Energy Contracts: In-House Counsel, *Force Majeure* and the COVID-19 Pandemic
COVID-19 is disrupting contracts in our energy industries, impacting electric power and petroleum, and both product providers and service providers. Contracts will be breached. The phrase “force majeure” will be top of mind.

This paper is not legal advice. It simply reminds in-house counsel how the law treats contract disruptions and what questions are likely to be on a tribunal’s mind if the dispute ends up in court or arbitration. The goal is to make it easier for in-house counsel to identify key legal issues when advising a client on whether compliance with the contract may be suspended.

Our approach reviews precedents from 12 jurisdictions, two hypothetical fact patterns and two hypothetical provisions in energy contracts. We review California, Texas, New York, Florida, Illinois, Colorado, Louisiana, New Mexico, Oklahoma, Ohio, Pennsylvania and maritime law. We address two scenarios:

- The first concerns the effect of COVID-19 on an Asian upstream parts maker. The closure of its factory allegedly prevents a U.S. company from fulfilling obligations to the developer of a solar electric generation facility.
- The second concerns the effect of COVID-19 directly on two U.S. companies engaged in drilling offshore oil and gas wells.

Sample contract language has been selected to focus the discussion for each scenario. For ease of reference, legal authorities are set out in extensive endnotes. Not every jurisdiction is covered in each scenario.

Overview

**Force Majeure**

There is no perfect contract. Even the lengthiest contracts for the most expensive transactions are lucky to contain language addressing the predictable range of future business risk. When parties try to address unpredictable risks – to expect the unexpected – they draft what is traditionally called a force majeure clause. To the extent it applies, a force majeure clause excuses the affected party from its obligations under the contract.¹

A force majeure clause could be extremely brief: “Force majeure means any cause beyond the control of the party affected.” In practice, the clause rarely is. With repeated use, with the drafter’s urge for increasing detail, and especially with the unexamined incorporation of language through cutting and pasting from other contracts, modern clauses are long, repetitive and potentially inconsistent. A sample clause is reproduced below and illustrates the point.

As part of a contract, a force majeure clause is subject to all the usual rules of contract interpretation.² In Texas, as elsewhere, the effect of a force majeure clause “depends on the specific contract language.”³ That said, when a court attempts to give effect to the written intentions of the parties, several jurisdictions interpret force majeure clauses “narrowly.”⁴

When any court expresses a rule of decision by emphasizing an adverb, uncertainty follows in its wake. But subsidiary rules of decision illustrate how the principle works. The Court of Appeals of New York, for example, has stated that “[o]rdinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused[.]” Because the clause in that case did not specifically list failure to obtain insurance, the court upheld the eviction of a tenant who failed to have the required insurance in place, despite evidence showing the tenant’s failure was beyond his control.⁵ In a similar vein, a California court of appeals has given a restrictive meaning to a key word in a clause. The court held that when an oil and gas lease allowed force majeure events to suspend “obligations of the Lessee,” it construed “obligations” to refer only to the covenants in the lease, not to other contractual “conditions” in it. As a result, a lessee lost a lease because no well was actually producing at the end of the lease’s term, even though force majeure events may have prevented the well from producing.⁶

The most frequent example of courts searching for limitations on the reach of force majeure clauses arises from the presence of “catch all” phrases. These follow a listing of particular force majeure events and often use “or any other cause,” or words to that effect. Courts are likely to follow the old guide to interpretation, called ejusdem...
generis: the catch-all phrase will cover only those events that are like the events specifically named. A Texas court of appeals has added further gloss on the catch-all phrase. Because, in the court’s view, the generality of a catch-all phrase makes it “unclear whether a party has contemplated and voluntarily assumed” a particular risk, the court has held as a matter of law that an event cannot be covered by the phrase unless it was unforeseeable.

Noncontract Remedies

Before turning to common law or code remedies, in-house counsel must first consider the jurisdiction. Some states have not adopted doctrines of “impossibility,” “frustration of purpose” or (outside the Uniform Commercial Code (UCC)) “impracticability.” In such a jurisdiction, no force majeure clause means no relief. Even with a clause, it is possible the jurisdiction might adopt the view that noncontract remedies should not apply when the parties have addressed the unexpected through contract. Now-retired Circuit Judge Richard Posner has expressed that view.

