, where the plaintiff’s

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<sup>94</sup> See Lewis et al., *supra* note 93, at 715.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (“goods were shipped and delivered in all respects in conformity with said contract of sale”).

factory was located to make and distribute glycerine, adopted a quarantine to control the spread of the Spanish influenza.<sup>99</sup> On December 5, 1918, the quarantine caused a delay in the plaintiff's production, and the plaintiff invoked the force majeure clause by sending a letter to the defendant on December 9, 1918:

Please be advised that we have been forced to close down by the health authorities due to the quarantine established in San Diego against the influenza. The quarantine went into effect Friday morning, the 6th of December, and we may be compelled to take advantage of the contingency clause of our contract. However, we have finished six drums of the glycerine, three of which we have already shipped, and we are in hopes of being able to deliver the entire amount by December 31st.<sup>100</sup>

The court found that the plaintiff's letter sufficiently complied with the contract requirements, reasonably warned the defendant of the delay due to the quarantine, and implied that the delay might cause the completion beyond December 31.<sup>101</sup> Moreover, the defendant did not object to the letter. Accordingly, the court held that the plaintiff was entitled to perform the contract within a reasonable time after December 31, and the defendant must therefore perform its obligation to pay the plaintiff.<sup>102</sup>

In the 21st century, the first pandemic was the H1N1 of 2009.<sup>103</sup> Among the many reported court opinions related to

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<sup>99</sup> *Id.* at 716.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> The World Health Organization declared H1N1 flu a pandemic on June 11, 2009. See *2009 H1N1 Flu ("Swine Flu") and You*, CENTER FOR DISEASE CONTROL AND PREVENTION (Feb. 10, 2010, 5:00 P.M. E.T.), <https://www.cdc.gov/h1n1flu/qa.htm>. The United States declared H1N1 a public health emergency on April 26, 2009; *2009 H1N1 Flu Outbreak: Determination that a Public Health Emergency Exists*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Apr. 19, 2013), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>; see also *McGhee v. City of Flagstaff*, 2020 WL

H1N1, none involved contract disputes and force majeure.<sup>104</sup> Perhaps parties settled their contract disputes either out of court or prior to courts issuing written decisions as they had done in resolving allegations of breach of contract and nonperformance in the earlier epidemic.

Indeed, before the H1N1 pandemic, parties to contracts experienced disruptions caused by the deadly Severe Acute Respiratory Syndrome (SARS) epidemic in 2003.<sup>105</sup> In contract performance disputes due to SARS, parties filed lawsuits but subsequently settled matters outside of court. For instance, the American Association for Cancer Research planned to host its 2003 annual conference for 16,000 attendees and signed contracts with hotels in Toronto and the convention center; however, three days before the conference was scheduled to open, AACR canceled the event due to the SARS epidemic.<sup>106</sup> For the hotels, all of their contracts with AACR contained force majeure clauses that allowed termination of contracts due to major unforeseen events that would render performance impossible. The hotels and the convention center insisted that the force majeure clauses do not apply “because the emergency was confined to area hospitals, there was not risk to the general public, and business was

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2309881, \*2 (D. Arizona 2020) (“from April 12, 2009 to April 10, 2010, CDC estimated there were 60.8 million cases and 12,469 deaths in the United States due to the H1N1 virus”).

<sup>104</sup> See Brendan S. Everman, *Force Majeure and Covid-19 Live Event Cancellations*, 43-MAY L.A. LAW. 36 (May 2020) (“Recent epidemics like Zika, Ebola, H1N1, and SARS did not result in the widespread cancellation of high-profile events. Consequently, there is no clear legal precedent for how courts would apply force majeure clauses”); see also Bruce Myint, *SARS Puts Contracts Under A Microscope*, MEETINGS & CONVENTIONS (May 1, 2003), <http://www.meetings-conventions.com/Newsline/SARS-Puts-Contracts-Under-a-Microscope/> (noting “there is very little clear precedent” in the law regarding force majeure clauses in modern contracts because the clauses “often are limited only to situations that would make it either ‘illegal’ or ‘impossible’ to hold the event”).

<sup>105</sup> See Martha Collins, *Cancellation and Force Majeure Issues in the SARS Era*, MEETINGSNET (Mar. 1, 2005), <https://www.meetingsnet.com/negotiatingcontracts/cancellation-and-force-majeure-issues-sars-era> (“Epidemics and diseases that could affect travel and the safety of attendees are now foreseeable and should be contemplated in the contract.”).

<sup>106</sup> See *id.*

proceeding as usual.”<sup>107</sup> The total damages as asserted by the hotels and the convention center reached \$6.2 million against AACR.<sup>108</sup> AACR then attempted to convince its insurance company that AACR’s policy with Aon Insurance Company covered the situation.<sup>109</sup> Ultimately, the parties settled their disputes out of court.<sup>110</sup>

On a lesser scale of severity, the global avian influenza (H7N9) outbreak of 2013 led the United States to declare a public health emergency on April 19, 2013.<sup>111</sup> The avian influenza impacted the poultry industry in the U.S., and at least one court issued an opinion addressing contract nonperformance and force majeure clause. The case, *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, serves as a good illustration and valuable reminder of contract law during a state of emergency.

In *Rembrandt Enterprises*, the district court denied Dahmes’s summary judgment motion on the issue that the force majeure clause did not supplant Rembrandt’s excuse of performance.<sup>112</sup> In that case, Rembrandt, an egg producer planning to build a new egg processing plant near one of its existing facilities planned for expansion, entered into an agreement with Dahmes to install a new egg dryer for \$8.5 million dollars.<sup>113</sup> The agreement required Dahmes to complete the installation by January 1, 2016.<sup>114</sup> In the spring of 2015, the highly pathogenic avian influenza hit the U.S.<sup>115</sup> The flu forced Rembrandt to kill more than one million birds and reduced production capacity by over 50 percent.<sup>116</sup> Rembrandt supplied the

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See Avian Influenza A (H7N9) Virus*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES (Nov. 21, 2013), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/H7N9-influenza-virus.aspx>.

<sup>112</sup> *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. Iowa 2017).

