

Where Is My Cargo?: When a Force Majeure Clause Should Not Be an Excuse for International Shipping Delays and Non-Delivery

Yujin Jang*

ABSTRACT

The year 2020 marked the onset of the global crisis wrought by the COVID-19 pandemic, reshaping every aspect of life. Many governments closed their borders and ordered lockdowns that paused daily activities, including those of businesses around the world. Most international trade companies faced challenges with maritime international shipping. Container shipping firms canceled more than a thousand voyages in the first six months of 2020.

Thus, an important question arises regarding the international trade delay: Who should be responsible for this damage? Regardless of where responsibility is placed, the responsible party could argue that COVID-19 caused the delay. More specifically, that party could argue that COVID-19 is a natural disaster that qualifies for a Force Majeure defense or that the government action that addressed COVID-19 qualifies for a Force Majeure defense. But should a COVID-19 Force Majeure defense be available for international trade delays?

To answer the question of whether COVID-19 should trigger the Force Majeure defense in maritime international trade delay, this Comment discusses how U.S. courts should handle international shipping delays regarding COVID-19 and the Force Majeure clause. This Comment argues that U.S. courts should evaluate the specific wording of the Force Majeure clause in international trade shipping contracts, evaluate the intervening factors of nonperformance, and consider the time frame of nonperformance to determine whether COVID-19 was an unforeseeable event. Depending on the specific facts of the international trade delay case, COVID-19 could or could not qualify for a Force Majeure defense. This Comment argues that if the specific wording of the Force Majeure clause

* J.D. Candidate, The Pennsylvania State University School of Law, 2024.

includes language that a pandemic or epidemic is a Force Majeure event, COVID-19 should qualify as a Force Majeure event. However, if there is an intervening factor between COVID-19 and the international trade delay, COVID-19 should not qualify as a Force Majeure event.

Table of Contents

I. INTRODUCTION	955
II. BACKGROUND.....	959
A. <i>Definition of Force Majeure from the Uniform Commercial Code</i>	960
1. Force Majeure in Article 2, Section 615 of the Uniform Commercial Code.....	960
2. Three Criteria for Applying Article 2, Section 615 of the Uniform Commercial Code.....	961
B. <i>Definition of Force Majeure for the International Sale of Goods</i>	962
C. <i>Four Necessary Components of a Force Majeure Clause</i>	964
1. Define the Breach.....	965
2. Enumerate Possible Force Majeure Events	966
3. Define and Obligate the Causal Connection Between the Force Majeure Event and the Breach	967
4. Explain the Consequence of Excusing the Performance Obligation.....	968
D. <i>How Courts Review the Force Majeure Clause</i>	968
1. Evaluate the Specific Wording of the Force Majeure Clause	969
2. Review Other Factors Outside of the Contract	972
a. Review the Circumstantial Facts to Evaluate the Proximate Cause of the Performance.....	975
b. Review the Circumstantial Facts to Evaluate the Foreseeability.....	976
III. ANALYSIS	977
A. <i>Evaluate the Specific Wording of the Force Majeure Clause in the International Shipping Contract</i>	978
B. <i>Follow the Four Corners Rule and Consider Factors Outside of the Contract</i>	979
C. <i>Evaluate the Intervening Factors of Nonperformance</i>	979
D. <i>Consider the Time Frame of Nonperformance to See If COVID-19 was Unforeseeable</i>	981
E. <i>Review the Trade Practice of Specific International Trade to Decide Foreseeability of the Event</i>	981
F. <i>Recommendation for the International Trade Companies</i>	983
1. Include Pandemics and Epidemics in the List of Force Majeure Events.....	983

2. Avoid Solely Depending on a Catch-All Phrase in the Force Majeure Clause.....	983
3. Require the International Shipping Company Claiming Force Majeure to Mitigate the Effects of the Force Majeure Event	984
IV. CONCLUSION.....	984

I. INTRODUCTION

Think of the frustration that you feel when your Amazon package is delayed; you did not receive the pair of shoes you ordered to wear for a party by the scheduled arrival date, and now, your day is ruined. However, what if it is not merely a pair of shoes at stake, but your company's entire profit?

In 2020, the COVID-19 pandemic consumed the world.¹ To prevent the virus's spread, many governments around the globe required people to wear masks in public and avoid contact with others.² Furthermore, many governments closed their borders, which stopped people from traveling to different countries.³ Also, governments ordered lockdowns that paused everyone's daily activities, including those of businesses around the world.⁴

During COVID-19, most international trade companies faced challenges with maritime international shipping.⁵ Because COVID-19 impacted the entire world,⁶ it also disturbed every port's operations.⁷ COVID-19 directly impacted the amount of labor available at ports, which

1. See CTR. FOR SYS. SCI. & ENG'G, *COVID-19 Dashboard*, JOHNS HOPKINS UNIV. & MED., <https://perma.cc/8W7W-U6EC> (last visited Dec. 19, 2023) (COVID-19 was declared a pandemic by World Health Organization and Centers for Disease Control and Prevention); Carolyn Crist, *U.S. Reports Record-Breaking 1.35 Million New COVID Cases in a Day*, WEBMD, <https://perma.cc/TM2D-Z863> (last visited Dec. 19, 2023); *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., <https://perma.cc/A6XB-ELRJ> (last visited Dec. 19, 2023) (stating COVID-19 is an extremely infectious disease that causes respiratory illness).

2. See Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Nov. 3, 2023), <https://perma.cc/RL5N-NZZD>.

3. See Paige McClanahan, *I'm a U.S. Citizen. Where in the World Can I Go?*, N.Y. TIMES (July 5, 2022), <https://perma.cc/5QQP-YVUL>.

4. See Dyani Lewis, *What Scientists Have Learnt from COVID Lockdowns*, NATURE (Sept. 7, 2022), <https://perma.cc/C6S4-XDFD>.

5. See *The Impact of the Covid-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, U.S. INT'L TRADE COMM'N, <https://perma.cc/3PYC-52VG> (last visited Dec. 19, 2023).

6. See CTR. FOR SYS. SCI. & ENG'G, *supra* note 1.

7. See *Port and Terminal Risks: Pandemic Brings Congestion and Delays*, MARSH, <https://perma.cc/22PD-UX4M> (last visited Dec. 19, 2023).

delayed operations and increased the costs of shipping.⁸ As a result, container shipping firms canceled scheduled sailings and limited shipping routes to certain major ports.⁹ By limiting shipping routes, shipping companies lowered costs and mitigated downward pressure on freight rates caused by overcapacity.¹⁰

During the first half of 2020, the three largest container shipping alliances, THE Alliance, 2M Alliance, and Ocean Alliance, intended to cancel 126 scheduled sailings between Asia and North America through August 2020 and another 94 sailings between Asia and Europe.¹¹ The industry reports indicate that the alliances canceled approximately 15 to 30% of scheduled sailings on major maritime routes from June of 2020.¹² All told, container shipping firms canceled more than a thousand voyages in the first six months of 2020.¹³

However, despite shipping firms canceling the scheduled sailings to stabilize prices, the international trade firms securing their spots on ships did not experience any additional stability.¹⁴ The trade companies were still bound by existing contracts to deliver shipments to certain minor ports by the agreed-upon date yet were subject to cancellations and delays.¹⁵ Unlike the big international trade firms, small firms were more likely to be critically affected.¹⁶ Shipping companies are more likely to prioritize big firms because they do more business with big firms.¹⁷ Therefore, big firms have larger leveraging power over shipping companies, as they can negotiate discounts over the large volumes that they ship.¹⁸ Also, small firms are less likely to have long-term contracts and are, therefore, more likely to pay higher spot rates for shipping.¹⁹

In addition to shipping companies canceling shipping schedules, one-fifth of all containers in the world were trapped in Chinese ports at the end of March 2022 because of the Chinese government's lockdown order.²⁰ In February 2022—just before the March lockdown in China—two-thirds of

8. See *U.S. Ports Work Through Daunting Challenges to Deliver the Goods*, U.S. DEP'T TRANSP. (Jan. 24, 2022), <https://perma.cc/X9QL-QEXN>.

9. See *The Impact of the Covid-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, *supra* note 5.

10. See *id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. *The Impact of the Covid-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, *supra* note 5.

20. *Windward: Fijih of World's Containerships are Stuck in Port Congestion*, MARITIME EXEC. (Apr. 19, 2022), <https://perma.cc/FJS5-WUK4>.

container ships in the world were behind schedule.²¹ However, in the same month, for the first time in two years, Sea Intelligence announced that there was an improvement in shipping schedule reliability.²² Although the number of days that vessels were behind schedule was still high, the delay improved before the lockdowns in China.²³ The lockdowns in China nearly doubled the congestion outside the country's ports.²⁴

Continuous international shipping delays frustrated most international trade companies, which endeavored to keep up with the supply chain.²⁵ International shipping companies are intermediaries in the supply chain.²⁶ They deliver the products to the end-user as promised to their clients, international trade companies.²⁷ When international trade companies face delays, the supply shortage also frustrates their customers—the end-users.²⁸

For example, supply chain disruptions caused U.S. car dealers' inventories to plummet to a record low during COVID-19.²⁹ As a result, the market faced a car supply shortage and a consumer price increase.³⁰ During COVID-19, many Americans who wished to buy a car had to wait because the inventory was low or buyers could not afford the cars at their increased prices.³¹ COVID-19 demonstrably triggered international shipping delays, adversely affecting business entities and consumers alike.³²

Thus, an important question arises regarding the international trade delay: Who should be responsible for this damage? Should international trade companies who promised to deliver the goods on time be responsible? Or, should the carrier who contracted with the international

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See* Chris Morris, *Warning Shipping Delay Problems to Continue This Year*, BBC (Jan. 27, 2022, 5:46 AM), <https://perma.cc/TXW9-ANNH> (reporting that COVID-19 continues to negatively impact international shipping delays and disturb the supply chain).