Most jurisdictions have neither accepted nor rejected Judge Posner’s view. In several cases, courts have silently assumed a party may invoke multiple claims to excuse performance. So when the contract lacks a force majeure clause, or when the breaching party does not obtain the relief it needs from the clause, that party may turn to common law, civil code or maritime law doctrines to excuse its failure to honor the contract.

One doctrine is “impossibility.” States that recognize this doctrine employ one of two tests: an actual one and a figurative one. New York and Louisiana are in the former camp. Colorado, among many other states, following the Restatement of Contracts, employs the latter. There, impossibility means “impracticability” when an unanticipated circumstance has made performance “vitally different” than what was within the parties’ contemplation.

Another is “frustration of purpose.” While this is very similar to “impracticability,” the California Supreme Court has explained what sets the frustration doctrine apart. The party seeking to excuse its failure to perform must show two things: that the risk of the event was not reasonably foreseeable and that the value of the other party’s “counterperformance is . . . nearly totally destroyed.”

CASE 1

An American company, SupplyCo, manufactures panels for solar arrays in its plant in Nebraska. It has a very large order to supply, install and maintain panels for a 200-megawatt solar photovoltaic generation station, already under construction. The project developer and counterparty, SolarCo, faces significant time pressure to begin generating electricity under the terms of its power purchase agreement with its buyer.

Key parts for the panels are manufactured by PartsCo in Daegu, South Korea. Since Feb. 23, the Ministry of Health and Welfare has maintained its infectious disease alert at the “highest level,” requesting all citizens of Daegu not to leave their homes. Honoring that request, PartsCo has closed its plant until further notice. It will not even ship parts already made and in storage. SupplyCo says it has attempted to obtain replacement parts from other manufacturers without success.

SupplyCo’s contract with SolarCo contains time-honored phrasing defining force majeure, an event excusing the parties from compliance with some or all of the contract’s obligations.

As used herein, “force majeure” means any causes or circumstances beyond the reasonable control and without fault or negligence of the party affected thereby or of its subcontractors or carriers, such as acts of God, governmental regulation, war, acts of terrorism, weather, floods, fires, accidents, strikes, major breakdowns of equipment, shortages of carrier’s equipment, accidents of navigation, interruptions to transportation, embargoes, order of civil or military authority, or other causes, whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the performance of an obligation under the Contract, but specifically excluding economic factors alone.

Can SupplyCo avoid liability for breach under these circumstances? Our starting point is the text of the force majeure clause. PartsCo’s decision to suspend operations appears to be a “circumstances beyond the reasonable control” of SupplyCo. The COVID-19 pandemic might be called an “act of God,” the statements of the Ministry of Health and Welfare might be an “order of civil . . . authority,” and any of the above might be an “other cause[]”, whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the performance of an obligation under the Contract.”
That is a promising start for SupplyCo. But questions that might cross the mind of a tribunal could include the following: Should it matter whether the contract between SupplyCo and SolarCo was entered into before or after the first announcement about the novel coronavirus? Should it matter that the force majeure clause does not expressly list “epidemic” or “pandemic” in its enumeration of causes? Should it matter that the South Korean government “requested,” but did not “order,” Daegu’s citizens to stay at home? Should it matter whether the parties believed that parts “made in Daegu” were preferred over those from other sources? Finally, what is the import of the parties’ phrase “specifically excluding economic factors alone”? SupplyCo says it could not find alternative parts, but was that simply a matter of cost?

In its discussions with SolarCo, SupplyCo’s opening position would likely be that COVID-19 itself, or PartsCo’s response to it, falls into one of the enumerated events and the catch-all phrase and that SupplyCo had no ability to control the virus or the response to it. SupplyCo would rely on the precedents holding that circumstances like these are plainly covered by the force majeure clause.

SolarCo’s opening response would emphasize the absence of the words “epidemic” and “pandemic” in the clause. It would rely upon those cases rejecting expansive readings of force majeure clauses when catch-all phrases are so broadly worded that they seem to negate the significance of the particular listing preceding the catch-all. Indeed, the catch-all here expressly attempts to nullify both ejusdem generis (by covering events “of the same or different nature” as those specified) and foreseeability (by covering events “foreseen or unforeseeable”). Some precedent supports the view that enforcing language like this may largely undo the rest of the contract.

CASE 2

Two U.S. companies, OilCo and DrillCo, have a contract under which DrillCo is to drill up to four wells in the deeper waters of the Gulf of Mexico. The drilling program is to begin in May.