<sup>113</sup> *Id.* at \*1–2.

<sup>114</sup> *Id.* at \*2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

reduced egg capacity on a pro rata basis to its buyers.<sup>117</sup> By May 2015, Rembrandt stopped the facility expansion and informed Dahmes about the stoppage.<sup>118</sup> Rembrandt sought a declaratory relief regarding its contract with Dahmes and requested restitution and an accounting of Dahmes' expenses.<sup>119</sup> Dahmes asserted that Rembrandt breached the contract and sought lost profits of \$2.4 million, plus costs incurred.<sup>120</sup> Rembrandt already paid Dahmes \$4.31 million prior to the alleged breach.<sup>121</sup>

At summary judgment, Dahmes argued that the "force majeure superseded any other claims Rembrandt might raise to excuse the breach."<sup>122</sup> In ruling against Dahmes, the court noted that the contract between Rembrandt and Dahmes contained a force majeure provision which states that "[n]either party shall be liable to the other for failure or delay in performance of the Work caused by war, riots, insurrections, proclamations, floods, fires, explosions, acts of any governmental body, terrorism, or other similar events beyond the reasonable control and without the fault of such party."<sup>123</sup> The contract defined the "Work" as the design,

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*3.

<sup>119</sup> *Id.* at \*1.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*10.

<sup>123</sup> *Id.* at \*12. The force majeure provision states:

Neither party shall be liable to the other for failure or delay in performance of the Work caused by war, riots, insurrections, proclamations, floods, fires, explosions, acts of any governmental body, terrorism, or other similar events beyond the reasonable control and without the fault of such party ("Force Majeure Event"). Nevertheless, such party shall use its best efforts to mitigate the effect and to perform in spite of the difficulties causing such failure or delay and shall resume performance with the utmost dispatch as soon as the cessation of the Force Majeure Event permits. Any party claiming force majeure shall give prompt written notice thereof to the other party. Notwithstanding the foregoing or any other provision of this Agreement, if either party is unable to resume performance within ninety (90) days after commencement of a Force Majeure Event, then the other party shall have the right to immediately terminate this Agreement with all available insurance

equipment, and labor provided by Dahmes for the building, including delivering and installing the egg dryer.<sup>124</sup> Accordingly, the court found that the clause “applies to a failure or delay in the performance of Dahmes' obligations under the contract.”<sup>125</sup> The force majeure did not apply to Rembrandt’s obligation to pay under the contract.<sup>126</sup> The express language of the force majeure clause “demonstrates that it does not apply” to the avian flu outbreak, as the parties did not intend for an unforeseen event such as the avian flu to prevent the construction and installation of the dryer by Dahmes.<sup>127</sup> This holding illustrates the need for parties to specifically include language for a pandemic in the future.

Regarding the COVID-19 pandemic and force majeure provisions, parties to contracts invoke them to excuse nonperformance and minimize damages.<sup>128</sup> *In re Cinemex USA Real Estate Holdings, Inc.*, is an example of how courts examine a force majeure clause in assessing whether the clause covers COVID-19 related events to excuse contract performance.<sup>129</sup> Here, the contract for commercial lease of theatre movie venues contained the following clause in contemplation of events that parties might not be able to perform their obligations:

If either party to this Lease, as the result of any (i) strikes, lockouts or labor disputes, (ii) inability to

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proceeds to be held in a separate account by the policy insured as a fiduciary which will distribute the proceeds between the parties in an equitable fashion.

<sup>124</sup> *Id.* at \*12.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*12–13.

<sup>128</sup> See generally *UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic*, PAUL WEISS (Mar. 16, 2020), <https://www.paulweiss.com/practices/litigation/litigation/publications/update-force-majeure-under-the-coronavirus-covid-19-pandemic?id=30881>; see also Joshua M. Cartee & William M. Mattes, *Origins of the Force Majeure Clause and Impossibility of Contractual Performance Defense*, NAT. L. REV. (Mar. 19, 2020), <https://www.natlawreview.com/article/origins-force-majeure-clause-and-impossibility-contractual-performance-defense>; John Delikanakis & Gil Kahn, *Force Majeure Clauses and the Impossible and the Impractical*, SNELL & WILMER (Apr. 7, 2020), <https://www.swlaw.com/publications/legal-alerts/2739>.

<sup>129</sup> *In re Cinemex USA Real Estate Holdings, Inc.*, et al., 2021 WL 564486, \*4 (S.D. Fla. 2021).

obtain labor or materials or reasonable substitutes therefor, (iii) the inability to obtain materials or labor at reasonable prices due to the occurrence of a hurricane or other nature disaster or due to terrorism; (iv) *acts of God, governmental action, condemnation, civil commotion, fire or other casualty, or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform* (other than failure to timely pay monies required to be paid under this Lease), fails punctually to perform any obligation on its part to be performed under this Lease, then such failure shall be excused and not be a breach of this Lease by the party in question, but only to the extent occasioned by such event.<sup>130</sup>

The tenant refused to make payments under the lease agreement citing to impossibility of performance while the government orders were in effect.<sup>131</sup> With respect to rent accruing during the government ordered shutdown, the court assessed “whether it was foreseeable at the time the lease was made that this shutdown would occur.”<sup>132</sup> The court found that, on the one hand, COVID-19 events that caused the shutdown were not foreseeable. On the other hand, the lease agreement anticipated such events and included them in the contract. Accordingly, the court ruled, the failure to operate the theatre was excused due to the shutdown orders.<sup>133</sup>

Likewise, in *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, Southern District of New York court relieved the defendant from its nonperformance liability due to COVID-19 force majeure.<sup>134</sup> In that case, the plaintiff art dealer and the defendant auction house entered into a contract governing the sale

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<sup>130</sup> *Id.* (emphasis added by the court).

<sup>131</sup> *Id.* at \*1.

<sup>132</sup> *Id.* at \*3.