26. *See, e.g.,* Adam Hayes, *The Supply Chain: From Raw Materials to Order Fulfillment*, INVESTOPEDIA (July 30, 2022), <https://perma.cc/3UZV-W4ZQ> (explaining that trade companies are intermediaries within the supply chain).

27. *See id.*

28. *See* Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, WHITE HOUSE (June 17, 2021), <https://perma.cc/K46P-QMXM> (explaining how COVID-19 disturbed the supply chain and frustrated consumers in the U.S.).

29. *See id.*

30. *See id.*

31. *See* Sue Doerfler, *Chip Shortage and Rising Prices Causing Consumers to Rethink Vehicle Purchases*, INST. FOR SUPPLY MGMT., <https://perma.cc/T4TB-KPHS> (last visited Dec. 19, 2023) (reporting on car supply chain disruption and price change and delivery time).

32. *See Port and Terminal Risks: Pandemic Brings Congestion and Delays, supra* note 7.

trade companies to deliver the goods be responsible? If the carrier is responsible, then should the insurance company be responsible for the carrier-caused damages?³³

Wherever responsibility falls, the responsible party may be able to avoid liability by arguing that COVID-19 caused the delay.³⁴ More specifically, the party could argue that COVID-19 is a natural disaster that qualifies for a Force Majeure defense or that government action meant to address COVID-19 qualifies for a Force Majeure defense.³⁵ However, this raises another important question: Should COVID-19 be able to trigger a Force Majeure defense in the instance of international trade delay?

To answer that question, this Comment discusses how U.S. courts should handle international shipping delays regarding COVID-19 and the Force Majeure clause.³⁶

In Part II, this Comment first explains the definition of the Force Majeure clause within the Uniform Commercial Code (“U.C.C.”) and under U.S. case law.³⁷ This Comment then discusses the definition of the Force Majeure clause within the United Nations international court regarding the Contracts for the International Sale of Goods (“CISG”).³⁸

After an explanation of Force Majeure, this Comment explores U.S. case law to analyze the methods that U.S. courts have adopted to decide whether certain events trigger the Force Majeure clause.³⁹ The Comment also discusses recent cases that analyze whether COVID-19 qualifies as a Force Majeure event.⁴⁰

Following Part II, this Comment applies the previously identified methods for triggering a Force Majeure defense to COVID-19 international trade delays.⁴¹ This Comment argues that U.S. courts should evaluate the specific wording of the Force Majeure clause in international trade shipping contracts, evaluate the intervening factors of nonperformance, and consider the time frame of nonperformance to determine whether COVID-19 was an unforeseeable event.⁴²

33. See *What is Cargo Insurance and When Do You Need It?*, DSV, <https://perma.cc/XC4T-DELK> (last visited Dec. 19, 2023) (explaining what cargo insurance is and how it helps with mitigating the risk associated with maritime shipment).

34. See, e.g., *Government Action as a Force Majeure Defense in Construction Contracts*, VORYS (Mar. 18, 2020), <https://perma.cc/SPF4-2DDP>.

35. See *id.*

36. See *infra* Part II.

37. See *infra* Section II.A.

38. See *infra* Section II.B.

39. See *infra* Section II.A.

40. See *infra* Section II.C.

41. See *infra* Part III.

42. See *infra* Part III.

Depending on the specific facts of an international trade delay case, COVID-19 could or could not trigger a Force Majeure defense.⁴³ If the specific wording of the Force Majeure clause includes an epidemic or pandemic as a qualifying event, COVID-19 should trigger the defense.⁴⁴ If there is an intervening factor between COVID-19 and the international trade delay, COVID-19 should not qualify as a Force Majeure event.⁴⁵

II. BACKGROUND

Originating from French civil law, Force Majeure is a French word that means “greater force,” referring to the concept of an act of God, which includes natural disasters like a hurricane or a tornado.⁴⁶ Generally, a Force Majeure clause excuses a party bound by contract from liability for nonperformance that Force Majeure events cause.⁴⁷ The legal concept of Force Majeure conflicts with the concept of *pacta sunt servanda*, which is Latin for “agreements must be kept”—a key concept at common law.⁴⁸ However, U.S. courts enforce Force Majeure clauses in contracts.⁴⁹ Importantly, U.S. courts do not imply a Force Majeure defense in contracts, so parties must expressly include a Force Majeure clause in their contracts to rely on the defense.⁵⁰ Nevertheless, some U.S. states still allow a contracting party to allege comparable common law defenses, such as “impossibility,” “impracticability” or “frustration of purpose.”⁵¹

In modern U.S. contract law, the Force Majeure clause developed to encompass more events, including human-caused acts such as warfare.⁵² The past progression of the Force Majeure clause—which was developed within U.S. and international law⁵³—presents an opportunity to analyze the standards regarding what events qualify as a Force Majeure event.⁵⁴

43. *See infra* Part III.

44. *See infra* Part III.

45. *See infra* Part III.

46. *See* Marshall Hargrave, *What Is a Force Majeure Contract Clause, and How Does It Work?*, INVESTOPEDIA: BUS. JARGON (July 23, 2022), <https://perma.cc/QZZ6-FBMN>.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* Lisa M. Richman et al., *Force Majeure and Covid-19: Frequently Asked Questions*, MCDERMOTT WILL & EMERY (Mar. 20, 2020), <https://perma.cc/5TTH-LZ5W> (“In common law jurisdictions . . . *force majeure* is not implied in contracts.”).

51. *See id.*

52. *See* Hargrave, *supra* note 46.

53. *See infra* Sections II.A–B.

54. *See infra* Section II.C.2.

A. Definition of Force Majeure from the Uniform Commercial Code

The U.C.C. is a model code for commercial transactions in the United States.⁵⁵ Every U.S. state and the District of Columbia has adopted the U.C.C. at least in part.⁵⁶ Each state organizes and codifies its own version, and this Comment refers generally to the model U.C.C., though states may have enacted slight variations.⁵⁷ If the international shipping contract is a commercial transaction between two American parties, the U.C.C. controls the contract.⁵⁸ For example, if American international trade firm *A* contracted with American client firm *B* to supply and deliver plastic cups, which are commercial goods, the contract would be subject to the governing state law—which is often negotiated when drafting the contract—and its version of the U.C.C.⁵⁹

1. Force Majeure in Article 2, Section 615 of the Uniform Commercial Code

It is essential for the contracting parties to check governing state law to see if the state's law aligns with the U.C.C. Force Majeure rule.⁶⁰ However, most states adopted article 2 of the U.C.C. in its entirety.⁶¹

The Force Majeure defense appears in the U.C.C. article 2, section 615.⁶² According to the U.C.C. § 2-615, the seller's delay in delivery and/or non-delivery is not a breach of the contract if the performance became impracticable “by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”⁶³ Parties including a Force Majeure clause and enumerating Force Majeure events in their contract contributes to this basic assumption.⁶⁴

55. See *Uniform Commercial Code*, UNIF. L. COMM'N, <https://perma.cc/M4CC-UFX5> (last visited Dec. 19, 2023).

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See Mayukh Sircar, *Business Interruption and Contractual Nonperformance: Uniform Commercial Code Article 2*, HUTCHISON PLLC (Apr. 9, 2020), <https://perma.cc/3M8R-QVVE>.

61. See *id.*

62. See *id.*

63. See *id.*; U.C.C. § 2-615 (Am. L. Inst. & Unif. L. Comm'n 2022).

64. See Sircar, *supra* note 60.

Furthermore, it is essential to differentiate a mere increase in cost from an increase in cost *caused by unforeseen occurrences*.⁶⁵ The U.C.C. § 2-615 enumerates such unforeseen occurrences, including:

[a] severe shortage of raw materials or [] supplies due to a contingency such as war, embargo, local crop failure, the unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or altogether prevent[s] the seller from securing supplies necessary to his performance.⁶⁶

2. Three Criteria for Applying Article 2, Section 615 of the Uniform Commercial Code

To avoid liability under U.C.C. § 2-615 for any delay in performance or nonperformance, a seller must prove three things when forming the contract.⁶⁷ First, the seller must not have expected the unknown contingency risk.⁶⁸ If the seller could anticipate such risk, courts will likely not consider the event an unforeseeable event.⁶⁹

Second, the seller must deliver any portion of the delivery, if possible.⁷⁰ According to U.C.C. § 2-615(b),⁷¹ if the seller is in a position to partially perform the duty, the seller must not be excused for the nonperformance.⁷² The seller must deliver the possible partial performance.⁷³

Finally, the seller must give proper notice to the buyer regarding the anticipated delay or non-delivery.⁷⁴ The prompt notice requirement is usually included in the Force Majeure clause of the contract at issue.⁷⁵ In the case of partial delivery, the seller must also notify the buyer of the specific amount of goods that the seller will deliver.⁷⁶

65. *See id.*

66. U.C.C. § 2-615.

67. *See Sircar, supra* note 60.

