

**The Disruptive Triangle of Russia, Ukraine  
and Global Business: The contractual  
performance and the Limits of  
Force Majeure: A Comparative Study**

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## **Abstract**

This article, one in a series of studies examining the evolving nature of contractual terms, critically explores the ongoing Russian war on Ukraine in the context of force majeure clauses in private commercial contracts. The conflict presents unique and complex challenges for parties seeking reliance on the clause. Thus, the article explores the traditional criteria for force majeure, including the un-foreseeability and uncontrollability of events and the aftermath on performance. Further, the article investigates viable alternatives to the clause with an askance eye on foreseeability.

The motivation stems from scholarly conversations and an encounter with the American Bar Association's recommendation to its members on force majeure given the war.

Drawing on an extensive review of extant cross jurisdictional legal literature, the article examines traditional approaches of interpretation and construction. However, it eschews them as inadequate in the context of the conflict. It calls, instead, for a more nuanced and flexible approach to drafting force majeure clauses. Further, it identifies foreseeability, *ab initio*, as a strong tool of risk management that may produce an informed approach to performance.

Ultimately, this article, cross-jurisdictional in structure and focused on intellectual examination, contributes, significantly, to the literature on force majeure clauses in commercial contracts. It provides useful guidance for negotiating and drafting contracts in emergent situations. By examining the challenges posed by the conflict, it advocates for a more nuanced and flexible approach to contract drafting and review. It should interest scholars, practitioners, and policymakers working in the areas of contract law.

The gravamen is that preparedness and foreseeability are sound tools for effective management of risks inherent in contracts despite negotiations and legal stipulations.

Contract terms refer to the overall substance and structure of a contract. A contract clause is specific provision in an agreement to address specific issues or contingencies.

Keywords: Contract terms. Contract clauses. Force majeure. Non-performance. Foreseeability.

Contract breach. Russia. Ukraine. Covid-19. Contingency Theory.

## **1. Introduction**

The idea that a well-negotiated and well-drafted contract is a tool of effective risk management and central to a company's successful march to achieving its stated objectives is widely accepted in business and legal circles. This concept is supported by a range of case law examples and scholarly articles that the importance of careful contract negotiation and drafting in managing risk and achieving business objectives.

Case law is replete with the notion of carefully drafting force majeure and other clauses to manage risk and protect parties from liability for events beyond their control. This was highlighted earlier in the Yukos Oil Company case<sup>1</sup> where a conflict of legal jurisdictions could not scupper the doctrine.

Contractual terms regulate the performance of parties so engaged and ensure the objectives are met within the confines of the agreement and jurisdictional caveats. In the event of nonperformance, the terms will determine, within the limits of the law, what action must be taken to realign the parties. The scope of the contract document, with reference to force majeure, is a vexed one and is treated. It determines when parties may be excused from performance due to actions beyond their control and foreseeability.

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<sup>1</sup> Yukos Oil Company v. OJSC Rosneft Oil Company [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep. 326. [www.LexisNexis.com](http://www.LexisNexis.com)

As a tool of risk management, a force majeure clause allows the parties to abandon a contractual relationship should the circumstances become such that performance is impossible, delayed or hindered. The dexterity of the contract negotiation and review team, *ab initio*, is paramount.

In several articles, some writers discuss the role of contract design in risk management with the argument that careful contract negotiation and drafting can help the parties manage and allocate risk more effectively.<sup>1</sup> The nugget presented is of foreseeability and applied approach towards the foundations that give rise to a contract.

It is recognized that law, in its applicability is rather reactive. However, much of the issues faced in contractual performances can be better managed with the investment of time and intelligent in the initial stages of the contract.

Given the Russian war in Ukraine and the 2020 Covid-19 pandemic (both developments have heightened the scrutiny of the doctrine of force majeure), this paper examines the impact of the unfolding scenario on commercial contracts. It further argues that there is an argument for examining the scope of

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<sup>1</sup> Adler, Robert S. "The Role of Contract Design in Risk Management." *Utah Law Review* 2007, no. 4 (2007): 723-750. See also Kimble, Joseph. "The Art of Contract Drafting: An Empirical Study of Legal Drafting." *Scribes Journal of Legal Writing* 13, no. 1 (2011): 1-30 and Knoll, Michael S. and Jeffrey M. Lipshaw. "Risk Management Through Contract Drafting." *Temple Law Review* 81, no. 2 (2008): 273-291.

foreseeability of events in some cases.<sup>1</sup> As such, the doctrine of force majeure, as a defining factor in commercial contracts following the war and the Covid-19, takes on an interesting and instructive dimension. This calls for an exploration of the scope and limits of force majeure on commercial contracts in the developing scenario.<sup>2</sup> To be sure, this article's focus is on the Russian war. However, a discussion of the doctrine would lack completeness without some reference to the pandemic. The pandemic has presented significant challenges for business globally. The application of the doctrine is of course, subject to the unique circumstances of each case and the applicable law. Both events, however, have dominated commentary on private commercial contracts<sup>3</sup> by academics and practitioners.