<sup>133</sup> *Id.*

<sup>134</sup> *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262 (S.D.N.Y. 2020).

of two paintings in June 2019.<sup>135</sup> The defendant agreed to pay the plaintiff a guaranteed minimum price in connection with the sale.<sup>136</sup> One of the two paintings was sold the same day the parties executed the agreement but the other painting was scheduled for auction in May 2020.<sup>137</sup> By March 2020, the COVID-19 pandemic crippled New York and Governor Andrew Cuomo declared a State Disaster Emergency and issued executive orders restricting and then barring all non-essential business activities until June 2020.<sup>138</sup> In light of the circumstances, the defendant terminated the agreement.<sup>139</sup> The plaintiff sought an order to compel the defendant to include the second painting at the defendant's next auction and pay the Guaranteed Minimum.<sup>140</sup> Alternatively, the plaintiff sought compensatory damages of \$7 million and punitive damages of \$10 million.<sup>141</sup>

The court turned to the agreement's "Termination Provision" for its force majeure interpretation. The Termination Provision stated:

"In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you."<sup>142</sup>

The court noted that the COVID-19 pandemic and government emergency executive orders "fall squarely under the ambit" of the

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<sup>135</sup> *Id.* at \*1.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*1–2.

<sup>138</sup> *Id.* at \*3.

<sup>139</sup> *Id.* at \*4.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*2 (emphasis in original).

force majeure clause because they are “beyond the parties’ reasonable control.”<sup>143</sup> The court also looked to Black’s Law Dictionary and the Oxford English Dictionary for support that the COVID-19 pandemic is a “natural disaster.”<sup>144</sup> As a natural disaster, the COVID-19 caused the “cessation of normal business activity” that was beyond the parties’ control.<sup>145</sup> In other words, the pandemic’s circumstances were “envisioned” by the Termination Provision.<sup>146</sup> Accordingly, the defendant was entitled to terminate the agreement.<sup>147</sup>

As seen, contract law on force majeure resiliently applies to private contracts ordering under state of emergency situations. Through many different epidemics and pandemics, parties excused nonperformance by allocating their risks and anticipating events with specificities in force majeure provisions. This explicit inclusion of potential pandemics can save parties from unanticipated costs without the need for government intervention.

### *C. The Doctrine of Impossibility and Supervening Events*

In situations where parties to a contract cannot perform the contract due to supervening events but their contract does not include a force majeure provision to accommodate the events, contract law provides the doctrine of impossibility, or also later referred to by the courts as commercial impracticability to excuse nonperformance.

The doctrine of impossibility, as discussed in much

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<sup>143</sup> *Id.* at \*7.

<sup>144</sup> *Id.* Other courts have also found that the Covid-19 pandemic is a natural disaster. *See, e.g.,* Easom v. US Well Services, Inc., 2021 WL 1092344, \*8 (S.D. Tex. Mar. 19, 2021) (finding the Covid-19 pandemic “qualifies as a disaster under the Worker Retraining and Notification Act); AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 20-CV-0310, 2020 WL 7024929, at \*58 (Del. Ch. Nov. 30, 2020) (“The COVID-19 pandemic arguably fits this definition [of natural disaster]” under a purchase and sale agreement); Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020) (“We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster” under a Pennsylvania statute); Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (Pa. 2020) (“The COVID-19 pandemic is, by all definitions, a natural disaster” under a Pennsylvania statute).

<sup>145</sup> *JN Contemporary Art LLC, supra* note 134, at \*8.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at \*9.

greater depth elsewhere, enjoys its roots in Roman law that “there is no obligation to the impossible.”<sup>148</sup> Impossibility can arise due to unexpected changes of circumstances.<sup>149</sup> As to the theory of supervening events or changed circumstances, the doctrine of impossibility owes its origin to Canon law’s doctrine of changed circumstances.<sup>150</sup>

Generally, “by act of god, the law or the other party” which renders the performance of a contract impossible, the party is excused from performing its end of the contract.<sup>151</sup> The United States Supreme Court first recognized the doctrine of impossibility in *The Tornado v. Atlantic Mut. Ins. Co.* in 1883.<sup>152</sup> In applying the doctrine of impossibility, courts generally do not readily excuse the parties from their contractual obligations.<sup>153</sup>

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<sup>148</sup> See James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 AM. J. OF COMP. L. 513, 513 (2004) (tracing the origins of the impossibility doctrine).

<sup>149</sup> See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

<sup>150</sup> See *id.* See generally Philip J. McConnaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT’L L. 595, 614 n.37 (2001) (“Western contract law doctrines of impossibility, commercial impracticality, frustration, and force majeure reflect a similar notion of the primacy and sanctity of written contracts.”).

<sup>151</sup> See, e.g., *Columbus R. Power & Light Co. v. Columbus*, 249 U.S. 399, 412 (1919) (denying World War I’s outbreak rendered performance of railway contract impossible); *Wheelabrator Envirotech Operating Servs. v. Mass. Laborers Dist. Council Local 1144*, 88 F.3d 40, 45 (1st Cir. 1996) (noting neither impossibility nor impracticability excuse a party’s express undertaking to perform).

<sup>152</sup> See *The Tornado v. Atlantic Mut. Ins. Co.*, 108 U.S. 342, 351 (1883) (“[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”). The *Tornado* court adopted the contract rule on impossibility excuse from the celebrated English case, *Taylor v. Caldwell*, 3 Best & S. 826 (1863); see also *Dermott v. Jones*, 69 U.S. 1, 6 (1864) (“It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.”); *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1097–1102 (4th Cir. 1987) (discussing the evolution of the impossibility of performance doctrine).

<sup>153</sup> See generally Jennifer Camero, *Mission Impracticable: The Impossibility of*

The nonperformance must objectively be deemed as impossible. The objective standard of impossibility prevents the party seeking excuse to unilaterally redraft the contract or add new terms to the contract.<sup>154</sup> For instance, in *North German Lloyd v. Guaranty Trust Co.*, the Court excused contract performance where the owner of the German steamship could not complete the voyage to deliver gold to England on the eve of war in Europe because the ship would be seized as a prize.<sup>155</sup> In *Montgomery v. Board of Education of Liberty TP., Union County*, the Ohio Supreme Court did not excuse the school board from their obligation to pay bus drivers during the Spanish flu of 1918 that caused school closures.<sup>156</sup> The Court rejected the defense that the school board's performance to pay the drivers pursuant to the contract terms during the highly contagious flu period was made impossible by the health authority's order.<sup>157</sup>

Higher cost of performance than previously anticipated in the contract generally fails to meet the impossibility

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*Commercial Impracticability*, 13 U. of N.H. L. REV. 1, 3 (2015); *United States v. Gleason*, 175 U. S. 588, 602 (1900) (“[I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose.”).