68. *See id.*

69. *See id.*

70. *See id.*

71. U.C.C. § 2-615(b) (“Where the causes . . . affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his requirements for further manufacture.”).

72. *See Sircar, supra* note 60.

73. *See id.*

74. *See id.*

75. *See Force Majeure Clauses: A 4-Step Checklist & Flowchart*, GIBSON DUNN (Mar. 24, 2020), <https://perma.cc/4USD-DR4F>.

76. *See Sircar, supra* note 60.

B. Definition of Force Majeure for the International Sale of Goods

Many international trade contracts involve parties from different countries.⁷⁷ The contracting parties from two different countries face complicated legal situations, especially choice-of-law decisions, if any issue with the contract arises.⁷⁸ To make it easier and more economical to buy and sell goods in international commerce and reduce such obstacles to international trade,⁷⁹ the United Nations formed a treaty—the CISG—to unify a broad area of commercial law at the international level.⁸⁰

The CISG is a self-executing treaty that becomes judicially enforceable upon a country's ratification.⁸¹ The treaty aimed to create fair and modern substantive rules to govern the rights and obligations of parties in international sales contracts.⁸² The CISG governs 74 contracting states, which includes the United States and most of its major trading partners.⁸³ Also, the CISG applies to the sale of more than two-thirds of all internationally traded goods.⁸⁴

The CISG regulates the drafting and performance of commercial contracts between sellers and buyers that have their places of business in different countries.⁸⁵ When a country signs on to the CISG, it agrees to adopt the CISG's rules as part of its law.⁸⁶ Accordingly, when doing business in the United States, contracting parties from different countries would follow the CISG rules, unless their contract explicitly says that CISG will not apply.⁸⁷ However, the CISG does not restrict parties from freely designing their contracts to their specific needs.⁸⁸

If the contracting parties adopt the CISG rules, it is important to review the Force Majeure clause according to the CISG.⁸⁹ An arbitral

77. See Press Release, U.S. Census Bureau, U.S. Dep't Com., *U.S. Goods Trade: Imports & Exports by Related-Parties, 2021*, (Sept. 7, 2022, 8:30 AM), <https://perma.cc/3P62-ZNAU>.

78. See Jason Gordon, *Convention on Contracts for the International Sale of Goods (CISG) – Explained*, BUS. PROFESSOR (Apr. 4, 2023), <https://perma.cc/TM5C-E96R>; see also Harry M. Flechtner, *Introductory Note to UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (Feb. 2009) AUDIOVISUAL LIBR. INT'L L., <https://perma.cc/256F-XGJR>.

79. See John P. McMahon, *Guide for Managers and Counsel: Applying the CISG*, INST. INT'L COM. L. (May 2010), <https://perma.cc/U5HZ-E8UN>.

80. See Flechtner, *supra* note 78.

81. See, e.g., *id.*; see also LEGAL INFO. INST., CORNELL L. SCH., *Self Executing Treaty*, <https://perma.cc/SGM9-W6CS> (last visited Dec. 19, 2023).

82. See *id.*

83. See *id.*; McMahon, *supra* note 79.

84. See Flechtner, *supra* note 78.

85. See McMahon, *supra* note 79.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

tribunal will decide such cases in the courts of countries that have joined the CISG.⁹⁰ To interpret a Force Majeure clause, the court or tribunal will first look at the terms of the Force Majeure clause in the contract.⁹¹ If the parties did not specify the terms of the Force Majeure clause, the parties will turn to article 79, section 1 of the CISG.⁹²

According to article 79, section 1 of the CISG,

[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.⁹³

The CISG's definition of Force Majeure is considerably different from both civil and common law jurisdictions because the CISG considers "[a]n impediment beyond a [party's] control" as a ground for a Force Majeure defense.⁹⁴ In contrast, Force Majeure in civil law jurisdictions is typically codified, allowing for the possibility of damages against a non-performing party if fault is proven, whereas, in common law systems, the absence of a Force Majeure clause in a contract leads to the use of impossibility or impracticability doctrines as grounds for excusing contract performance.⁹⁵

Article 79, section 1 of the CISG contains four elements of Force Majeure.⁹⁶ First, there must be an obstacle beyond the control of contracting parties.⁹⁷ Second, the non-performing party could not have foreseen the obstacle at the time of signing the contract.⁹⁸ Third, the party reasonably could not have conquered or avoided the obstacle and the resulting consequence.⁹⁹ Fourth, the party must prove the causal connection between the obstacle and the nonperformance.¹⁰⁰ These elements parallel the Force Majeure elements in the U.C.C.¹⁰¹ Both

90. See *The COVID-19 Pandemic and Force Majeure under the CISG: Lessons from the 2006 Avian Flu*, MOLOLAMKEN LLP, <https://perma.cc/HSR8-ME8J> (last visited Dec. 19, 2023).

91. See Gizem Alper, *COVID-19: Force Majeure Under CISG*, JURIST (May 27, 2020, 4:38 PM), <https://perma.cc/83QD-W7TV>.

92. See *id.*

93. U.N. Convention on Cont. for the Int'l Sale of Goods, art. 79, Jan. 1, 1980, 1489 U.N.T.S. 25567.

94. Alper, *supra* note 91.

95. *Id.*

96. *Id.*

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. See Sircar, *supra* note 60.

definitions require the event to be beyond the contracting parties' control and unforeseeable and require a causal link between the two.¹⁰²

C. Four Necessary Components of a Force Majeure Clause

The Force Majeure clause is almost always found at the end of commercial contracts because it is considered to be a boilerplate clause or a miscellaneous provision.¹⁰³ A boilerplate clause refers to the standardized text added to a contract to efficiently enforce different aspects of a contract so that all parties to the contract are protected.¹⁰⁴ Because the boilerplate clause is often standardized, parties do not typically negotiate the terms but use the standardized form.¹⁰⁵ One example of a Force Majeure clause as a boilerplate clause is as follows:

Neither party shall be held liable or responsible to the other party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any obligation under this Agreement when such failure or performing any obligation under this Agreement when such failure or delay is caused by or results from causes beyond the reasonable control of the affected party, including but not limited to fire, floods, embargoes, war, acts of war, insurrections, riots, strikes, lockouts or other labor disturbances, or acts of God: provided, however, that the party so affected shall use reasonable commercial performance hereunder with reasonable dispatch whenever such causes are removed. Either party shall provide the other party with prompt written notice of any delay or failure to perform that occurs by reason of force majeure.¹⁰⁶

Again, while a Force Majeure clause is standardized and therefore often not negotiated,¹⁰⁷ U.S. courts interpret Force Majeure clauses as if they represent “an allocation of risk that the parties bargained for.”¹⁰⁸ Consequently, if contracting parties do not thoughtfully consider the general or particular risks and their effects, the Force Majeure clause may lead to unfortunate results.¹⁰⁹ For example, before the COVID-19 outbreak, COVID-19 was an event that neither party of the contract likely anticipated; but, because a court could consider the Force Majeure clause

102. *See id.*; *see also* Alper, *supra* note 91.

103. *See* Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, A.B.A. (Mar. 25, 2021), <https://perma.cc/MR46-BVSK>; *see also* *Boilerplate Contract: Everything You Need to Know*, UPCOUNSEL, <https://perma.cc/533S-7Y9J> (last visited Dec. 19, 2023).

104. *See Boilerplate Contract: Everything You Need to Know*, *supra* note 103.

105. *See id.*

106. Bagger, *supra* note 103.

107. *See Boilerplate Contract: Everything You Need to Know*, *supra* note 103.

108. Bagger, *supra* note 103.

109. *See id.*

as “an allocation of risk that the parties bargained for,” a court could decide that COVID-19 was an event that has been bargained for if it decides that COVID-19 falls into the clause’s scope.¹¹⁰ Before further discussing the ways to decide if COVID-19 is a Force Majeure event, this Comment explains the necessary components of a Force Majeure clause and what parties should consider when drafting such a clause.

Before COVID-19, the Force Majeure clause was often an overlooked boilerplate provision.¹¹¹ However, Force Majeure language is now a critical part of drafting and negotiating a contract, as that language focuses on the big picture of the commercial arrangement and anticipates the impact of a Force Majeure event, such as another global pandemic or similar event.¹¹² While drafting a Force Majeure clause, contracting parties must ask what type of commercial transaction or relationship they have with each other, which obligations created by the contract would a Force Majeure event most likely impact, and which party is more likely to benefit most from having a Force Majeure clause.¹¹³

For the contracting parties to be prepared and protected, a Force Majeure clause must include four components. First, the Force Majeure clause must define the breach that the obligated party tries to be excused from.¹¹⁴ Second, the Force Majeure clause must enumerate possible Force Majeure events.¹¹⁵ Third, the Force Majeure clause must define and obligate the causal connection between the Force Majeure event and the breach.¹¹⁶ Finally, the Force Majeure clause must explain the consequence of excusing the performance obligation.¹¹⁷

1. Define the Breach

Deciding the breadth of a breach in the Force Majeure clause determines the power of a Force Majeure defense to excuse the party from the breach.¹¹⁸ The parties must consider what type of breach is possible from different unforeseeable events.¹¹⁹ While parties can choose to define breach in broad or narrow terms, narrow drafting terms could place the

110. *Id.*

111. David S. Hirsch & Jessie M. Reniere, *Drafting and Negotiating Force Majeure Clauses in Today's World*, HINCKLEY ALLEN (Apr. 12, 2022), <https://perma.cc/36VS-FWNJ>.