The wells will be drilled from a floating vessel specially designed to hold the equipment and house the crew, who typically works two straight weeks on the rig followed by two weeks off duty. While on the rig, OilCo and DrillCo employees are in close proximity, even when working in the open air, but certainly so when in control rooms or in accommodations when they are not on shift. The crew changes are made by helicopter flights between the vessel and a shore base.

Both companies take concerns about COVID-19 very seriously. But the logistical and financial planning for the 2020 drilling program has been at least many months in the making. One company or the other faces substantial financial loss.

President Donald Trump’s administration has issued guidelines for Americans to follow to combat the pandemic. It has not yet followed states such as California, New York, Illinois and others in ordering nonessential workers to stay home. And even if it had, these workers might be deemed essential.

The contract contains the following force majeure provision, under which OilCo is referred to as the “Operator”:

Exception as otherwise provided . . . , each party to this Contract shall be excused from complying with the terms of this Contract, except for the payment of monies when due, . . ., if and for so long as such compliance is hindered or prevented by riots, strikes, wars (declared or undeclared), insurrection, rebellions, piracy, terrorist acts, civil disturbances, dispositions or order of governmental authority (but specifically excluding the inability of the Operator to obtain drilling permits), whether such authority be actual or assumed, epidemics, a pandemic, acts of God (except, however, adverse sea or weather conditions including loop, eddy and other adverse currents), or by any act or cause (other than financial distress or inability to pay debts when due) which is reasonably beyond the control of such party, such cause being herein sometimes called “force majeure.”

For simplicity, the reader should assume (1) this contract is a “maritime contract,” (2) other provisions of the contract are not germane, (3) drilling must begin in May or substantial liquidated damages provisions will apply and (4) the phrase in the clause “except for the payment of monies when due” is not germane. Can DrillCo avoid liability if it fails to drill on schedule?

In-house counsel (for OilCo and DrillCo) would likely focus only on two phrases or words in the force majeure provision. First is the phrase “hindered or prevented.” That suggests the force majeure provision could be triggered by some effect less than full “prevention” of compliance. Second is, of course, the word “pandemic.” COVID-19 checks that box. The presence of “pandemic” as an enumerated event makes it unnecessary to address “dispositions or order of governmental authority” or the catch-all phrase at the end.
The question then comes down to the meaning and application of the word “hindered.” The meaning of the word, unless it is found ambiguous, is a question of law. In answering what the word means, what are the guideposts? It is undefined in the contract. Does the word appear in other parts of the contract in a way that might shed light on the parties’ intent? Will a court be tempted to apply notions of impracticability from the common law?

The more difficult questions may be the factual ones: How much of a hindrance? How much of a risk? For example, could the risk be sufficiently mitigated by mandating that all persons on the vessel wear N95 respiratory masks? If yes, will that equipment be available by the date when performance is due? Is there other personal protective equipment that might allow workers to do their jobs without unacceptable risk of infection? And what level of risk is acceptable? These are issues for which current case law provides indirect guidance at best.

Conclusion

In-house counsel studying whether a force majeure clause or other doctrine may be invoked know that the burden of proof to establish an excuse from performance will rest on the party invoking it. As discussed above, the general tendency in the courts is to fashion rules limiting the circumstances when excuse may be successfully invoked. That said, COVID-19 is unlike anything the law has seen in at least a century. Forecasting outcomes here is itself a hazardous undertaking.
by omitting any specific causes, Judge Posner explained that when "the parties citing Krause v. Bd. of Trustees".

"The party seeking to excuse its performance under a contractual force majeure clause . . . bears the burden of proof to establish that defense. As we interpret the parties' contract, including the force majeure provisions, our primary concern is to determine the parties' intent. We must examine the contract as a whole to harmonize and effectuate all of its provisions so that none are rendered meaningless. We look at how a reasonable person would have used and understood the language, considering the circumstances surrounding the contract negotiations and purposes the parties intended to accomplish by entering in the contract."


5 Kel Kim Corp., 519 N.E.2d at 296. Following New York precedent, a federal district court, in a case governed by Florida law, has also held that force majeure clauses are narrowly construed and apply only if the event is specifically identified in the clause. ARHC WWELFO1, LLC v. Chatsworth at Wellington Green, LLC, No. 18-80712, 2019 WL 4694416 *3 (S.D. Fla. Feb. 5, 2019) no cert. Despite the frequency of hurricanes, "[p]recedent on the enforcement of force majeure clauses is limited in Florida." Id.