<sup>154</sup> See generally *Columbus R. Power & Light Co. v. Columbus*, 249 U.S. 399, 412 (1919) (“Where the parties have made no provision for a dispensation, the terms of the contract must prevail.”); *United States v. Gleason*, 175 U.S. 588, 602 (1900) (“it is competent for parties to a contract, . . . to make it a term of the contract . . . , shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.”); *Chicago, M. & S.P.R. Co. v. Hoyt*, 149 U. S. 1, 14, 15 (1893) (“There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.”).

<sup>155</sup> See *North German Lloyd v. Guaranty Trust Co.*, 244 U.S. 12, 22–23 (1917).

<sup>156</sup> *Montgomery v. Board of Educ.* 131 N.E. 497, 497 (Ohio 1921).

<sup>157</sup> See *id.*

requirement.<sup>158</sup> Illustratively, in *Columbus R. Power & Light Co. v. Columbus*, the Supreme Court rejected that World War I's outbreak rendered performance of railway contract impossible due to higher costs caused by the war.<sup>159</sup> Under the modern approach of impossibility, some courts focus on commercial impracticability due to difficulty attributed to either physical or substantially higher cost.<sup>160</sup>

Unanticipated government regulations may render contracts impossible to perform. For instance, in *International Minerals and Chemical Corp. v. Llano, Inc.*, the Tenth Circuit ruled that the buyer, International Minerals and Chemical Corp (IMC), was excused from purchasing the minimum purchase obligations under the contract due to changes in government regulation that rendered the contract impossible.<sup>161</sup> In that case, IMC entered into a contract with Llano for the purchase of natural gas. The contract contained provisions related to the minimum purchase obligation, stating in the event the buyer is "unable to receive gas as provided in the contract for any reason beyond the reasonable control of the parties . . ." then "an appropriate adjustment in the minimum purchase requirements . . . shall be made."<sup>162</sup> Subsequently, in December 1978, the New Mexico Environmental Improvement Board (EIB) promulgated

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<sup>158</sup> See generally *Columbus R. Power & Light*, 249 U.S. at 411 (rejecting the railroad company's contention that "the conditions following the World War . . . particularly in the great increase in wages by the arbitral award of the War Labor Board," caused the "subsequent keeping of the contract practically impossible, except at a ruinous loss to the company"). Nicholas R. Weiskop, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN L. REV. 239, 270 n.126 (1996) ("[T]he traditional reluctance of American courts to excuse a performance made significantly more expensive than anticipated by supervening circumstance.").

<sup>159</sup> *Columbus R. Power & Light Co.*, 249 U.S. at 413–14 ("It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. . . . We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such.").

<sup>160</sup> See *Mineral Park Land v. Howard*, 156 P. 458, 460 (1916).

<sup>161</sup> See *International Minerals & Chemical Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985).

<sup>162</sup> See *id.* at 887.

Regulation 508 to limit from potash processing equipment and encouraged compliances “as expeditiously as practicable” and not later than December 31, 1982.<sup>163</sup> IMC participated with the EIB in the Rule 508 rulemaking process and complied with the new regulation.<sup>164</sup> Consequently, IMC did not need as much natural gas and asserted that it should be excused from accepting the minimum purchase requirement under the contract.<sup>165</sup>

In interpreting the contract terms and ruling for IMC, the Tenth Circuit found that “unable” meant “impracticability” due to “having to comply with a supervening governmental regulation.”<sup>166</sup> Because there existed “no technically suitable way for IMC to comply with the EIB’s Regulation 508 without shutting down the Ozarks and changing to the SOP, with the concomitant decrease in natural gas consumption, we hold that the adjustment provision of paragraph 16 of the contract was triggered.”<sup>167</sup> Accordingly, IMC was “unable, for reasons beyond its reasonable control, to receive its minimum purchase obligation of natural gas” and the amount must be adjusted.<sup>168</sup> The Tenth Circuit held that IMC should “not be required to pay for any natural gas it did not take under the contract.”<sup>169</sup>

In the current COVID-19 pandemic, parties to contract who are unable to perform may assert the defense of impossibility. The doctrine of impossibility resiliently allows courts to determine whether parties to a contract are excused from nonperformance of obligations under contracts due to the arrival of COVID-19, subsequent government orders to shut down, and social distancing.

For instance, students filed a number of breach of contract cases against their universities for pivoting to online education and activities. In *Hiatt v. Brigham Young University*, the student brought a breach of contract and unjust enrichment action against the University arising from the change from in-person to online

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<sup>163</sup> *Id.* at 883.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 884.

<sup>166</sup> *Id.* at 886–87.

<sup>167</sup> *Id.* at 887.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

classes and campus activities.<sup>170</sup> The University moved to dismiss the suit for failure to state a claim. The court denied the motion because the student sufficiently alleged that he performed his obligation under the contract, but the University failed to perform their obligations.<sup>171</sup> Also, the court rejected the University's affirmative defense of impracticability defense that it was impracticable for BYU to provide in-person education and services during the COVID-19 pandemic.<sup>172</sup> The court noted that under Utah law, the dismissal of a claim for failure to state claim on the basis of an affirmative defense can only occur if "the defense is clear from the face of the Complaint."<sup>173</sup> Also, the doctrine of impracticability excuses a party's performance if an unforeseen event occurs after contract formation and without fault of the obligated party, rendering "the performance impossible or highly impracticable."<sup>174</sup> Parties who assume the risk of supervening events cannot defend on grounds of impracticability.<sup>175</sup> Here, the University urged the court to take judicial notice of the COVID-19 pandemic and government orders that cause the University's performance impracticable. Moreover, the University asserted that the student himself "bore the risk of a supervening event" because the student's Financial Responsibility Declaration in which the student agreed to "pay all tuition upon registration."<sup>176</sup> At the early stage of the litigation, the court could not grant the University's motion to dismiss based on the affirmative defense of impracticability because it is "essential to know which party bears the risk" before the court could determine whether impracticability is a valid defense.<sup>177</sup> The court found that the language of the students' Financial Responsibility Declaration "does not unequivocally answer which party bears the risk" and therefore, the University's defense is not clear on the face of the

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<sup>170</sup> Hiatt v. Brigham Young University, 2021 WL 66298 (D. Utah Jan. 7, 2021).