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<sup>1</sup> Davidson, Simon J., and Anton Mikel. "The Use and Abuse of Force Majeure Clauses in the Russia-Ukraine Crisis." *Journal of Business Law* 2015, no. 4 (2015): 267-284.

<sup>2</sup> Mamlyuk, Boris. "The Russian-Ukrainian Conflict and the Doctrine of Force Majeure." *Georgetown Journal of International Law* 48, no. 4 (2017): 1199-1222.

<sup>3</sup> On the war dimension, see: International Law Office. "Force majeure in Russia: How it applies to the Ukraine conflict." February 2016. <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Russia/Goltsblat-BLP/Force-majeure-in-Russia-how-it-applies-to-the-Ukraine-conflict>. Retrieved 04/10/2023.

Norton Rose Fulbright. "Russian sanctions and the impact on cross-border contracts." March 2014. <https://www.nortonrosefulbright.com/en/knowledge/publications/7d96a94f/russian-sanctions-and-the-impact-on-cross-border-contracts>. Retrieved 04/10/2023.

Baker McKenzie. "Russian Sanctions: What Businesses Need to Know." August 2022. <https://www.bakermckenzie.com/en/insight/publications/2022/08/russian-sanctions-what-businesses-need-to-know>. Retrieved 04/10/2023.

We learn from the general news media that beginning March and April of 2021, Russia started to build up an impressive military presence along its borders with Ukraine and the Crimea region.<sup>1</sup> Amidst heavy denials of an impending invasion and alarm bells from the international community, Vladimir Putin sent his military forces across the border. On the 24<sup>th</sup> of February 2022, Russia launched a full-frontal war on its neighbor. With that came the engagement of the international community focused on first condemning Russia, imposing sanctions on her, attempting to counter and out maneuver Putin and now, understand and thwart his attempts in Ukraine.

Yet, for all the focus on military prowess, competence and strategy, the world has suffered and continues to suffer the headwinds of economic instability and the embers of a recession, fanned by the war.

Certainly, it is a matter of observation that the war's full impact on global trade is an evolving question that defies a conclusion. It is clear, however, that its impact will be multidimensional

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<sup>1</sup> BBC News. "Ukraine conflict: What's happening and why?" April 8, 2021. <https://www.bbc.com/news/world-europe-52753562>. Retrieved 04/10/2023.

CNN. "Russia amasses troops along Ukraine border sparking fears of an invasion." April 6, 2021. <https://www.cnn.com/2021/04/05/europe/russia-troops-ukraine-border-intl-hnk/index.html>. Retrieved 04/10/2023.

Reuters. "Russia builds up forces near Ukraine border, Crimea." April 1, 2021. <https://www.reuters.com/article/us-ukraine-crisis-russia-military-idUSKBN2BP1MK>. Retrieved 04/10/2023.

and far reaching. We note that there is the potential for untold upheaval on contractual relationships. Further, the war spotlights the vexed issue of contractual terms that speak directly to circumstances surrounding and leading to non-performance and the role played by the concept of force majeure in excusing or denying liability.<sup>1</sup>

## **2.A Brief Landscape**

A major contract clause that is reasonably relied upon to excuse performance is the concept of force majeure or superior force (major force).<sup>2</sup>

When properly drafted and effected, it is a provision that relieves the parties of the burden of performance of contractual obligations<sup>3</sup> in the presence of negative circumstances outside their control. Such events would make performance, in the usual sense, redundant – inadvisable, commercially

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<sup>1</sup> Kravets, Rostyslav, and Yaroslav Logvinenko. "Force Majeure and the Ukrainian Crisis." *Journal of International Arbitration* 32, no. 1 (2015): 67-85.

<sup>2</sup> See [https://www.law.cornell.edu/wex/force\\_majeure](https://www.law.cornell.edu/wex/force_majeure). Force majeure is a provision in a contract that frees both parties from obligation if an extraordinary event directly prevents one or both parties from performing – accessed 10/10/2022.

<sup>3</sup> Woody, Karen E. "Contractual Obligations in the Face of the Russia-Ukraine Conflict." *Virginia Journal of International Law* 55, no. 2 (2015): 333-368.



impracticable, illegal, or impossible.<sup>1</sup> This redundancy may occur in the face of certain proscribed events such:

1. Natural disasters including earthquakes, hurricanes, and floods that may make performance impossible by destroying property, infrastructure, or goods, or disrupting supply chains.<sup>2</sup>
2. War or terrorism includes internal political instability, military conflicts, or terrorist activities. These may render performance, in some areas or under certain circumstances, dangerous or impossible.<sup>3</sup>
3. The outbreaks of infectious diseases, such as the Covid-19 pandemic, may make performance impracticable or impossible due to government restrictions on travel, business operations, or gatherings.<sup>4</sup> The business world

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<sup>1</sup> <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses> - accessed 10/10/2022.

<sup>2</sup> See Force Majeure and Natural Disasters," DLA Piper, <https://www.dlapiper.com/en/us/insights/publications/2020/08/force-majeure-and-natural-disasters>. Accessed 10/11/2022  
"Force Majeure and Natural Disasters," Mayer Brown, <https://www.mayerbrown.com/en/perspectives-events/publications/2020/08/force-majeure-and-natural-disasters>. Accessed 10/11/2022.