112. *See id.*

113. *See id.*

114. *See Bagger, supra* note 103.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

breaching party outside of the defined scope of the Force Majeure clause.¹²⁰

For example, in *Gibson v. Lynn University*, the Force Majeure clause stated that Lynn University will give no tuition refund if a Force Majeure event stopped the operation of the University.¹²¹ During COVID-19, the University claimed that offering an alternative mode of teaching is a breach covered by the Force Majeure clause, and, therefore, it was not obligated to refund the tuition to the students.¹²² However, the court denied Lynn University's motion to dismiss, interpreting the offering of an alternative mode of teaching as not a breach.¹²³ The court reasoned that because the University did not suspend operations, it did not fall under the Force Majeure clause.¹²⁴

As seen from *Gibson v. Lynn University*, U.S. courts often narrowly construe the terms the contracting parties agreed upon under the Force Majeure clause.¹²⁵ So, if parties narrowly define the breach, it is more likely that the agreed Force Majeure clause might not cover and excuse the alleged breach.¹²⁶ Accordingly, in an international shipping delay, if the parties agreed to narrowly define a breach by stating that there will be no penalty in the event of a loading delay at the dock, the agreed Force Majeure clause terms might not cover other types of delays such as a customs delay or a port congestion delay.¹²⁷

2. Enumerate Possible Force Majeure Events

A Force Majeure clause must include a list of the types of unforeseeable events.¹²⁸ It usually begins with a broad statement, stating that unforeseeable events are events beyond the parties' control, and then enumerates examples of Force Majeure events.¹²⁹ Another option is to include a catch-all phrase at the end of the Force Majeure event list, stating that such other unforeseeable events are beyond the parties' control.¹³⁰

120. *See id.*

121. *See Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1340 (S.D. Fla. 2020); *see also Bagger, supra* note 103.

122. *See Gibson*, 504 F. Supp. 3d at 1339–43.

123. *See Bagger, supra* note 103.

124. *See id.*

125. *See id.* (explaining that courts usually respect purposefully carved out contract terms); *see also In re CEC Ent., Inc.*, 625 B.R. 344, 351–59 (Bankr. S.D. Tex. 2020).

126. *See Bagger, supra* note 103.

127. *See id.*; *see also Reasons Why Your Ocean Freight Shipments Might Be Delayed in the Coming Months*, GOBALIA LOGISTICS NETWORK (June 1, 2022), <https://perma.cc/YW5V-8LP6>.

128. *See Bagger, supra* note 103; *see also Hirsch & Reniere, supra* note 111.

129. *See Bagger, supra* note 103.

130. *See id.*

Enumerating a list of Force Majeure events is important because, if the word pandemic or epidemic is included in the list, a court will very likely apply the Force Majeure clause to the breach due to COVID-19.¹³¹ In *Patel v. University of Vermont and State Agricultural College*, the Force Majeure clause included the event of a pandemic, which encompassed widespread pandemic flu, stating that when the University of Vermont faces a disaster outside of its control and the disaster makes its operation of student housing impossible, room and meal plan fees will not be refunded.¹³² Because the pandemic was included in the Force Majeure clause, the court ruled that the University of Vermont did not have to refund students their room and meal plan fees.¹³³ Therefore, including a list of types of unforeseeable events is important for a court in analyzing whether a certain event triggers the Force Majeure defense.¹³⁴

3. Define and Obligate the Causal Connection Between the Force Majeure Event and the Breach

The Force Majeure clause must define the causal connection between the Force Majeure event and the failure of performance.¹³⁵ The contracting parties can decide how direct the causal connection must be.¹³⁶ For example, some expressions like “caused by,” “due to,” or “as a result of” refer to the requirement of proximate cause.¹³⁷ On the other hand, an expression like “solely caused by” places a heightened burden of causal connection on the breaching party.¹³⁸

In the context of COVID-19, a proximate cause could impact the court’s decision in viewing the Force Majeure clause.¹³⁹ In *In re Hitz Restaurant Group*, the tenant-restaurant argued that it could invoke the lease’s Force Majeure clause because the phrase “government action” was included as a Force Majeure event in the contract.¹⁴⁰ However, the court determined that the government action at issue referred to the Illinois shutdown order that prohibited only on-premises dining.¹⁴¹ Therefore, the court ordered that the tenant’s rent be reduced *pro rata* so it only reflected

131. See Ryan Franklin & Nicholas Wind, *The Importance of Force Majeure Clauses in the COVID-19 Era*, A.B.A. (Mar. 3, 2022), <https://perma.cc/25WB-SBLX>.

132. See *Patel v. Univ. of Vt. & State Agric. Coll.*, 526 F. Supp. 3d 3, 20 (D. Vt. 2021); see also Franklin & Wind, *supra* note 131.

133. See *Patel*, 526 F. Supp. 3d at 20–21.

134. See Bagger, *supra* note 103.

135. See *id.*

136. See *id.*

137. *Id.*

138. *Id.*

139. See *id.*

140. *In re Hitz Rest. Grp.*, 616 B.R. 374, 376–77 (Bankr. N.D. Ill. 2020); see also Bagger, *supra* note 103.

141. See Bagger, *supra* note 103.

the proportion of on-premises dining revenue, excluding the revenue from takeout or delivery.¹⁴² Anticipating the pandemic as a Force Majeure event, the contracting parties must thoroughly establish the causal connection between COVID-19 and the breach.¹⁴³

4. Explain the Consequence of Excusing the Performance Obligation

Finally, the parties must decide the scope of relief when the Force Majeure event excuses the performance.¹⁴⁴ The negotiated scope of relief on the Force Majeure clause impacts a court's decision on the extent of relief granted to each party.¹⁴⁵ If the parties agreed to excuse any future performance by either party, courts will respect such agreement even when one party had substantially performed.¹⁴⁶

For example, in *NetOne, Inc. v. Panache Destination Management Inc.*,¹⁴⁷ the parties included a pandemic as a Force Majeure event that would excuse both parties from future nonperformance.¹⁴⁸ The booking party paid a considerable amount of a deposit and almost fulfilled its performance.¹⁴⁹ However, COVID-19 interrupted the other party's performance and the booking party sued to recover its deposit.¹⁵⁰ The district court dismissed the booking party's claim because the Force Majeure clause excused both parties from nonperformance and the clause did not state that the nonperforming party must return all deposits made.¹⁵¹ Because courts respect the contracting parties' agreement on the consequence of excusing nonperformance, contracting parties must think well ahead about the consequence that the agreed-upon terms will bring.¹⁵²

D. How Courts Review the Force Majeure Clause

To answer the question of whether COVID-19 qualifies as a Force Majeure event, this Comment reviews how U.S. circuit courts have historically reviewed Force Majeure clauses.¹⁵³ This Section discusses five

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *NetOne, Inc. v. Panache Destination Mgmt.*, No. 20-cv-00150, 2020 U.S. Dist. LEXIS 201129, at *6 (D. Haw. Oct. 28, 2020).

148. *See Bagger, supra* note 103.

149. *See NetOne, Inc.*, 2020 U.S. Dist. LEXIS 201129, at *6.

150. *See id.*

151. *See id.*

152. *See id.*

153. *See generally* Franklin & Wind, *supra* note 131 (discussing how courts determine whether a pandemic is covered by Force Majeure clause).

factors courts have used when considering a qualifying Force Majeure event.¹⁵⁴

First, this section addresses how courts evaluate the specific wording that contracting parties included in the Force Majeure clause of the contract to decide if the argued event is a qualifying Force Majeure event.¹⁵⁵ If the wording within the Force Majeure clause is unambiguous, courts follow the “Four Corners Rule” of review, which is to review the meaning of the word solely within the wording of the contract.¹⁵⁶ If the wording is ambiguous, courts have considered factors outside of the contract.¹⁵⁷

Second, this section analyzes how courts review any intervening factors of nonperformance that weaken the direct causal relationship between the argued event and the breach of contract.¹⁵⁸ Third, this section shows how courts consider the amount of time passed from the advent of the argued qualifying Force Majeure event to the time of nonperformance in determining whether the argued event was unforeseeable.¹⁵⁹ Finally, this section demonstrates how courts review the trade practice of the industry related to the underlying contract to decide whether the argued event was foreseeable.¹⁶⁰

1. Evaluate the Specific Wording of the Force Majeure Clause

When a court considers a Force Majeure event, it largely considers two things: (1) the wording of the contract and (2) the circumstantial facts.¹⁶¹ Because a Force Majeure clause is specific to every contract, the court must review the specific wording of the Force Majeure clause.¹⁶² If the Force Majeure clause includes the word “pandemic” or “epidemic,” a court will likely decide that COVID-19 is a Force Majeure event under the disputed contract.¹⁶³

However, courts have ruled differently when the words “pandemic” or “epidemic” were not included in the list of Force Majeure events.¹⁶⁴ Therefore, it is even more important that courts thoroughly analyze the words of the clause in each case.¹⁶⁵ Adhering to the principle of *pacta sunt*

154. *See infra* Section II.D.

155. *See infra* Section II.D.1.

156. *See infra* Section II.D.4.a.

157. *See infra* Section II.D.4.b.

158. *See infra* Section II.D.2.

159. *See infra* Section II.D.3.