<sup>171</sup> See *id.* at \*2-3.

<sup>172</sup> *Id.* at \*4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

complaint.<sup>178</sup>

Another type of case involving breach of contract and the doctrine of impossibility defense is the enforcement of settlement agreement that at least one court has issued an opinion. Illustratively, in *Belk v. Le Chaperon Rouge Co.*, the parties entered into a settlement agreement in March 2020 for a non-contract case.<sup>179</sup> The settlement agreement became a contract between the parties. The plaintiff then sought to enforce the agreement but the defendant asserted that due to COVID-19 and government shutdown order of children centers, including defendant's facilities, the defendant could not pay the agreed amount under the settlement.<sup>180</sup> The court ruled in favor of the plaintiff upon a finding that the defendant was fully aware by the time of entering the settlement agreement that the government already declared a state of emergency, asked educational institutions to move online, and urged all not to attend indoor events.<sup>181</sup> Therefore, the court rejected the defendant's defense of impossibility.<sup>182</sup> The court ordered enforcement of the settlement agreement.<sup>183</sup> Because of the lack of clarification in the contract about how to proceed if the pandemic were to interfere with the contract, the plaintiff was forced to perform.

#### *D. Frustration of Purpose Doctrine*

The twin sibling of the doctrine of impossibility to excuse nonperformance of a contract is frustration of purpose. Under contract law, a person who is still capable of performing the contract does not perform the contract because the value of the contract to that person has been reduced significantly. The

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<sup>178</sup> *Id.* See also *Gibson v. Lynn University, Inc.*, 2020 WL 7024463, (S.D. Fla. 2020) (denying the defendant University's motion to dismiss upon a finding that the University failed to conclusively establish that the breach of contract claim was barred by the defense of impossibility).

<sup>179</sup> *Belk v. Le Chaperon Rouge Co.*, 2020 WL 3642880, \*10 (N.D. Ohio Jul 6, 2020).

<sup>180</sup> *See id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (additionally, the court found that the defendant failed to demonstrate financially that the defendant could not pay in accordance with the settlement agreement).

<sup>183</sup> *Id.*

purpose of the contract is frustrated.<sup>184</sup> In other words, the doctrine of frustration of purpose is distinct from the doctrine of impossibility.<sup>185</sup> In impossibility or commercial impracticability, the party's nonperformance is excused because the cost of performance is prohibitive compared to what is contemplated in the contract.<sup>186</sup> Also, with a supervening event, the party cannot perform due to the person or the thing perishing which causes performance of the contract to be impossible.<sup>187</sup> However, under the doctrine of frustration of purpose, the ability to perform exists, and the party to the contract can still perform because there is no impossibility of performance.<sup>188</sup> Nevertheless, the party does not wish to perform because of the diminished value of the performance. The excuse for nonperformance in frustration of purpose, however, requires that a supervening event occurs that causes the frustration. Also, the party asserting the defense of frustration of purpose neither assumes the risk nor is at fault.<sup>189</sup> Underlying the doctrine of frustration of purpose is economic efficiency, waste prevention, and freedom from contract.<sup>190</sup>

Relating back to *Rembrandt Enterprise v. Dahmes* discussed in the force majeure section, frustration of purpose of contract during a pandemic is illustrated.<sup>191</sup> Here, Rembrandt ordered Dahmes to stop building and installing the egg dryer

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<sup>184</sup> See *In re Cinemex USA Real Estate Holdings, Inc.*, 2021 WL 564486, \*3 (S.D. Fla. Jan. 27, 2021).

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> *Id.* (noting “Impossibility of performance refers to the nature of the thing to be done, and . . . frustration of purpose arises when one of the parties finds that the purposes for which he or she bargained [has been unfulfilled] because of the failure of consideration or impossibility of performance by the other party”).

<sup>189</sup> See Michelle L. Evans, *Impossibility of Performing Contract*, 102 AM. JUR. PROOF OF FACTS 3d 401 (2008).

<sup>190</sup> See *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. Ct. App. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 265 (Am. L. Inst. 1981) (“Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”).

<sup>191</sup> *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. Iowa, Sep. 7, 2017).

several months after contract formation. Rembrandt cited to the avian flu for the severe drop in egg demand that forced Rembrandt to scuttle the new facility construction, including the purchase and installation of the new dryer for the facility. Under contract law, Rembrandt may attempt to rely on the doctrine of frustration of purpose to excuse its performance. That means Rembrandt may argue that its principal purpose to “supply equipment for the egg processing facility under construction” at Rembrandt’s new facility was frustrated. Therefore, the egg dryer to be completed by Dahmes yielded little or no value to Rembrandt.<sup>192</sup> Whether Rembrandt would prevail depends on whether Dahmes also possessed the same understanding of Rembrandt’s purpose when the parties entered the contract.<sup>193</sup>

During COVID-19, parties to contract breached cases routinely asserting frustration of purpose as a defense. For example, in the bankruptcy case involving *Cinemex USA Real Estate Holdings, Inc.*, the debtors were in the theatre movie business in twelve states.<sup>194</sup> The debtors sought to delay payments for rent incurred after June 5, 2020, relying on the doctrine of frustration of purpose as excuse for nonperformance. The court in that case, applying Florida contract law on frustration of purpose, observed that the defense is not available if relevant business risk was “foreseeable” at contract formation and “could have been the subject of an express contractual agreement.”<sup>195</sup> The court took notice that the government shutdown of business in Florida prior to June 5, 2020 made it impossible for the debtors to operate the theatre. However, when the government lifted the shutdown order on June 5, 2020, the debtors could have reopened their business,

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<sup>192</sup> *Id.* at \*12 (N.D. Iowa, Sep. 7, 2017) (“Rembrandt contends that its obligation to buy the Dahmes dryer is excused because, the Thompson processing facility could not be built as a result of the HPAI outbreak, and therefore the dryer no longer has any value to Rembrandt.”).