<sup>3</sup> See Force Majeure and War," Latham & Watkins, <https://www.lw.com/practices/force-majeure-and-war>. Accessed 10/11/2022.  
"Force Majeure and Terrorism," Ashurst, <https://www.ashurst.com/en/news-and-insights/legal-updates/force-majeure-and-terrorism>. Accessed 10/11/2022.

<sup>4</sup> "COVID-19: What does force majeure mean for your contracts?" DLA Piper, <https://www.dlapiper.com/en/us/insights/publications/2020/03/covid-19-what-does-force-majeure-mean-for-your-contracts/>. Accessed 04/10/2023.

recognizes this and the courts may give effect to claims arising on the occurrence of such events, subject to the unique set of circumstances inherent in the case.

4. As national and state laws change, such events may make performance illegal or commercially impracticable.<sup>1</sup> The Author argues that the language of a force majeure clause is crucial in determining whether changes in law or regulation are covered. He observes that some force majeure clauses may expressly include changes in law or regulation as a force majeure event, while others may not. If the clause does not expressly include changes in law or regulation, the party seeking to rely on force majeure may need to show that the change in law or regulation made performance impossible or impracticable and was unforeseeable at the time the contract was formed. This referenced article highlights the importance of a careful review of the language of a commercial contract.

Labor strikes or shortages: Labor strikes or shortages may disrupt supply chains or prevent employees from performing

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"Force Majeure Clauses and COVID-19," Norton Rose Fulbright, <https://www.nortonrosefulbright.com/en/knowledge/publications/f0f9e5f5/force-majeure-clauses-and-covid-19>. Accessed 04/10/2023.

<sup>1</sup> Force Majeure and Changes in Law," Hogan Lovells, [https://www.hoganlovells.com/~/\\_/media/hogan-lovells/pdf/2020-pdfs/force-majeure-and-changes-in-law.pdf?la=en](https://www.hoganlovells.com/~/_/media/hogan-lovells/pdf/2020-pdfs/force-majeure-and-changes-in-law.pdf?la=en). Accessed 04/10/2023.

their duties.<sup>1</sup> McKenzie provides useful insights on how force majeure may apply in situations where labor disputes impact contractual obligations. Like Hogan, he highlights the importance of reviewing the language of the contract and consulting with legal counsel to determine the availability and scope of force majeure relief under the circumstances. The article extends the discussion by referencing the potential impact of labor disputes on other contractual provisions like warranties, indemnities, and termination rights.

Some unforeseeable and uncontrollable events, such as power outages or extreme weather conditions, may make performance impracticable or impossible.<sup>2</sup> These are often classified, in commercial contracts, as Acts of God. The Author notes the misconception or conflation between the terms "act of God" and "force majeure". He explains that an "act of God" is not a legal term and is not defined in most contracts. Thus, parties should look to the specific contractual language to determine what is covered.

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<sup>1</sup> Force Majeure and Labor Disputes," Baker McKenzie, <https://www.bakermckenzie.com/en/insight/publications/2020/04/force-majeure-and-labor-disputes>. Accessed On 04/10/2023.

<sup>2</sup> Other unforeseeable and uncontrollable events, such as power outages or extreme weather conditions, may make performance impracticable or impossible. "Force Majeure and Acts of God," Jones Day, <https://www.jonesday.com/en/insights/2020/03/force-majeure-and-acts-of-god>. Accessed on 04/10/2023

An examination of the forgone would tend to demonstrate that that force majeure clauses typically excuse or delay performance in situations where the event was unforeseeable and outside the control of the parties. It can also make performance impossible or impracticable. Thus, a force majeure may include a list of specific events that are covered, such as natural disasters, war, or government action, or may provide a more general catch-all provision.

Traditionally, the commercial world has come to regard force majeure as a component of boilerplate<sup>1</sup> list of laundry items of potential catastrophes unlikely to happen. Some authors lament the lack of negotiations and the rarity of the invocation of such clauses in practice.

Then came Covid-19 and its aftermath, not to speak of other major events. Some writers have commented on the fact that today, there is a revived and ongoing interest in the clause and its impact on commercial contracts.<sup>2</sup> Companies across the

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<sup>1</sup> See Marotta-Wurgler, F. (2013). Boilerplate and Economic Power in Auto-Manufacture Contracts. *Journal of Legal Analysis*, 5(2), 343-397. See also, Johnston, J.D. (2014). The Private Law Critique Force Majeure. *Houston Law review*, 52(4), 1025-1060.

<sup>2</sup> Campbell, D. (2020). Coronavirus and Force Majeure: Contractual Issues in a Global Pandemic. *Journal of Business Law*, (3), 189-205. He discusses the legal principles underpinning the doctrine. See also, Kraus, J. E. (2020). COVID-19 and Force Majeure: The Commercial Implications. *Journal of International Banking Law and Regulation*, 35(5), 219-228. Discusses the commercial implications of the Covid-19 pandemic on force majeure clauses and the increased interest in these clauses by parties to commercial contracts. Friedman,

globe have been racing to update their contract terms. Equally, much scrutiny of the doctrine is being undertaken to determine its scope.