160. *See infra* Section II.D.5.

161. *See* Franklin & Wind, *supra* note 131.

162. *See id.*

163. *Id.*

164. *Id.*

165. *See id.*

servanda,¹⁶⁶ courts typically scrutinize Force Majeure clauses with a narrow scope,¹⁶⁷ deliberately avoiding broad interpretations to ensure that contractual obligations are preserved and enforced as intended.¹⁶⁸ Therefore, courts look for a clear justification from the Force Majeure clause when a party wants to be relieved from the contractual obligation.¹⁶⁹

For example, in *Regal Cinemas, Inc. v. Town of Culpeper*, COVID-19 ceased the operation of Regal Cinemas.¹⁷⁰ However, the lease stated that the Force Majeure defense will be applied only if the leased property or other improvements on the property is “damaged or destroyed by fire, flood, natural causes, or other casual[t]ies.”¹⁷¹ The United States District Court for the Western District of Virginia based its decision on *pacta sunt servanda*—courts must construe contracts as written.¹⁷² Therefore, in analyzing the words of the Force Majeure clause, the court held that the Force Majeure clause only applied to physical damage to the property and that COVID-19 was not a Force Majeure event that could release Regal Cinemas of its contractual obligation.¹⁷³

When the words are unambiguous, courts will use the plain meaning in the context of the four corners of the contract.¹⁷⁴ The Four Corners Rule, also known as the parol evidence rule, refers to the rule that the parties under a written agreement cannot use oral or implied agreements in court to contradict the terms of the written agreement.¹⁷⁵ Furthermore, this rule posits that the contract’s legally binding components are confined strictly to the content within the literal four corners of the written document.¹⁷⁶

Because the function of a Force Majeure clause is for parties to account for the risk of unforeseeable events, courts are reluctant to deem an anticipated event a Force Majeure event.¹⁷⁷ Therefore, following the Four Corners rule, courts must pay close attention to the internal consistency of the contract and its Force Majeure clause.¹⁷⁸ In *Zhao v.*

166. See Hargrave, *supra* note 46 (“[A]greements must be kept.”).

167. See, e.g., *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (“[Force Majeure clauses] are construed narrowly and will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified.”).

168. See Franklin & Wind, *supra* note 131.

169. See *id.*

170. See *Regal Cinemas, Inc. v. Town of Culpeper*, No. 3:21-cv-4, 2021 WL 2953679, at *7 (W.D. Va. July 14, 2021); see also Franklin & Wind, *supra* note 131.

171. See Franklin & Wind, *supra* note 131.

172. See *id.*

173. See *id.*

174. See *id.*

175. See *Four Corners Rule Contract Law: Everything You Need to Know*, UPCOUNSEL, <https://perma.cc/2FJY-KDT8> (last visited Dec. 19, 2023).

176. See *id.*

177. See Bagger, *supra* note 103.

178. See *id.*

CIEE, Inc.,¹⁷⁹ the contract for a foreign program guaranteed refunds in the event of program cancellation, but the District Court of Maine ordered that the student would not receive a refund for cancellation of the foreign program when the school canceled the program due to COVID-19.¹⁸⁰ The court's decision hinged on the Four Corners Rule, which dictates that the interpretation of a contract is limited to the information contained within its written text, without consideration for external or unwritten communications.¹⁸¹ Applying this rule, the court focused strictly on the contract's text, specifically the liability waiver clause.¹⁸² This clause explicitly stated that "the company would not be liable for any loss or damage arising inter alia from [an] epidemic."¹⁸³

By invoking the Four Corners Rule, the court effectively disregarded any outside evidence or arguments that contradicted the clear terms set out within the document.¹⁸⁴ The waiver's inclusion of the term "epidemic" within the contract was deemed sufficient to release the company from liability for losses or damages related to epidemic events, aligning with the precise words and phrases as they were presented within the confines of the contract's pages.¹⁸⁵ Moreover, the court noted that the parties had anticipated the potential risk of an epidemic elsewhere in the contract, demonstrating a mutual understanding and acceptance of this risk at the time of signing.¹⁸⁶ As such, the outbreak of COVID-19 was considered a risk that had been foreseen and agreed upon by the parties, not qualifying as a Force Majeure event.¹⁸⁷ The court's adherence to the Four Corners Rule thus led to the conclusion that the specific terms agreed upon within the written agreement precluded the application of the Force Majeure clause to the COVID-19 epidemic, as the parties had already allocated the risk of such an event.¹⁸⁸

In *Patel v. University of Vermont and State Agricultural College*,¹⁸⁹ the United States District Court for the District of Vermont interpreted the wording of the contract to analyze the Force Majeure clause.¹⁹⁰ In this case, for the Spring 2020 semester, plaintiffs and class members paid for

179. See *Zhao v. CIEE, Inc.*, No. 2:20-cv-00240, 2020 WL 5171438, at *5 (D. Me. Aug. 31, 2020).

180. See *Bagger*, *supra* note 103.

181. See *id.*

182. See *id.*

183. *Id.*

184. See *id.*

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See *Patel v. Univ. of Vt. & State Agric. Coll.*, 526 F. Supp. 3d 3, 13–17 (D. Vt. 2021).

190. *Franklin & Wind*, *supra* note 131.

tuition, on-campus housing, meals, and various fees at the school.¹⁹¹ They alleged that the school had promised an in-person educational and residential experience, which was largely not delivered due to the shift to online instruction.¹⁹² Despite demands for refunds of the unused portions of these payments, the school retained these payments, offering only minimal credits for housing and inadequate future meal credits, rather than full refunds.¹⁹³

The plaintiffs argued that this retention of funds was contrary to the educational and residential experience promised by the school.¹⁹⁴ The Force Majeure clause specifically mentioned pandemics as a covered event, including situations akin to a widespread pandemic flu.¹⁹⁵ According to this clause, if a disaster beyond the University's control occurred and made the operation of student housing impossible, students would not be entitled to refunds for their room and meal plan fees.¹⁹⁶ The court said that when the Force Majeure clause is interpreted independently, it could mean the closure of the entire campus and cease of all operations.¹⁹⁷ However, the court analyzed the Force Majeure clause in the context of the entire contract and concluded that the word "closure" was unambiguous and referred to the closure of necessary facilities to provide student housing and meals.¹⁹⁸ Because COVID-19 caused this unambiguous meaning of "closure," the court released the university from the obligation to pay refunds to the students.¹⁹⁹

2. Review Other Factors Outside of the Contract

In the past, courts have declined to recognize events that cause a severe economic impact alone as Force Majeure events.²⁰⁰ For example, during the 2008 recession,²⁰¹ parties under contract tried to argue that a Force Majeure clause excused them from the contractual obligations because of the severe economic impacts the recession caused, such as significant workforce layoffs and a sharp decrease in revenues.²⁰² While

191. *See Patel*, 526 F. Supp. 3d at 7–10.

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See Franklin & Wind*, *supra* note 131.

197. *See id.*

198. *Id.*

199. *See id.*

200. *See id.*

201. *See How Will Courts Interpret Force Majeure Clauses in the COVID-19 Crisis Response? Look to 2008 Recession Fallout for Clues*, LOWENSTEIN SANDLER (Apr. 6, 2020), <https://perma.cc/YFJ9-M9SY>.

202. *See Franklin & Wind*, *supra* note 131.

such attempts during the 2008 recession were not fruitful,²⁰³ current litigation shows that courts treat COVID-19 as an event that created more than a severe economic impact.²⁰⁴ Further, when courts determine that the wording of a Force Majeure clause is ambiguous, they often look into factors outside of the contract to review whether COVID-19 qualifies as a Force Majeure event.²⁰⁵

As mentioned above, courts also review the detailed facts and circumstances of the case to determine if COVID-19 qualifies as a Force Majeure event.²⁰⁶ Specifically, courts review the reasoning behind the nonperformance of the contractual obligation.²⁰⁷ Also, courts review whether COVID-19 was a direct cause of the nonperformance.²⁰⁸ Even if the Force Majeure clause listed the pandemic as a Force Majeure event, courts do not excuse the party's nonperformance if COVID-19 only hindered or delayed the performance partially.²⁰⁹

For example, a Michigan court decided that a party was not excused from performance when the buyer failed to purchase polysilicon for solar panels per the contract due to alleged price distortion that the Chinese government's improper subsidies to Chinese companies caused.²¹⁰ Although a government act was included in the list of the contract's Force Majeure clause, the Michigan court held that the party was not excused from performance.²¹¹ This decision was based on the buyer's inability to pinpoint a specific government action that directly impeded their ability to meet the contractual terms.²¹² Essentially, the court required a direct link between a listed Force Majeure event and the party's non-performance, which the buyer failed to establish.²¹³ The court reasoned that the party did not negotiate the Force Majeure clause of the contract although they had the opportunity to do so.²¹⁴ The party would have been excused from performance if it included terms stating that the nonperformance due to unprofitability was caused by the government's manipulation of the market.²¹⁵

203. See *How Will Courts Interpret Force Majeure Clauses in the COVID-19 Crisis Response? Look to 2008 Recession Fallout for Clues*, *supra* note 201.

204. See Franklin & Wind, *supra* note 131.

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.*

209. See *id.*

210. See *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 N.W.2d 445, 438–43 (Mich. App. 2015); see also Franklin & Wind, *supra* note 131.