<sup>193</sup> *See id.* at \*6–9 (analyzing Dahmes’s arguments and providing analysis of both parties’ arguments).

<sup>194</sup> *In re Cinemex USA Real Estate Holdings, Inc.*, 2021 WL 564486 (S.D. Fla. Jan. 27, 2021).

<sup>195</sup> *See id.* (frustration of purpose “refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which [it] bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party”).

but choose not to do so. Accordingly, no frustration of purpose existed. The court rejected the debtor's argument that opening the theaters at 50% capacity coupled with increased costs of providing protective gears to employees would generate negative operating income and should be covered by the doctrine of frustration of purpose.<sup>196</sup>

Likewise, in *Great New York Automobile Dealers Assn, Inc. v. City Spec, LLC*, the parties litigated a nonpayment breach of a commercial lease contract case, and the court issued a ruling in favor of the landlord.<sup>197</sup> The tenant asserted a defense of frustration of purpose for their nonpayment because of the Governor's Executive Order stating that all non-essential businesses must close in person operations due to the COVID-19 public health crisis. The tenant's staff could not come to work causing frustration of the contract's purpose.<sup>198</sup> The tenant requested that the rent be excused. Applying New York contract law, the court noted that to establish the frustration of purpose defense, a party must prove (1) the frustration must relate to the principal purpose of the contract; (2) the frustration must be substantial; and (3) the frustrating event must be unforeseen that its non-occurrence was the basic assumption of which the contract was made.<sup>199</sup> The court found the tenant failed to meet the test. Specifically, the court found that the tenant services fell within the essential services per the Executive Order that the tenant could have all their staff to continue in-person operations, but the tenants decided not to have the business operate—the tenant “frustrated their own purpose.”<sup>200</sup>

### *E. The Duty of Performing in Good Faith*

Under contract law, each party must perform and enforce

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<sup>196</sup> *Id.* at \*5 (“CB Theater chose not to do so for what appears, based on the Marti declaration, to be primarily economic concerns. Therefore CB Theater's performance under the Lakeside Lease from June 5, 2020 on is not excused under the doctrine of frustration of purpose.”).

<sup>197</sup> *Great New York Automobile Dealers Assn, Inc. v. City Spec, LLC*, 136 N.Y.S.3d 695 (N.Y. Civ. Ct. Dec. 29, 2020).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

the contract in good faith.<sup>201</sup> The duty of good faith and fair dealing is important in holding the parties to “an implied obligation that neither party shall do anything to injure or destroy the right of the other party to receive the benefits of the agreement.”<sup>202</sup> If a party acts in bad faith or engages in inequitable conduct in performing its obligations under the contract, the party breaches the implied covenant of good faith and fair dealing.<sup>203</sup> Overall, the duty of good faith and fair dealing is used to “effectuate the intentions of the parties or to honor their reasonable expectations.”<sup>204</sup> The duty does not provide the basis for a stand-alone claim; rather, the claim is part of an overall breach of contract claim.<sup>205</sup>

Demonstrably, in *Anadarko Petroleum Corp. v. Noble Drilling*, the district court found there was violation of the duty of good faith and fair dealing by Anadarko. There, Anadarko invoked the force majeure clause in the contract when the Mineral Management Service of the Department of Interior ordered Anadarko to cease drilling on Well No. 2 at Keathley Canyon and informed Anadarko about a six month drilling moratorium in the Gulf of Mexico.<sup>206</sup> The moratorium rendered the contract to drill in the Gulf of Mexico impossible as the evidence established that Anadarko would incur “substantial, and perhaps excessive and impractical costs” if it continued to pursue operations in accordance with the contract in the Gulf of Mexico during the moratorium period.<sup>207</sup> The court ruled for Anadarko’s declaration of the force majeure was not done in bad faith.<sup>208</sup> Though this

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<sup>201</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (Am. L. Inst. 1981).

<sup>202</sup> 23 Richard A. Lord, *Williston on Contracts* § 63.22 (4th ed. 2020).

<sup>203</sup> *See id.* *See also* *Anadarko Petroleum Corp. v. Noble Drilling (U.S.) LLC.*, 2012 WL 13040279, 1, 22 (S.D. Tex. 2012) (finding no violation of the duty of good faith and fair dealing).

<sup>204</sup> *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

<sup>205</sup> *See Cut-Heal Animal Care Products, Inc. v. Agri-Sales Associates, Inc.*, 2011 WL 1563165, \*2 (N.D. Tex. 2011).

<sup>206</sup> *Anadarko Petroleum Corp. v. Noble Drilling (U.S.) LLC.*, *supra* note 203, at \*22.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* *See also* *SNB Farms, Inc. v. Swift and Company*, 2003 WL 22232881, \*5 (N.D. Iowa, Feb. 7, 2003) (finding that the defendant’s termination of the contract in accordance with the contract terms did not violate the duty of good faith and fair dealing).

decision did not arise in a pandemic, it is still instructive.<sup>209</sup>

In COVID-19-related contract disputes, a party that refuses to perform obligations under a contract must adhere to the duty of performing the contract in good faith.<sup>210</sup> That means if the contract contains a force majeure provision, the party invoking the provision must establish through evidence that invoking the provision is fully supported. Likewise, if the contract does not contain a force majeure and the party wishes to rely on the doctrine of impossibility to excuse nonperformance, the party must demonstrate that its excuse meets the duty of good faith and fair dealing.