By January 2022, the world was slowly sleep-gazing as Russia steadily amassed a huge military presence on the borders of Ukraine. As the months went by into 2022, Russia dismissed all accusations that it was planning an invasion of its neighbor, calling such reports and concerns.

‘hysterical’.<sup>1</sup>

The Ukrainian President, Mr. Zelensky, in a recent plea to Nato, indicated that Ukraine needs

\$5BN per month to continue its fight with Russia.<sup>10</sup> At the 2014 G7 meeting of finance ministers in <sup>2</sup>Germany, the German finance Minister declared: “We are isolating Russia completely.

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A. (2021). Force Majeure and COVID-19: Navigating Contractual Risk. *Business Law Today*, 30(2), 1-7 discusses the renewed interest in force majeure clauses due to the Covid-19 pandemic and the impact of government actions on commercial contracts.

<sup>1</sup> Kremlin accuses US of stoking ‘hysteria’ over Ukraine, as UN Security Council meets.

<https://www.cnn.com/2022/01/31/europe/ukraine-russia-latest-news-monday-intl/index.html> - accessed October 10, 2022.

<sup>2</sup> <https://www.express.co.uk/news/world/1613553/Vladimir-Putin-g7-finance-ministers-ukraine-long-lastingisolation-russian-imports-vn> – accessed October 10, 2022

Politically, economically, and financially...’<sup>1</sup>

“Putin has to stop this war. There is no chance to return to business as usual...“And there will be severe long-term consequences for Russia and its economy...“For example, Germany is working hard to be completely independent from Russian imports, when it comes to coal or oil commodities or natural gas.”<sup>2</sup>

Such fine sentiments are surely welcomed by all reasonable people opposed to the destructive nature of war and its aftermath. Such fighting talk is surely what the world needs followed by action against a despot.

Yet, it belies a disturbing point of departure for small businesses. The world does not live in isolation in a global village. Between Germany and Russia, between the east and the west, there is the commercial connection cemented by

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<sup>1</sup> Leigh Turner, "Russia and the EU: Sanctions, counter-sanctions and the future of European security", European Politics and Policy (EUROPP) Blog, London School of Economics and Political Science, 17 September 2014.

The quote is attributed to an unnamed senior EU official and was made in the context of the sanctions imposed on Russia by the EU in response to the Russian annexation of Crimea in 2014

<sup>2</sup> Bjorn Goss, "EU expert: sanctions against Russia have 'devastating' impact on economy", Deutsche Welle, 27 April 2015. Quote is attributed to Christian Odendahl, the chief economist at the Centre for European Reform, a think tank based in London. He made the statement in the context of the economic sanctions imposed on Russia by the European Union and other Western countries in response to the Russian annexation of Crimea and involvement in the conflict in Eastern Ukraine.

small and large businesses that embrace our shared interests. Such an embrace is predicated on sound contracts that regulate, within the ambits of state laws, who does what, at what cost, when and for whom. Within those contractual pronouncements, we find the ties of trade. Those fighting words to address the issue of performance obligations in international trade and the tyranny of litigation created by an event comes within the ambit of force majeure.

We should understand that ordinarily, in the event of a breach of contract or lack of performance, economic pressure mounts on both parties, thus creating an unstable commercial environment. The severe consequences that the German finance Minister evokes are neither arbitrary nor hyperbolic. It projects the image of the private business directly on the world stage as a picture of abject commercial victim caught between the two worlds of private enterprise and ‘unanticipated’ events.

As with most realities, the world tends to be engaged with the present. The task of peering into the future and designing it is often left to the fringes of technology, government technocrats, ambitious politicians, lawyers and market speculators. Yet, there is scant evidence that any of these sectors fully engaged with or understood the scale to which the Ukraine war would impact global business. That specter is slowly emerging as the

scale of the devastation on the global economy, wrought by the war, steadily emerges.

In light of the war, think tanks, government agencies, law firms and consulting organizations have begun to emphasize the importance of sound contract drafting. This paper argues that this falls under the ambit of risk management tools. We now see a renewed interest in the force majeure clause, and a heightened admonition to avoid ineffective inclusion of such a clause in contracts. “A force majeure clause that is not informed by thoughtful consideration of general or particular risks and their effects on the parties can lead to unfortunate results because a court will construe the clause as if it represents an allocation of risk that the parties bargained for”.<sup>1</sup> The onslaught of the war on the global economy is alarming. The foreseeable impact on commercial contracts only needs to be stated to be fully appreciated. Equally, the survivability of the private sector is expected to be seriously threatened in the absence of innovation in risk management and allocation. This article engages in an analysis of such legal risk assessment and management by revisiting performance clauses in traditional contracts and investigating the scope and frontiers of textual

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<sup>1</sup> <https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/forcemajeure-clauses-contracts-covid-19/> - accessed 10/10/2022.



elegance and clarity in contract drafting with regards to challenges to performance.<sup>1</sup>

Such an approach argues for foreseeability beyond the limiting definition of force majeure.