211. See Franklin & Wind, *supra* note 131.

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.*

According to the Michigan court's decision, the court must ask fact-finding questions to decide whether a party can use a Force Majeure clause to be completely excused from the performance obligation in a binding contract.²¹⁶ For a court to find that COVID-19 is one of the listed events on the Force Majeure clause, a court must find that the parties intended the COVID-19 pandemic to be a Force Majeure event when the contract was executed and also find that COVID-19 had a requisite impact on the nonperforming party so that performance became either impracticable or impossible by looking into the specific facts of the case.²¹⁷

In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*,²¹⁸ the United States District Court for the Southern District of New York also reviewed the surrounding facts of the case beyond the contract itself.²¹⁹ Phillips and JN made a contract to auction artwork, but New York state issued a governmental executive order that shut down all nonessential businesses.²²⁰ While Phillips could have rescheduled the event, Phillips decided to terminate the contract under the Force Majeure clause.²²¹ JN objected and sued Phillips for the breach of contract.²²²

The court reviewed the wording of the contract and decided that Phillips' nonperformance should be excused.²²³ The court decided that COVID-19 should be considered a natural disaster under the Force Majeure clause.²²⁴ However, more importantly, the court investigated different facts surrounding the case in making its decision.²²⁵ The court based its argument on the catch-all statement included in the Force Majeure clause, which states, "In the event, the auction is postponed for circumstances beyond our or your reasonable control, including, *without limitation*, as a result of *natural disaster*, . . . we may terminate this Agreement with immediate effect."²²⁶ Relying on this catch-all phrase, the court reviewed two different dictionaries, including *Black's Law Dictionary*, and confirmed that the word "natural disaster" from the Force Majeure clause is broad enough to include a pandemic.²²⁷ Also, the court found that the pandemic could also belong to other listed events after the

216. *See id.*

217. *See id.*

218. *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 496–98 (S.D.N.Y. 2020).

219. *See Franklin & Wind, supra note 131.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See Bagger, supra note 103; see also Franklin & Wind, supra note 131.*

224. *See Franklin & Wind, supra note 131.*

225. *See id.*

226. *Bagger, supra note 103; see Franklin & Wind, supra note 131.*

227. *Bagger, supra note 103.*

word “natural disasters,” such as economic upheaval and climate disasters.²²⁸

However, the court emphasized that the Force Majeure clause should not be expansive.²²⁹ The court noted the principle of *ejusdem generis*, a legal principle that guides the interpretation of a word to be consistent with the others in its list, as captured in the phrase “the meaning of the word in a series of words is determined by the company it keeps.”²³⁰ When the court decided that the pandemic belongs in the general definition of circumstances outside the reasonable control of the parties, the court said that the listed events after the “natural disaster” did not narrow the general definition, especially when the contract pointed out that the listed events are not included to limit the definition.²³¹ Such an explanation by the court implies that the result would have been different if the Force Majeure clause did not include “without limitation” or “natural disaster.”²³² This explanation also indicates that the New York court does not wish to expand a Force Majeure clause without a careful review of the facts.²³³

a. Review the Circumstantial Facts to Evaluate the Proximate Cause of the Performance

It is well-established that to constitute a Force Majeure event, the event must be the proximate cause of nonperformance of the contract.²³⁴ If there is an intervening event other than the Force Majeure event that influenced a party’s nonperformance, the court should evaluate if that party’s nonperformance is a direct and proximate result of the intervening event or the Force Majeure event.²³⁵ Most Force Majeure clauses include that nonperformance must be “caused by,” “due to,” or “on account of” the Force Majeure event.²³⁶ Most states consider the inclusion of this causal wording as requiring a proximate cause to use the defense.²³⁷ While the Force Majeure event does not have to be the only cause, it has to be a substantial cause.²³⁸

228. Franklin & Wind, *supra* note 131.

229. *See id.*

230. *Id.*

231. *See id.*

232. *Id.*

233. *See id.*

234. *See* Hong Kong Islands Line Am. S.A. v. Distrib. Servs. Ltd., 795 F. Supp. 983, 989 (C.D. Cal. 1991), *aff’d*, 963 F.2d 378 (9th Cir. 1992); *see also* 1600 Walnut Corp. v. Cole Haan Co. Store, 530 F. Supp. 3d 555, 559 (E.D. Pa. 2021).

235. *See* *Tour de Force: When Is COVID-19 the Cause of Nonperformance?*, PILLSBURY L., <https://perma.cc/3GKU-YHPN> (last visited Dec. 19, 2023).

236. *Id.*

237. *See id.*

238. *See id.*

For example, in *Coker International, Inc. v. Burlington Industries*, the District Court of South Carolina stated that Force Majeure events can only excuse nonperformance if the Force Majeure events directly cause the nonperformance.²³⁹ Coker wanted to cancel a deal because of unexpected government actions in Peru that affected their plans.²⁴⁰ However, the court found that because these government actions didn't stop Coker from getting the items they agreed to buy, even though Coker subjectively found it impossible to do what they had originally planned with the items, the unexpected actions did not cancel the deal.²⁴¹

Similarly, in *Northern Illinois Gas Co. v. Energy Coop., Inc.*, the Illinois Appellate Court stated that Force Majeure events must proximately cause the nonperformance under Illinois law.²⁴² The plaintiff argued that its failure to fulfill its obligations was due to a rate order issued by the Interstate Commerce Commission, which they claim was a force majeure event.²⁴³ Upon examination of the rate order, the court determined that it did not mandate the plaintiff to take any actions that were directly significant or pertinent to its contractual duties with the defendant.²⁴⁴

b. Review the Circumstantial Facts to Evaluate the Foreseeability

In addition to proximate cause, the party must prove the unforeseeability of the event.²⁴⁵ In reviewing whether an event was unforeseeable, courts analyze the time frame of the event and the trade practice of the specific industry.²⁴⁶ For an event to be unforeseeable, the parties should not have anticipated the event during the negotiation of the contract.²⁴⁷ Therefore, if significant time has passed since the claimed Force Majeure event, it is likely that the courts will not deem the event unforeseeable.²⁴⁸

For example, the Florida Supreme Court decided in *Florida Power Corporation v. City of Tallahassee*²⁴⁹ that the power company is not excused from providing unstable electric power because a hurricane in

239. See *Coker Int'l, Inc. v. Burlington Indus.*, 747 F. Supp. 1168, 1170 (D.S.C. 1990).

240. See *id.*

241. See *id.*

242. See *N. Ill. Gas Co. v. Energy Coop., Inc.*, 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984).

243. See *id.*

244. See *id.*

245. See Erin Webb, *ANALYSIS: No Longer Unforeseeable? Force Majeure and Covid-19*, BLOOMBERG L. (Nov. 1, 2021, 3:03 AM), <https://perma.cc/DPN9-ZV9V>.

246. See *id.*

247. See *id.*

248. See *id.*

249. *Fla. Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944).

Florida is a seasonable event and not an extraordinary event, although a hurricane is an act of God that would typically qualify as a Force Majeure event.²⁵⁰ Moreover, in *Cachick v. United States*, the District Court of Southern Illinois held that wind events, which had been previously recorded in the area and at the same time of year, did not qualify as Force Majeure events.²⁵¹ Therefore, if the claimed Force Majeure event was reasonably foreseeable in the area, particularly with respect to weather, courts do not excuse the nonperformance.²⁵²

Furthermore, courts consider circumstantial factors like trade usage and commercial practices in interpreting contracts.²⁵³ Under the U.C.C., a contract for the sale of goods requires the drafters to consider trade usage.²⁵⁴ If the risk allocation is not consistent with the commercial practice, parties must draft the inconsistency in the contract.²⁵⁵

III. ANALYSIS

In the wake of COVID-19, numerous international shipping contract breaches led to settlements between parties,²⁵⁶ while others prompted courts to consider if COVID-19 could be classified as a Force Majeure event.²⁵⁷ Courts are tasked with meticulously examining the contract terms and the context surrounding each case to accurately determine the intent and boundaries of the agreement.²⁵⁸ When analyzing the words of the contract, courts should look closely for internal consistency to decide the scope of the parties' agreement.²⁵⁹ Moreover, it is crucial for courts to identify the proximate cause and assess the foreseeability of a Force Majeure claim.²⁶⁰ This analysis involves evaluating whether the parties

250. See Joseph Foster, *A Short Primer on Force Majeure and Related Defenses*, AKERMAN (Apr. 27, 2020), <https://perma.cc/9X3A-3YNX>.

251. See *Cachick v. United States*, 161 F. Supp. 15, 17–19 (S.D. Ill. 1958).

252. See Foster, *supra* note 250.

253. See Bagger, *supra* note 103.

254. See U.C.C. § 2-615 cmt 8 (AM. L. INST. & UNIF. L. COMM'N 2022). The U.C.C. clarifies that

[foreseeability] is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like, [including] among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances.

Id.; see also Bagger, *supra* note 103.

255. See Bagger, *supra* note 103.

256. See *See Tour de Force: When Is COVID-19 the Cause of Nonperformance?*, *supra* note 235 (listing cases that signed settlement agreement over COVID-19 Force Majeure dispute).