For instance, in *Su Jung Shin v. Yoon*, the plaintiff brought a breach of contract against the defendants to recover funds she provided for investment in a hotel property of \$1.5 million.<sup>211</sup> The parties settled the case, and the plaintiff attempted to enforce the settlement agreement wherein the defendants were to pay the plaintiff installment payments.<sup>212</sup> The defendants, as the judgment debtors, relied on the doctrine of impossibility of performance as a defense to non-payments.<sup>213</sup> The defendant asserted that due to COVID-19, they could not sell the hotel for a sufficient price to satisfy the installments.<sup>214</sup> The court rejected the defendants' argument because of the fact that the defendants "are currently unable to raise the funds necessary to make the two \$50,000 payments due under the Stipulated Judgment; however, this obviously does not mean that COVID-19 has "likewise" deprived "other persons" of the ability to make \$50,000 payments."<sup>215</sup>

Though the court did not explicitly discuss good faith

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<sup>209</sup> See *Pennington v. Continental Resources, Inc.*, 2019 ND 228, 932 N.W.2d 897, 902 ("An express force majeure clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive.").

<sup>210</sup> See Faye Milton and Paul Palik, *Contracting "Good Faith" in Covid-19*, LEXOLOGY (July 29, 2020), <https://www.lexology.com/library/detail.aspx?g=dd5710c9-1d0f-4836-9392-dc010c216942>

<sup>211</sup> *Su Jung Shin v. Yoon*, 2020 WL 6044086, \*1 (E.D. Cal. Oct 13, 2020).

<sup>212</sup> See *id.*

<sup>213</sup> *Id.* at \*6.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

performance, the court found that the defendants “have not made a showing and cannot make-such as showing” of the impossibility defense.<sup>216</sup> In other words, the defendants failed both the duty to performance of the contract in good faith and the defense of impossibility defense.<sup>217</sup> These cases provide a roadmap showing that if a party has not included a pandemic in the force majeure clause in the contract, it must be able to show it met the duty of good faith and fair dealing, even though this has not been demonstrated by case law as of yet.

#### IV. BEYOND THE UNITED STATES’ BORDERS: CHINA’S APPROACH TO CONTRACTS UNDER STATE OF EMERGENCY LAW

In China, with many domestic and international contracts, the COVID-19 pandemic caused an unprecedented crisis in the first half of 2020 because parties could not perform their obligations or undertakings under existing contract terms. Chinese companies in contracts with international partners for the manufacturing and distribution of products and parts in the global supply chains network invoked the force majeure clauses to protect their businesses when the companies could not fulfill their contractual obligations.<sup>218</sup> Indeed, as of March 3, 2020, thousands of companies insulated themselves from breach of contract damages by invoking the force majeure provisions.<sup>219</sup> The companies together invoked 4,800 contracts with force majeure provisions, and in total value, these contracts estimated a staggering \$53.79 billion dollars.<sup>220</sup>

China’s legal system is still evolving with respect to contract law. Legal doctrines related to force majeure, impossibility, frustration of purpose, duty to perform contracts in good faith and fair dealing, mitigation, and damages are not as

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> See Huileng Tan, *China Invokes “Force Majeure” to Protect Businesses — but the Companies May be in for a “Rude Awakening,”* CNBC (Mar. 6, 2020, 5:53 A.M.), <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html>.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

robust compared to the United States and other nations.<sup>221</sup> In terms of force majeure, PRC law defines it as objective circumstances that cannot be foreseen or avoided and cannot be overcome.<sup>222</sup> Additionally, a party correctly exerting a force majeure clause has no obligation to perform or mitigate damages.<sup>223</sup>

For domestic contracts, China's Supreme People's Court issued guidance on judicial interpretations of contracts that possesses the legal force as Chinese laws and regulations.<sup>224</sup> With respect to contracts involving international parties, China instead adopted a different approach to address contracts in emergency through the authority exerted by the China Council for the Promotion of International Trade (the Council).<sup>225</sup> China continuously used this unusual approach in order to protect its domestic companies from feeling the severe economic impact.<sup>226</sup> However, through this "protection," the Chinese counterparties will be "hit by a wave" of unsuspected force majeure certificates, which is unheard of between the affairs of private parties.<sup>227</sup>

The China Ministry of Commerce and the Council's local branches coordinated their efforts in March 2020 to issue force

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<sup>221</sup> See *Force Majeure Plus – The Use of Force Majeure Provisions in China During Covid-19*, MAYER BROWN (Apr. 22, 2020), <https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/force-majeure-plus-the-use-of-force-majeure-provisions-in-china-during-covid-19> (explaining force majeure in China and various government directives and high-level Supreme People's Court Guidance on the availability of force majeure to mitigate losses and nonperformance); *Is SARS a Force Majeure Event? A Brief Overview of Hong Kong and PRC Law*, MARTINDALE (June 17, 2003), [https://www.martindale.com/business-law/article\\_Perkins-Coie-LLP\\_13314.htm](https://www.martindale.com/business-law/article_Perkins-Coie-LLP_13314.htm).

<sup>222</sup> *Is SARS a Force Majeure Event? A Brief Overview of Hong Kong and PRC Law*, *supra* note 221.

<sup>223</sup> *Id.*

<sup>224</sup> See Jenny Y. Liu & Carrie Bai, *Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change*, PILLSBURY (Mar. 16, 2020), <https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html>.

<sup>225</sup> See Anton A. Ware et al., *What to Do When You Receive a Coronavirus-Related Force Majeure Notice*, ARNOLD & PORTER (Mar. 16, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/03/what-to-do-when-you-receive-a-coronavirus> (stating that the Council is a "nongovernmental organization with deep government roots").

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

majeure certificates.<sup>228</sup> The Council permits contracting parties who are exporters desiring to invoke force majeure provisions to excuse performance by applying for force majeure certificates.<sup>229</sup> To obtain the certificate, the applicant only needs to show that they are “suffering from circumstances beyond their control.”<sup>230</sup> The threshold requirement is low enabling Chinese exporters to meet it with ease.<sup>231</sup> In addition, the certificates are available to both companies with executed contracts and “companies that have failed to execute their contracts on time or have not been able to execute their international trade contracts are entitled to apply for the certificates.”<sup>232</sup>

The Council holds the authority to swiftly determine and issue a force majeure certificate. In fact, by March 11, 2020, the Council issued 5,637 force majeure certificates to companies in China affected by COVID-19, and these certificates represented contracts in total value of \$72.47 billion dollars.<sup>233</sup> By issuing the force majeure certificates, the Council reduced the losses incurred by the companies during the peak of the pandemic.<sup>234</sup> The Council claims that the force majeure certificates are recognized by “more than 200 countries and regions.”<sup>235</sup>

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<sup>228</sup> See *id.*

<sup>229</sup> See Zhong Nan, *Commerce Chambers Urged to Issue Force Majeure Certificates*, CHINA DAILY (Feb. 6, 2020), <https://www.chinadaily.com.cn/a/202002/06/WS5e3b7db9a31012821727566f.html>.