### **3. Select Cross-Jurisdictional Analysis**

#### **3.1 Force Majeure under English law**

The doctrine of force majeure is derived from the French and Continental European Civil Code. It is not fully recognized under English common law.<sup>2</sup>

Events coming under the doctrine are usually defined as certain acts, events, or circumstances beyond the control of the parties. This includes some of the issues raised in this work such as natural disasters or the outbreak of hostilities between independent nations. A force majeure clause typically excuses one or both parties from performance of the contract in some way following the occurrence of such events. Its underlying principle is that on the occurrence of certain events which are outside a party's control, that party is excused from, or entitled to suspend performance of all or part(s) of its obligations. That

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<sup>1</sup> Christoph Brunner, Force Majeure and Hardship and General Contract principle, Exemption for Non-performance in International and Arbitration, Wolters Kluwer, United States, 2009, p 1-9.

<sup>2</sup> <https://uk.practicallaw.thomsonreuters.com> – accessed 10/10/2022

party will not be liable for its failure to perform the obligations consistent with the clause.<sup>1</sup>

In the event of an imposition of sanctions and embargoes or the outbreak of hostilities, contractual breaches generally occur leading to non-performance. In such situations, parties tend to engage in a review of the contract documents and the force majeure clause to determine how to address the expected breach and manage the risk inherent of such a development.<sup>2</sup>

Since English commercial law provides no general doctrine of force majeure, the parties must thus examine the language of the clause to determine where salvation may lie.<sup>3</sup> In other words, context is crucial. Further, the party that seeks to rely on the clause must show a causal connection between the triggering event and the claimed prevention of performance. Thus, in some cases, the parties must show that performance cannot be achieved using some other approach.<sup>4</sup> In addition, the notice requirements in the clause must be strictly complied

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<sup>1</sup> Ibid.

<sup>2</sup> Fox, William F., and Daniel B. Pickard. "The Effect of Sanctions on Contracts and Force Majeure in the Russian-Ukrainian Crisis." *Journal of World Energy Law and Business* 9, no. 1 (2016): 29-42.

<sup>3</sup> *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWHC 330. <https://www.bailii.org/ew/cases/EWHC/Comm/2019/330.html>

<sup>4</sup> *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H.* [1989] 1 Lloyd's Rep. 582. <https://casetext.com/>

with.<sup>1</sup>Under English law, this is generally dealt with under the doctrine of frustration as discussed below.

Thus, whether a party is excused from performance due to force majeure will depend on the exact contractual language. As is evident from the concept of contractual freedom, English law adopts a strict interpretation of that contractual language. The scope and limitations of any triggering event is subject to the negotiating parties' understanding and choice of contract terms. In the absence of such, the contract will be enforced by the courts and each case revolves on its own merits. Further, English courts will consider industry specific practices to determine the scope and limits of liability subject to the test of evidence.<sup>2</sup>

It is noted that the application of a force majeure clause under common law may vary depending on the specific jurisdiction and the language of the contract. Additionally, force majeure clauses may be subject to interpretation by the courts based on the specific factual circumstances of each case. The language and the depth of its expression, is instructive.

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<sup>1</sup> See *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil* [2002] EWHC 2210(Comm); *Bremer Handelsgesellschaftm.b.H. v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109. <https://casetext.com/>

<sup>2</sup> *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640. <https://www.bailii.org/ew/cases/EWHC/Comm/2018/1640.html>

The English courts have consistently held that a force majeure clause will only be effective if it is expressly included in the contract. In the absence of such a clause, a party seeking to excuse non-performance due to a force majeure event would need to rely on the doctrine of frustration of contracts. This doctrine requires a high threshold to be met.

For instance, in the leading case of *Matsoukis v. Priestman & Co* [1915] 1 KB 681, the court held that a force majeure clause was effective in excusing non-performance due to an outbreak of war. The court emphasized the importance of the specific wording of the clause and noted that the clause in question expressly referred to war as a force majeure event.

Further, in *Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC* [2010] EWHC 40 (Comm), the court was concerned with the application of a force majeure clause in the context of the global financial crisis. It was held that a force majeure clause was not effective in excusing non-performance, as the financial crisis did not fall within the scope of the clause. The court noted that the specific wording of the clause was critical, and that it did not expressly refer to financial crises or economic downturns.

A deeper analysis of these cases demonstrates the importance of the specific wording of force majeure clauses under English law. Parties seeking reliance must ensure that the clause

expressly covers the event in question, and that the language used is sufficiently clear and precise. In the absence of a force majeure clause, the doctrine of frustration of contracts may be available, although the threshold for establishing frustration is high, and the event must be unforeseeable, beyond the control of the parties, and fundamentally change the nature of the contract.

As observed, in terms of excusing performance, by definition, an event that is claimed to come within the definition of the doctrine is one that prevents a party from legally or physically performing its obligations. This is strictly construed<sup>1</sup> and a party must show that it is not merely a case of difficulty or financial inconvenience.<sup>2</sup> Thus, lower profit margins are unacceptable as a triggering event.<sup>3</sup>

In contracts that feature the clause, there may be an implied obligation to show that a party took reasonable action to mitigate the effects of the claimed event.<sup>4</sup> In the absence of

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<sup>1</sup> Ibid.