257. See *Regal Cinemas, Inc. v. Town of Culpeper*, No. 3:21-cv-4, 2021 WL 2953679, at *7 (W.D. Va. July 14, 2021).

258. See Franklin & Wind, *supra* note 131.

259. See *id.*

260. See *id.*

could have predicted the occurrence of the pandemic at the time the contract was signed and whether they made provisions for such an eventuality.²⁶¹ As courts develop case law in response to COVID-19, they should maintain their established methodologies in interpreting Force Majeure clauses.²⁶² This consistent approach is vital to uphold contract integrity and prevent misuse of the Force Majeure provision as a loophole for evading foreseeable and manageable contractual duties.²⁶³ This approach also ensures that the principle of Force Majeure remains a shield for unforeseeable and uncontrollable events, rather than a sword to cut through the obligations of a binding agreement.²⁶⁴

A. Evaluate the Specific Wording of the Force Majeure Clause in the International Shipping Contract

When parties under an international shipping contract breach the contract due to COVID-19, courts should evaluate the specific wording of the contract's Force Majeure clause.²⁶⁵ If the Force Majeure clause includes the word "pandemic" or "epidemic" in the list of Force Majeure events, courts should decide that COVID-19 is considered a Force Majeure event under the disputed contract.²⁶⁶ Because courts respect each contracting party's freedom to negotiate the terms of Force Majeure, the fact that the words "pandemic" or "epidemic" are included in the contract shows that the parties intended for pandemics like COVID-19 to be covered by the Force Majeure clause.²⁶⁷

However, if the international shipping contract's Force Majeure clause does not include the word "pandemic" or "epidemic", courts should narrowly review the words of the Force Majeure clause.²⁶⁸ The majority of states agree that courts should avoid expansively interpreting the Force Majeure clause because courts should respect the legal doctrine of *pacta sunt servada*—that contractual obligations must be kept.²⁶⁹ In *Regal Cinemas, Inc. v. Town of Culpeper*, the District Court for the Western District of Virginia narrowly analyzed the words of the Force Majeure clause by construing the Force Majeure clause as written.²⁷⁰ Similarly, the

261. *See id.*

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *Id.*

267. *See id.*

268. Franklin & Wind, *supra* note 131.

269. *See id.*; *see also* Regal Cinemas, Inc. v. Town of Culpeper, No. 3:21-cv-4, 2021 WL 2953679, at *7 (W.D. Va. July 14, 2021).

270. *See* Franklin & Wind, *supra* note 131.

court should base its decision on *pacta sunt servada* and narrowly analyze the words of the international shipping contract.²⁷¹

B. Follow the Four Corners Rule and Consider Factors Outside of the Contract

When the words of the international shipping contract are unambiguous, the court should use the words' plain meaning in the context of the four corners of the contract.²⁷² Because the Force Majeure clause is an agreement to account for the risk of an unforeseeable event, if part of the contract suggests that both parties anticipated the pandemic, the court should not excuse the international shipping companies' nonperformance, similar to the analyses of the District Courts of Vermont and Maine.²⁷³ For example, if the Force Majeure clause's list of Force Majeure events does not include the word "epidemic" or "pandemic," and the parties anticipated an "epidemic" or "pandemic" under another clause, courts should not excuse international trade companies' nonperformance, under the four corners rule.²⁷⁴

When the words of the contract are ambiguous, courts should consider other factors outside the contract to decide the meaning of the words.²⁷⁵ Such factors would be the reasoning behind the nonperformance or delay of international shipments and COVID-19 being the direct cause of nonperformance and delay.²⁷⁶

C. Evaluate the Intervening Factors of Nonperformance

While courts could determine that COVID-19 qualifies as a Force Majeure event based on the contractual terms,²⁷⁷ courts could also infer from many intervening factors that COVID-19 was not a substantial cause

271. *See id.*

272. *See id.*; *see also* Patel v. Univ. of Vt. & State Agric. Coll., 526 F. Supp. 3d 3, 20–21 (D. Vt. 2021); *see also* Zhao v. CIEE, Inc., No. 2:20-cv-00240, 2020 WL 5171438, at *5 (D. Me. Aug. 31, 2020).

273. *See Patel*, 526 F. Supp. 3d at 20–21; *see also* Franklin & Wind, *supra* note 131.

274. Franklin & Wind, *supra* note 131.

275. *See id.*

276. *See id.*

277. *See* JN Contemp. Art LLC v. Phillips Auctioneers LLC, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020); AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC, No. 20-CV-0310, 2020 WL 7024929, at *58–59 (Del. Ch. Nov. 30, 2020) (commenting that COVID-19 and its effects are under the enumerated term of "calamities" and possibly under the enumerated term of a "natural disaster"); Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020) (holding COVID-19 is a "natural disaster" under a Pennsylvania statute); *see also* 1600 Walnut Corp. v. Cole Haan Co. Store, 530 F. Supp. 3d 555, 559 (finding the pandemic fell within a catch-all phrase because it was similar to "other life-altering national events [], such as war, riots, and insurrection").

and, therefore, does not qualify as a Force Majeure event.²⁷⁸ For example, COVID-19 caused government-mandated shutdowns, transportation difficulties, and labor shortages.²⁷⁹ Therefore, an opposing party, wanting to enforce the contract, can argue that the real cause of the delay in shipping or nonperformance is not substantially from COVID-19 but from other events that are arguably more foreseeable than COVID-19.²⁸⁰ Because courts focused heavily on the question of causation before COVID-19,²⁸¹ courts should continue to consider intervening events and causation when determining whether to enforce a contract's Force Majeure clause.²⁸²

In *Hong Kong Islands Line America S.A. v. Distribution Services, Ltd.*, the Central District of California decided that COVID-19 was not the proximate cause of the delay in shipping because the defendant failed to prove that the shipment was impossible or unprofitable.²⁸³ The defendant failed to prove the impossibility of shipment because the defendant made a partial shipment.²⁸⁴ The partial shipment proved that the defendant was not facing an unforeseeable event completely outside of their control but, rather, made a business decision to make a partial shipment.²⁸⁵

In *1600 Walnut Corporation v. Cole Haan Company Store*, the Eastern District of Pennsylvania ruled that COVID-19 must be the proximate cause of nonperformance of the contract to claim a Force Majeure defense.²⁸⁶ Also, in *Future Street Limited v. Big Belly Solar, LLC*, the District Court of Massachusetts required that the party must show the proximate cause between COVID-19 and nonperformance when alleging that COVID-19 qualified as a Force Majeure event.²⁸⁷ As these cases show, courts should continue to consider intervening factors in reviewing the causes of delay in international shipping cases because such factors could represent anticipated events, unlike Force Majeure events.²⁸⁸

If shipping delays result from companies canceling sailings due to port closures, higher costs, or labor shortages linked to COVID-19, it's

278. See *Detail in Force Majeure Clauses is Foreseeable*, CARLILE PATCHEN & MURPHY LLP (Sept. 26, 2022), <https://perma.cc/J49V-DCED>.

279. See *id.*

280. See *id.*

281. See *Hong Kong Islands Line Am. S.A. v. Distrib. Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991), *aff'd*, 963 F.2d 378 (9th Cir. 1992); see also *1600 Walnut Corp.* 530 F. Supp. 3d at 555.

282. See *Detail in Force Majeure Clauses is Foreseeable*, *supra* note 278.

283. See *Hong Kong Islands Line Am. S.A.*, 795 F. Supp. at 989.

284. See *id.*

285. See *id.*

286. See *1600 Walnut Corp.*, 530 F. Supp. 3d at 555.

287. See *Future Street Ltd. v. Big Belly Solar, LLC*, Civ. No. 11020, 2020 WL 443174, at *6 (D. Mass. July 31, 2020).

288. See *Sircar*, *supra* note 60.

inaccurate to say that the pandemic is the sole direct cause.²⁸⁹ Each contributing factor, such as the port shutdown, rising costs, or labor shortages, should be individually assessed to determine the cause of the delays.²⁹⁰

D. Consider the Time Frame of Nonperformance to See If COVID-19 was Unforeseeable

In international trade cases, COVID-19 must be an unforeseeable event for parties to use the Force Majeure clause to defend from nonperformance.²⁹¹ When reviewing the foreseeability of COVID-19, courts should consider the time frame of COVID-19 and when the parties made the contract.²⁹² Because parties in international shipping contracts would likely take COVID-19 into consideration when significant time passes after the initial spread of COVID-19, the timing of contract formation is important.²⁹³

While a party could likely argue that COVID-19 was not foreseeable in 2019 and 2020,²⁹⁴ contracting parties should have foreseen COVID-19 as a bargained-for event if the contract was formed after the COVID-19 pandemic began.²⁹⁵ Further, by the time COVID-19 affected the entire globe,²⁹⁶ both parties would have considered the pandemic as a factor in their negotiation.²⁹⁷ Therefore, in cases in which the contract was formed during or after the COVID-19 pandemic's substantial impact, courts should hold that COVID-19 was not an unforeseeable event.²⁹⁸

E. Review the Trade Practice of Specific International Trade to Decide Foreseeability of the Event

Courts should consider the trade practices when relevant to international shipping contracts. For example, in *AB Stable VIII LLC v.*

289. See *Hong Kong Islands Line Am. S.A.*, 795 F. Supp. at 989; *1600 Walnut Corp.*, 530 F. Supp. 3d at 555.

290. See *Hong Kong Islands Line Am. S.A.*, 795 F. Supp. at 989; *1600 Walnut Corp.*, 530 F. Supp. 3d at 555.

291. See Webb, *supra* note 245.

292. See Ezekiel J. Emmanuel et al., *A National Strategy for the "New Normal" of Life with COVID*, JAMA NETWORK (Jan. 6, 2022), <https://perma.cc/WXH7-RC2P>.