7 In Stepnica v. Grant Park 2 LLC, Nos. 1-11-3229, 1-11-3236, 1-11-3235, 1-11-3230, 2013 WL 3213061 *15 (Ill. Ct. App. June 21, 2013), the court rejected a claim that a catch-all phrase excused performance for any cause beyond the reasonable control of the Seller. Applying ejusdem generis, the court found the cause was not like the specifically listed events in the force majeure clause. "Had defendants intended all causes beyond the reasonable control of Seller were contained in paragraph 9 [the force majeure clause], it would have been a simple matter for the Seller as drafter to have drafted paragraph 9 with that intent by omitting any specific causes of delay" (emphasis added). Texas courts also have applied the doctrine when interpreting force majeure provisions in contracts. See TDC Olmos, 555 S.W.3d at 185-86 (citing to Texas Supreme Court cases in support of applying the doctrine and explaining that the general phrase "any other cause not enumerated herein" in a force majeure provision must be limited to the types of events specified in the plain language of the clause). Similarly, in Snavely Siesta Associates, LLC v. Senker, 34 So. 3d 813 (Fla. App. 2010), a Florida court rejected a claim that the catch-all provision would excuse performance for "routine problems" such as "rain, wind and lightning storms" when the language of the clause included "circumstances beyond the Seller's control, such as acts of God, or any other grounds cognizable in Florida contract law as impossibility of frustration of performance," the catch-all phrase restricted permissible delays to those whose grounds would be cognizable in Florida contract law under those doctrines.

8 TEC Olmos, 555 S.W.3d at 184. A Louisiana court of appeals has similarly rejected a broad reading of a force majeure clause. Hanover Petroleum Corp. v. Tennesco Inc. 521 So.2d 1234, 1238 (La. App. 3d Cir. 1988) ("If this interpretation were correct, the contract would state that either party could escape responsibility if events beyond the party's control made performance wither impossible or difficult."). California courts have refused to apply force majeure provisions to events not specifically included in force majeure provisions when such events are foreseeable. In Free Range Content, Inc. v. Google Inc., No. 14-CV-02329-BLF, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016), the court declined to excuse "invalid activity" as force majeure where the risk of such activity was explicitly contemplated in terms agreed to by the parties but was not included in the force majeure provision. In Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1113-14 (C.D. Cal. 2001), the court held that the force majeure provision of a supply agreement, which excused breach by the supplier caused by "regulatory or governmental action," did not encompass the FDA shutdown of a plant that produced drugs for the supplier for violations of federal regulations, in part because the shutdown was foreseeable based on the plant's prior violations. The court went on to state, "[W]hen parties expressly contemplate a known risk of a regulatory prohibition, they should be expected to allocate that risk expressly, rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different." One court applying Florida law interprets contracts with catch-all language similarly. See In re Flying Cow Ranch HC, LLC, No. 18-12681-BKC-MAM, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018) (stating that a party should not rely on general or catch-all language to cover foreseeable events, as the party must expressly set those out in a contract to relieve itself of liability).

9 For example, "frustration" is not a defense to breach under Indiana precedent. Ross Clinic, Inc. v. Tabion, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981) (citing Krause v. Bd. of Trustees, 70 N.E. 264, 265 (1904)). In Louisiana, which has not adopted the UCC, commercial impracticability is not a defense to breach.

10 Sitting by designation as trial judge in Commonwealth Edison Co. v. Allied- General Nuclear Servs., 731 F. Supp.850 (N.D. Ill. 1990), Judge Posner explained that when “the parties include a force majeure clause in the contract, the clause supersedes the doctrine of impossibility.” Id. at 855. Judge Posner cited two cases that do not state the principle as directly as he did. See Wiggins v. Warrior River Coal Co., 696 F.2d 1356, 1359 (11th Cir. 1983) (applying Alabama law and holding that “[i]mpossibility does not excuse nonperformance where the promisor has indicated an intent to assume the risk thereof”) and Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277-78 (7th Cir. 1986) (Posner, J.) (after ruling that the court “need not decide whether a force majeure clause should be deemed a relinquishment of a party’s right to argue impracticability or frustration,” it adopted the narrower holding that the doctrines could not be applied in the case before it because the contract “explicitly” assigned the particular risk at issue). For a view from a Florida appeals court, see Am. Aviation, Inc. v. Aero-Flight Serv., Inc., 712 So. 2d 809, 810 (Fla. App. 1998) (considering whether an event outside the force majeure clause should excuse nonperformance under the doctrine of impossibility, noting that “[t]he doctrine of impossibility of performance should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement.”).