<sup>230</sup> See *China Issues Over 1,600 Force Majeure Slips to Coronavirus-Hit Companies*, CHINA DAILY (Feb. 17, 2020), <https://www.chinadaily.com.cn/a/202002/17/WS5e4a38eaa31012821727818d.html>. (Hereinafter, “China Force Majeure Certificates”); Ma Zhenhuan, *Huzhou Firm 1st in Nation to Get Force Majeure Certificate*, CHINA DAILY (Feb. 3, 2020), <https://www.chinadaily.com.cn/a/202002/03/WS5e37bef6a3101282172746fa.html>.

<sup>231</sup> See Zhong, *supra* note 229 (“Applicants must submit proof of delay in the resumption of production, delays or cancellations in sea, air or land transportation, as well as export cargo sales contracts or agreements.”).

<sup>232</sup> See *id.*

<sup>233</sup> *China Force Majeure Certificate Issuance Pass 5,600 Amid Virus Outbreak - Trade Body*, *supra* note 7.

<sup>234</sup> *Id.*

<sup>235</sup> See *China Force Majeure Certificates*, *supra* note 230; see also Zhong Nan, *More Than 4,300 Force Majeure Certificates Issued to Exporters*, CHINA DAILY (Feb. 27, 2020) (reporting that the Council’s force majeure certificates cover 30 industries, including

By allowing the Council to issue the force majeure certificates to breaching parties, China expeditiously addressed contract nonperformance in the state of emergency. The issuance insures certainty, in addition to efficiency, but there are several problems with China's approach.<sup>236</sup>

The Council, acting as an administrative agency, renders decisions that are the equivalence of redrafting thousands of contracts that have been bargained for and entered into by the parties. The Council possesses the extraordinary power of revisions that contracting parties, particularly, international parties neither know nor accept. These revisions go against the very foundation of contract law—the power of the two parties to contract privately and as they see fit. The Council's conduct intimates a level of coercion when a quasi-administrative body unilaterally rewrites or introduces new terms to negotiated contracts. Further, the swiftness of the issuance suggests that the Council does not carefully analyze the force majeure provisions. As shown in preceding sections on contract norms, interpreting force majeure provisions is not a simple process in breach of contract and nonperformance law. Even if each of these contracts are solved amicably, the litigation involved will be messy, and it will take time to address each case.<sup>237</sup> In addition, invoking force majeure alone does not automatically relieve the invoking party with the provision from contractual liability because contract law requires the breaching party to prove that the COVID-19 supervening events specifically cause the contract

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“five business areas - manufacturing, wholesale and retail, construction, leasing and business services, and power generation equipment production”), <https://www.chinadaily.com.cn/a/202002/27/WS5e57bcd5a31012821727adfc.html>.

<sup>236</sup> See Ware et al., *supra* note 225 (observing that the impact of the certificates “outside of China may not be so clear or automatic”); Francesca Lo et al., *Force Majeure Certificates: China Leads but Does the UK Follow?* BDB PITMANS (Apr. 6, 2020); <https://www.bdbpitmans.com/insights/force-majeure-certificates-china-leads-but-does-the-uk-follow/> (“The CCPIIT has claimed that the certificates will be recognised internationally. Given the novelty of the certificates, it remains too early to say whether they would be upheld in PRC courts, let alone in other jurisdictions.”).

<sup>237</sup> Alison Frankel, *Chinese Force Majeure Certificates Presage Complexity of Resolving Post-Crisis Disputes*, REUTERS (Mar. 16, 2020, 4:58 P.M.), <https://www.reuters.com/article/us-otc-covid19/chinese-force-majeure-certificates-presage-complexity-of-resolving-post-crisis-disputes-idUSKBN2133MQ>.

nonperformance, and the party has taken steps to mitigate damages.<sup>238</sup> Overall, the Council's issuances of the force majeure certificates serve as shields to protect Chinese companies at the expense of the other parties in the global supplies network.<sup>239</sup> Even though the certificates are likely to protect these Chinese companies, there will be international consequences on the opposing parties; the "spillover" effects will punish other countries that are not at fault for the pandemic's effect on these contracts.<sup>240</sup>

## CONCLUSION

Contracts are relationships between parties. Through a long and storied history of development, contract law percolates to reflect how parties handle emergencies caused by deaths, wars, epidemics, and government actions. These doctrines prevent governments, either the judicial or executive branch, to rewrite the contracts. Though in the time of the pandemic, some governments may prefer expediency to rewrite contracts for the parties. The short-term action, however, undermines the core principles underlying the freedom to contract that parties have bargained for when they enter contracts. Government interventions, in the name of certainty and expediency, actually may cause uncertainty and generate mistrust in future contracts and undermine the resiliency of contract law as emergency law. Parties are best served to anticipate future pandemic and government actions by drafting better contracts to reflect the new normal.

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<sup>238</sup> Anadarko Petroleum Corp. 2012 WL 13040279 at \*22; Tan, *supra* note 218 ("While such documents will help entities claiming against one another in the Chinese domestic markets, most claims will not hold up internationally. . . They will often specifically refer to epidemics, which would cover the coronavirus. . . The party claiming force majeure would then need to prove that their ability to meet the contract was "impaired" or made "impossible" by the coronavirus. The latter, in particular, is extremely challenging to prove. Most FM claims fail.").

<sup>239</sup> See China Force Majeure Certificates, *supra* note 230 (reporting that China issues force majeure certificates "to shield companies from legal damages" arising from the novel coronavirus disease).

<sup>240</sup> See Frankel, *supra* note 237.