293. See Webb, *supra* note 245.

294. But see Deb Reichmann, *Trump Disbanded NSC Pandemic Unit that Experts had Praised*, AP NEWS (Mar. 14, 2020, 11:37 AM), <https://perma.cc/ZL23-T7Z2> (explaining that experts warned about the next pandemic for years, the National Security Council kept a pandemic office until the Trump administration disbanded it in 2018, and the pandemic office strongly suggests the foreseeability of pandemics before COVID-19).

295. See Webb, *supra* note 245.

296. See *Coronavirus Disease (COVID-19)*, *supra* note 1.

297. See Webb, *supra* note 245.

298. See *id.*

Maps Hotels Resorts One LLC,²⁹⁹ the Delaware Chancery Court considered each party's expert testimony when reviewing the material adverse effects provision in an acquisition agreement.³⁰⁰ The main dispute was if the word "calamities" on the contract customarily included a pandemic under the industry practice, and the expert testimony showed that the argument that general terms like "calamity," "natural disaster," "Act of God," or "force majeure" do not encompass pandemics can be rejected, given that similar deal contracts clearly associate these terms with pandemic scenarios.³⁰¹

Similarly in international shipping contracts, courts should consider the industry practice of risk-management.³⁰² For example, unlike other commercial contracts, maritime international shipping contracts specifically foresee the risk of piracy.³⁰³ Courts must analyze whether parties agree to deviate from international shipping standards when they draft the contract.³⁰⁴ If the parties did agree to deviate, the Force Majeure clause should be understood as agreed upon.³⁰⁵ However, if the parties did not deviate from the standard, courts must review the industry standard to determine how it applies to the contract and the facts at issue.³⁰⁶

Customarily, international shipping companies are used to handle different types of risk, which is why the shipping industry is traditionally known as the risk and reward industry.³⁰⁷ For example, maritime freight rates tripled from 2003 to 2008, but later prices decreased by 95% in the second half of 2008.³⁰⁸ This freight rate change demonstrates the size of the risk and possible reward that shipping companies regularly face.³⁰⁹

Generally, the most threatening risks to shipping companies are macroeconomic fluctuation, ship accidents, freight fluctuations, and oil price fluctuations.³¹⁰ COVID-19 negatively impacted the closing of the ports, operational efficiency of ports, and labor shortages.³¹¹ These

299. *AB Stable VIII LLC v. MAPS Hotels Resorts One LLC*, No. 2020-3130, 2020 WL 7024929, at *58–59 (Del. Ch. Nov. 30, 2020).

300. *See* Bagger, *supra* note 103.

301. *Id.*

302. *See id.*

303. *See Risk Management Strategies of Shipping Companies*, CELLO SQUARE (Aug. 24, 2022), <https://perma.cc/HPH7-QGQB>.

304. *See id.*

305. *See id.*

306. *See id.*

307. *See id.*

308. *See id.*

309. *See id.* (identifying common risks in the shipping industry).

310. *See id.* (citing Frederick Holm & Vitalijs Kalinovs, *Risk and Risk Management in the Shipping Industry*, COPENHAGEN BUS. SCH. (2017) (surveying Danish shipping companies)).

311. *See The Impact of the Covid-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, *supra* note 5.

risks,³¹² however, were foreseeable to the party far in advance.³¹³ While the parties might not have considered the pandemic as a risk factor, the industry standard shows that parties likely knew the possibility of port closures impacting the shipment.³¹⁴

F. Recommendation for the International Trade Companies

For international shipping contract parties to adequately predict their risks, they should consider the following when drafting their Force Majeure clause: First, they should include pandemics and epidemics in the list of Force Majeure clause events;³¹⁵ second, they should avoid solely depending on a catch-all phrase in a Force Majeure clause;³¹⁶ and third, they should include a provision that requires the international shipping company claiming Force Majeure to mitigate the effects of the Force Majeure event.³¹⁷

1. Include Pandemics and Epidemics in the List of Force Majeure Events

When courts review the wording of the Force Majeure clause, courts will first look to see if pandemics or epidemics are on the list of Force Majeure events.³¹⁸ When parties include the pandemic as a Force Majeure event in their international shipping contract, it is clear evidence that they contemplated and agreed on its inclusion. Therefore, courts should respect the agreement based on *pacta sunt servada* and conclude that COVID-19 qualifies as a Force Majeure event.³¹⁹

2. Avoid Solely Depending on a Catch-All Phrase in the Force Majeure Clause

While a catch-all phrase could be at the end of the Force Majeure event list,³²⁰ parties should not rely solely on this phrase to protect them

312. See *An Updated Checklist & Flowchart for Analyzing Force Majeure Clauses During the COVID-19 Crisis*, GIBSON DUNN (Aug. 4, 2021), <https://perma.cc/V6RF-4WZ7> (considering the argument that these impacts are indirect).

313. See *Risk Management Strategies of Shipping Companies*, *supra* note 303.

314. See *id.*

315. See Franklin & Wind, *supra* note 131.

316. See Bagger, *supra* note 103.

317. See Robert B. Milligan & Darren W. Dummit, *COVID-19 Update: Force Majeure Under California Law in Business and Commercial Disputes*, SEYFARTH (Mar. 26, 2020), <https://perma.cc/YQM8-DZ3A>.

318. See Franklin & Wind, *supra* note 131.

319. See Hargrave, *supra* note 46.

320. See Bagger, *supra* note 103 (explaining that catch-all phrases state that other unforeseeable events are beyond the parties' control).

from the responsibility of nonperformance.³²¹ Courts may decide that the pandemic is a weak proximate cause of the shipping delay or non-delivery.³²² Courts may also find that a pandemic was foreseeable for international shipping companies.³²³ Therefore, parties in international shipping contracts take an unnecessary risk by depending solely on the catch-all phrase because courts may find that the pandemic is not a Force Majeure event not covered by the catch-all phrase.³²⁴

3. Require the International Shipping Company Claiming Force Majeure to Mitigate the Effects of the Force Majeure Event

By adding a provision requiring the international shipping company under the Force Majeure protection to mitigate the effects of the Force Majeure event, the client feels more at ease knowing that “pandemic” and “epidemic” are specified as Force Majeure events in the agreement.³²⁵ The provision would guarantee service quality for shipping firms during a pandemic, requiring only reasonable efforts from them to minimize its impact.

IV. CONCLUSION

Under the Force Majeure defense, should courts excuse international shipping companies from shipping delays and non-delivery caused by COVID-19? The answer is maybe.³²⁶ Whether or not COVID-19 qualifies as a Force Majeure event depends on the specific wording of the Force Majeure clause and the surrounding facts of the case.³²⁷

While courts are developing case law on COVID-19 and its qualification as a Force Majeure event,³²⁸ courts should not deviate from their past methods of reviewing the Force Majeure clause.³²⁹ Accordingly, courts should narrowly evaluate specific wording of the Force Majeure clause because courts should respect *pacta sunt servada* and avoid

321. See *id.*; see also *Patel v. Univ. of Vt. & State Agric. Coll.*, 526 F. Supp. 3d 3, 20–21 (D. Vt. 2021) (holding that the University of Vermont was not obligated to refund the student because the pandemic was covered under the Force Majeure clause).

322. See *Detail in Force Majeure Clauses is Foreseeable*, *supra* note 278.

323. See *Risk Management Strategies of Shipping Companies*, *supra* note 303 (noting that while the pandemic itself may not have been foreseeable, the events related to the its impact were foreseeable to international shipping companies).

324. See *Bagger*, *supra* note 103. *But see* *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020) (holding COVID-19 is a part of the catch-all phrase).

325. See *Milligan & Dummit*, *supra* note 317.

326. See *supra* Section II.D.

327. See *supra* Part II.

328. See *supra* Section II.D.

329. See *supra* Section II.D.

expansively interpreting the Force Majeure clause.³³⁰ When words of the Force Majeure clause are unambiguous, courts should use the words' plain meaning in the context of the four corners of the contract.³³¹ However, when the words are ambiguous, courts should consider other factors outside of the contract to decide the meaning of the words.³³²

Courts should evaluate the intervening factors to decide if COVID-19 was a proximate cause or a substantial cause of non-delivery.³³³ Also, courts should consider the timeline to decide the foreseeability of COVID-19.³³⁴ Furthermore, courts should consider the industry practice of managing risk in international shipping contracts.³³⁵ Customarily, international shipping companies are used to handling different types of risk, and parties likely anticipated the possibility of an epidemic impacting the shipment.³³⁶

International shipping contract parties should include pandemics as Force Majeure events,³³⁷ avoid solely depending on a catch-all phrase,³³⁸ and include a provision that requires the international shipping company, claiming a Force Majeure defense, to mitigate the effects of the Force Majeure event.³³⁹ Not overlooking the importance of the Force Majeure clause will pay off in the end.³⁴⁰

330. *See supra* Section III.A.

331. *See supra* Section III.B.

332. *See supra* Section III.B.

333. *See supra* Section III.C.

334. *See supra* Section III.D.

335. *See supra* Section III.E.

336. *See supra* Section III.E.

337. *See supra* Section III.F.1.

338. *See supra* Section III.F.2.

339. *See supra* Section III.F.3.

340. *See supra* Part III.