11 "Impossibility excuses a party’s performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." Kel Kim Corp., 519 N.E.2d at 296. Under Articles 1873, 1875 and 1876, Louisiana’s Civil Code has a counterpart doctrine for “fortuitous event[s],” which also requires actual impossibility.
In Texas, an unforeseen, intervening act of a competent government agency may constitute a force majeure. Because SupplyCo attempted to find an alternate source, it likely would avoid the fate of an oil and gas company that attempted to invoke force majeure due to unreasonable expense, though performance may still be technically possible.

In determining whether the closing of the factory in Daegu was the cause of SupplyCo's breach, in-house counsel must explore whether there were sources of parts of comparable quality that SupplyCo failed to purchase from. In this example, if the parties intended that the parts come from a particular factory in Daegu, and if the closure of the factory in Daegu was the cause of SupplyCo's breach, the doctrine of frustration would not apply.

In Illinois, the doctrine of frustration might have applied because the lease specifically restricted the use of the premises as a saloon and a national prohibition made the sale of alcoholic beverages illegal. In Florida, the doctrine of frustration of purpose is broader than the doctrine of impossibility.

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factory was a force majeure event, at least one Texas court would not impose a duty to seek alternate sources for the parts. Virginia Power Energy Mkty., 297 S.W.3d at 403 (parties agreed that gas was to be delivered to a specified location and the location was destroyed by Hurricane Katrina – a circumstance within the force majeure clause; therefore, the seller had no obligation to deliver to an alternate location).

19 Some jurisdictions hold that a change in circumstances making the seller unable to sell a product at a profit is not “a force majeure event.” Golsen v. ONG Western, Inc., 756 P.2d at 1213; Valero Transmission Corp. v. Mitchell Energy Corp., 743 S.W.2d 658, 663 (Tex. App. – Houston [1st Dist.] 1987, no writ) [citing Alamo Clay Prod., Inc. v. Gunn Tile Co. of San Antonio, Inc., 597 S.W.2d 388 (Tex. Civ. App. – San Antonio 1980, writ ref’d n.r.e.); see Meadsay v. Kwiek–Kopy Corp., 713 F.2d 118, 126 (5th Cir. 1983), and Mainline Inv. Corp. v. Gaines, 407 F. Supp. 423, 427 (N.D. Tex. 1976)] (“An economic downturn in the market for a product is not such an unforeseeable occurrence that would justify application of the force majeure provision, and a contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated.”). But see Smith v. Long, 578 P.2d 232 (Colo. App. 1978), where the court found that a mineral lessee was excused from a work requirement of $8,000 per year under a provision excusing performance of the requirement “in the event there exists no market for developed ore.” Looking to the parties’ correspondence before the controversy arose, the court found that the “parties intended the application of a profit standard to the term ‘market,’” and that “the lessee does not have an obligation to engage in an unprofitable endeavor.” Id. at 234.

20 In analyzing the force majeure provision, a district court held the contract was not ambiguous (the operative clause was similar to the one in the example here) and, since seabed anomalies or unknown causes were not listed as act of God events, or as events beyond the control of the parties, the accident did not fall within the clause in the contract. See Valencia Center, Inc. v. Publix Super Markets, Inc., 464 So. 2d 1267, 1269-70 (Fla. Dist. Ct. App. 1985) (the “feelings of financial frustration do not necessarily equate to findings of frustration or impossibility under the law.”).

21 Hanover Petroleum Corp., 521 So.2d at 1238 [“If this interpretation were correct, the contract would state that either party could escape responsibility if events beyond the party’s control made performance wither difficult or unprofitable.”]. See also Golsen, 756 P.2d at 1214 (the court refuses to apply the phrase “failure of markets” in a force majeure clause to undue five pages of contract devoted to contingencies around the price of natural gas); TEC Olmos, 555 S.W.3d at 184 (“To dispense with the unforeseeability requirement in the context of a general ‘catch-all’ provision would . . . render the clause meaningless because any event outside the control of the nonperforming party could excuse performance, even if it were an event that the parties were aware of and took into consideration in drafting the contract.”).