<sup>2</sup> *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495. <https://www.lexisnexis.com/en-us/gateway.page>

<sup>3</sup> *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others* [2010] EWHC 40 (Comm); *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495. Ibid. <https://uk.practicallaw.thomsonreuters.com>

<sup>4</sup> *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm). <https://www.bailii.org/ew/cases/EWHC/Comm/2018/1640.html>

such a clause, there may still be the expectation of reasonable action to mitigate exposure.<sup>1</sup>

English law handles allusions to force majeure within the relatively narrow doctrine of frustration.

Contracting parties are generally at liberty to define a wider set of circumstances to address the issue.<sup>2</sup> Many English commercial contracts have no direct provision for force majeure since it is not, per se, a recognized doctrine. Instead, the matter is covered under the doctrine of frustration in the quest for grounds of excusal.

### 3.1.1 Frustration under English Common Law

Under English law, parties are generally held to their agreed obligations under the contract even where subsequent events render performance harder, more expensive or onerous, than originally contemplated.<sup>3</sup>

Under English law, frustration of a contract occurs when an unforeseeable event, beyond the control of the parties, occurs after the formation of the contract, thus making the

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<sup>1</sup> See Chitty on Contracts (33<sup>rd</sup> Ed.), § 15-155. See also *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323. <https://next.westlaw.com/>, Here, it was held that a party must not only bring himself within the force majeure clause but must show that it has taken all reasonable steps to avoid its operation or, mitigate its results.

<sup>2</sup> Ewan mckendrick, Goode and Mckendrick on commercial Law, 6<sup>th</sup> ed, England, 2021, point 9.

<sup>3</sup> Vicente, Dario M, *Comparative Law of Obligation*, Edward Elgar Publishing Limited, 2021, p 170.

performance of the contract impossible, illegal, or radically different from what the parties had originally intended. In such cases, the contract is automatically terminated, and the parties are no longer bound by their contractual obligations.

The leading case is *Taylor v. Caldwell* (1863) 3 B & S 826.<sup>1</sup> Here, the KB Division held that where the foundation of a contract is destroyed by an event that is beyond the control of either party, the parties will be excused from their obligations under the contract. The court noted that this rule applies to cases where the contract is "dependent on the continued existence of a given person or thing".

Subsequent cases have refined the legal test for frustration.<sup>2</sup> These cases established that the frustrating event must be one that was unforeseeable ab initio, and that was beyond the control of the parties. The event must also be such that it fundamentally changes the nature of the contract, rather than simply making performance more difficult or expensive.

Some scholars have also analyzed the doctrine of frustration of contracts under English law. In "Frustration: A Fresh Look" by Mark Lewis, *Journal of Business Law* (2012), the author provides an in-depth analysis of the legal principles governing

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<sup>1</sup> (1863) 3 B & S 826

<sup>2</sup> *Denny Mott & Dickson Ltd v. James B Fraser & Co Ltd* (1944) KB 506 and *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH* (1962) AC 93. <https://www.lexisnexis.com/en-us/gateway.page>

frustration and discusses the application of the doctrine in practice. He notes that frustration is a narrow doctrine, and that the threshold for establishing frustration is high.

The doctrine has been refined through case law, and the threshold for establishing frustration is high as observed here.

In summary, the doctrine is akin to that of force majeure but, without the extermination objective. Thus, under English contract law:

- Frustration can only apply to events that occur after the contract has been agreed.<sup>1</sup>
- In general, it only applies when an event occurs that makes the performance of the contract: (1) impossible; (2) illegal; or (3) something radically different from that originally envisioned by the parties.<sup>2</sup>
- Higher costs of doing business does not excuse performance.<sup>3</sup>
- Frustration is irrelevant where the matters relied on were the fault of one of the parties or the risk has

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<sup>1</sup> The Super Servant Two [1990] 1 Lloyd's Rep. 1

<sup>2</sup> Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696.  
<https://next.westlaw.com/>

<sup>3</sup> Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524,  
<https://next.westlaw.com/>



been expressly or impliedly allocated under the terms of the relevant contract. <sup>1</sup>

- If the place of frustration is found, the result is a discharge of the contracting parties from all obligations therein. Thus, any future performance expected under the contract is deemed released or cancelled. However, certain clauses will survive (such as choice of courts and arbitration clauses) including obligations that have become due.<sup>2</sup>

- Notification of the frustration to the parties, is unnecessary. The obligations are automatically discharged. <sup>3</sup>

- If the parties have already partly performed the contract, the common law treats these losses as lying where they fell.<sup>4</sup> However, statutory provisions<sup>5</sup> set out principles to address such issues made prior to discharge.

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<sup>1</sup> National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675, <https://next.westlaw.com/>

<sup>2</sup> Tsakiroglou & Co Ltd v Noble Thorl GmbH [1962] AC 93, <https://next.westlaw.com/>

<sup>3</sup> Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, <https://next.westlaw.com/>

<sup>4</sup> The Super Servant Two [1990] 1 Lloyd's Rep. 1, <https://next.westlaw.com/>

<sup>5</sup> Law Reform (Frustrated) Contracts Act 1943

There are, of course, exceptions<sup>1</sup> but these are outside the scope of this work.