22. In re Larry Dorton, Inc., 879 F.3d 568, 575 (5th Cir. 2018) (en banc), cert. denied, 138 S. Ct. 2033 (2018) (“Our cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity.”). The clarity of the word “pandemic” in the force majeure clause above forestalls the need for precise explanation of the maritime law of contracts here. It suffices to say the parties to a maritime contract can choose some other source of law to govern their disputes, and absent compelling reasons that choice will be enforced, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972). Absent a choice of law clause, the maritime rules of interpretation will still feel familiar to the non-admiralty attorney, for “the general maritime law, as developed by the judiciary . . . is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.” E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864-65 (1986) (citations omitted). Therefore, many cases in U.S. courts decided under the maritime law of contracts will follow “the general principles of contract interpretation.” World Fuel Serv. Singapore Pte, Ltd. v. Bulk Juliana M/V, 822 F.3d 766, 774 (5th Cir. 2016).

23 R&B Falcon Corp. lays out a district court’s analysis of a force majeure clause in a maritime (offshore drilling) contract where the law of Texas was followed in lieu of the general maritime law of contracts. A drilling unit’s leg was bent most likely due to seabed anomalies when the rig was being placed on station and force majeure was declared as a result. In analyzing the force majeure provision, the district court held the contract was not ambiguous (the operative clause was similar to the one in the example here) and, since seabed anomalies or unknown causes were not listed as act of God events, or as events beyond the control of the parties, the accident did not fail within the clause in the contract. The court looked to the specific language the parties’ bargained for in the contract to determine intent, rather than resorting to any traditional definition of the term force majeure and “[c]ontractual terms are controlling regarding force majeure with common law rules merely filling in gaps left by the document.” The agreement itself defined the application, effect and scope of force majeure. 154 F.Supp.2d at 973 (quoting Sun Operating L.P. v. Holt, 984 S.W.2d 277, 283 (Tex. App – Amarillo 1998)).

24 Commercial impracticability in the maritime context has been analyzed as: “Even though the owner is not excused because of strict impossibility, it is urged that American law recognizes that performance is rendered impossible if it can only be accomplished with extreme and unreasonable difficulty, expense, injury, or loss.” American Trading & Prod. Corp. v. Shell Int’l Marine Ltd., 453 F.2d 939, 942 (2nd Cir. 1972) (case arising out of the closure of the Suez Canal in 1967 due to war in the Middle East). The closure of the Suez Canal due to war in the Middle East required a vessel to transit the Cape of Good Hope and arrive 30 days later than initially planned, as well as travel approximately 8,300 extra miles. This was not considered to be “extreme and unreasonable difficulty.” The court also held that the increased cost (less than one-third over the agreed-upon amount) was not enough to constitute commercial impracticability, and a mere increase in cost is not a sufficient excuse for nonperformance. In American Trading, the route taken was well recognized even though it resulted in a much longer and more expensive transit. The increase in cost must be an “extreme and unreasonable expense.” Here, perhaps because there would be additional expenses and delays coupled with the risk to personnel due to the nature of the pandemic (increased danger or risk to personnel was not present in American Trading), a court may reach a different result.

Commercial impracticability to excuse further performance has been found when the increased cost to repair a vessel that was damaged while being converted was more than twice the fair market value of the vessel, the vessel was old, and the vessel would be subject to reinspection and recertification, requiring additional improvements. Asphalt Int’l, Inc. v. Enter. Shipping Corp., S.A., 514 F. Supp. 1111 (S.D.N.Y. 1981). Cases from Texas and Ohio, while not controlling, may be instructive. In Haverhill Glen, LLC, an Ohio court of appeals rejected the argument that a party’s access to the property had to be “completely denied” because the force majeure clause covered actions that “prevented or delayed” access, a phrase the court found “quite broadly written.” 67 N.E.3d at 850-51. See also TEC Olmos, 555 S.W.3d at 176 (discussing, where the contract contemplated a party’s performance being “prevented or hindered” by a force majeure event, whether such event must have been foreseeable, and further assessing whether the liquidated damages provision in the contract was a “reasonable forecast of actual damages by considering the time of contracting, not the time of breach.”).