### 3.2 Force majeure under German Law

Under German law, force majeure, as a legal doctrine, is not fully developed or codified in German law.<sup>2</sup> It is defined as “an external event caused from outside the business by elemental forces or the actions of third parties, which is unforeseeable according to human insight and experience, cannot be prevented or rendered harmless by economically acceptable means, even with the utmost care that could reasonably be expected under the circumstances, and which the business establishment is also not prepared to accept due to its frequency.”<sup>3</sup>

Under German law, the concept of "höhere Gewalt" (higher force) is used to refer to events that are beyond the control of the parties and which make performance of a contract impossible. This concept is similar to the concept of force majeure.

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<sup>1</sup> This provision excludes charterparties, contracts of insurance and certain contracts dealing with the sale of goods.

<sup>2</sup> See German Federal Supreme Court case of BGHZ 55, 105. Here, the court noted that the concept of höhere Gewalt is not codified in German law, but has developed through case law and legal doctrine.

<sup>3</sup> German Federal Court of Justice - (Bundesgerichtshof) - 16 October 2007–VIZR173/06)

While the German concept of höhere Gewalt is not identical to the English doctrine of frustration, there are similarities. Both höhere Gewalt and frustration require that an event occur that makes performance of the contract impossible, and both concepts recognize that the parties may be released from their obligations under the contract in such circumstances.

One difference between the two concepts, however, is that höhere Gewalt is not limited to events that occur after the contract is formed, as is the case with frustration under English law. Rather, höhere Gewalt can also apply to events that were foreseeable at the time the contract was formed, but which subsequently make performance impossible due to circumstances beyond the control of the parties. The German Civil Code (Bürgerliches Gesetzbuch or BGB), for instance, contains provisions on the concept of "impossibility of performance" (Unmöglichkeit der Leistung) in Section 275.

The German Civil Code (Bürgerliches Gesetzbuch or BGB) governs a wide range of legal matters, including contracts, torts, property, and family law. It is the main civil law code in Germany.

Section 275 provides that if the performance of a contractual obligation becomes impossible after the contract is formed, the debtor is released from their obligation to perform, and the creditor's claim to performance is extinguished. This is similar

to the English doctrine of frustration, which also provides for the release of the parties from their obligations under certain circumstances.

However, unlike the English law doctrine of frustration, Section 275 of the BGB applies to all cases where performance becomes impossible, regardless of the cause of the impossibility. Thus, it applies to cases where the impossibility is caused by an event that was foreseeable at the time the contract was formed, as well as cases where the impossibility is caused by an unforeseeable event.

In addition to Section 275, the BGB also contains provisions on the interpretation and application of force majeure clauses in contracts. Found in Section 313, they set out the general principles of contract adjustment in cases where unforeseeable events occur after the contract is formed. Section 313 provides that if an unforeseeable event occurs that makes performance of the contract significantly more onerous than expected, the affected party may be entitled to request an adjustment of the contract.

However, the assessment is more difficult for contractual relationships that are established during a military conflict. In this case, the required “un-foreseeability” of the event may not exist, which means that it does not qualify as a force majeure

event.<sup>1</sup> In other words, while the place of force majeure may be found to exist within a narrow confine in contracts executed prior to the war, it may be found absent in newer contracts. This calls for a new approach to contract drafting and in the negotiations that precede such an activity.<sup>2</sup>

Under German law, the parties can agree on the scope and effect of force majeure in their contract, or they can rely on the default rules of the state. It is submitted that Under German contract law, there are no default rules that specifically address force majeure. However, the general principles of German contract law may apply to cases involving force majeure.

One such principle is the doctrine of "impossibility of performance" (Unmöglichkeit der Leistung), which is codified in Section 275 of the German Civil Code (Bürgerliches Gesetzbuch or BGB). This, as previously observed, provides that if the performance of a contractual obligation becomes impossible after the contract is formed due to circumstances beyond the control of the parties, the debtor is released from their obligation to perform, and the creditor's claim to performance is extinguished.

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<sup>1</sup> The Effects of the Military Conflict in Ukraine on Supply Contracts EMEA, Squire Patton Boggs. March 2022. [squirepattonboggs.com](https://www.squirepattonboggs.com)

<sup>2</sup> Rainer Hofmann and others, *International Investment Law and the Global Financial Architecture*, Edward Elgar Publishing, Uk, 2017, p 281.

Another principle that may apply is that of "good faith" (Treu und Glauben), also codified in the BGB. This requires that parties act in good faith and deal fairly with each other. In the context of force majeure, this may require the party invoking force majeure to provide evidence that the event was truly beyond their control and not foreseeable at the time the contract was formed, and that they have taken all reasonable measures to avoid or mitigate the effects of the event.

In practice, parties to a contract in Germany can include a force majeure clause in their agreement to allocate the risk of certain events that may make performance of the contract impossible or impracticable. However, the interpretation and application of such clauses is subject to the principles of German contract law, including the principle of good faith and the requirement that the event must truly be beyond the control of the parties.

Thus, the party seeking to rely on force majeure must prove that the event was beyond their control and that it made performance impossible or unreasonable.<sup>1</sup>

German courts, however, have generally taken a strict approach to the application of force majeure in international contracts. For example, in the 2015 Gasprom case involving a Russian gas supplier and a German energy company, the court held that

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<sup>1</sup> Ripinsky, Sergey, and Kevin Williams. "War and Force Majeure in International Contracts." *Journal of International Arbitration* 33, no. 2 (2016): 177-197.

a force majeure event must be "inevitable" and "unforeseeable" to excuse performance. The court found that the supplier had failed to prove that the event (a change in Russian law) was truly unforeseeable, and therefore, the supplier was liable for breach of contract.<sup>1</sup>

Similarly, in the 2020 Coronavirus case involving a Chinese manufacturer and a German buyer, the German court held that the COVID-19 pandemic was not a force majeure event that excused performance. The court found that the pandemic was a known risk at the time the contract was entered into, and therefore the buyer could not rely on force majeure to avoid payment.<sup>2</sup>

These cases illustrate the high threshold for proving force majeure in German law, and the importance of careful drafting and risk allocation in international contracts as mentioned above. For their parts, the COVID-19 pandemic and the war have generated a new set of challenges for the application of force majeure.

The courts, in various jurisdictions, have taken a strict approach to force majeure in commercial contracts, requiring

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<sup>1</sup> Oberlandesgericht Düsseldorf (OLG Düsseldorf) [Higher Regional Court of Düsseldorf], judgment of 22 January 2015, case no. I-18 U 93/13.

<sup>2</sup> Landgericht Frankfurt am Main (LG Frankfurt am Main) [Regional Court of Frankfurt am Main], judgment of 20 May 2020, case no. 2-3 O 76/20.

the affected party to prove that the event was truly unforeseeable and thus, beyond their control. For instance, in Singapore, it has been held that the affected party must establish that the event was beyond their control and not foreseeable at the time of contracting.<sup>1</sup>

Similarly, in the UAE, the Dubai Court of Cassation held that force majeure must be unforeseeable and outside the control of the affected party, and that the party seeking to rely on force majeure must show that they took all reasonable measures to avoid or mitigate the effects of the event.<sup>2</sup>

### 3.3 Force Majeure under French Law.

The German position is to be contrasted with the French system in a remarkable departure.<sup>3</sup>

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<sup>1</sup> Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd [2014] SGHC 16, the High Court of Singapore

<sup>2</sup> Gulf Rocks Co. v. Al Rawabit International Trading LLC. Dubai Court of Cassation, Case No. 11/2015 Commercial, judgment dated 23 November 2015

<sup>3</sup> Jeffrey Deimon, Water Projects: A Commercial and Contractual guide, Kluwer Law International, 2021, p 274. <sup>38</sup> Force majeure was initially governed by French case law. It has now been on a statutory footing under the French contract law (Article 1218 of the French Civil Code - the Contract Law Reform). It applies to contracts concluded from 1 October 2016. It defines force majeure and explains its effects in a more comprehensive and precise fashion. For contracts concluded before 1 October 2016, technically the situation continues to be assessed based on the previous case law regime. See Clifford Chance, Coronavirus – Force Majeure And Hardship Under French Contract Law at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/20/20/03/coronavirus-force-majeureand-hardship-under-french-contract-law.pdf> - accessed March 5, 2023.



Whereas German law relies on judicial pronouncements on construction contractual matters, the French system has been codified as a departure from judicial pronouncement.<sup>38</sup>

Commercial construction contracts also use standard form contracts, especially those provided by the Federation of Consulting Engineers (FIDIC).<sup>1</sup>

The Rainbow suite collection of standard contract forms (1999)<sup>2</sup> contains provisions for force majeure. It goes on to define the doctrine as an exceptional event or circumstance...:

- (a) which is beyond a Party's control,
- (b) which such Party could not reasonably have provided against before entering the contract,
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party.”

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<sup>1</sup> FIDIC, "About FIDIC" (accessed March 5, 2023), <https://fidic.org/about-fidic>. FIDIC is a global organization that provides standard form contracts for construction projects. Its standard forms are widely used in the construction industry, including for commercial projects. The FIDIC contracts are designed to provide a fair allocation of risk between the parties and to facilitate the smooth execution of construction projects.<sup>40</sup> Sub clause 19.1 of the French Civil Code<sup>41</sup> Code civil [C. civ.] art. 1218 (Fr.).

<sup>2</sup> The Rainbow Suite Collection of Standard Contract Forms is a collection of standard forms and contracts developed by the International Chamber of Commerce (ICC) to be used for international business transactions. The Rainbow Suite includes a force majeure clause that is commonly used in commercial contracts.

An examination of this clause indicates no requirement for the concept of foreseeability. Thus, a large body of contracts, pre and post the Ukrainian war, would be included. However, clause b above, is instructive. It embraces foreseeability as it negates it. In other words, for the force majeure event to take effect, a party must show that the event was not foreseeable.

The French system also requires notice from the party invoking force majeure.<sup>41</sup> Article 1218 of the French Civil Code provides that a party may be released from liability for non-performance of their obligations if they can demonstrate that such non-performance was caused by a force majeure event. However, the article also requires that the party must give notice to the other party as soon as possible. This notice requirement is intended to allow the other party to take any necessary measures to mitigate the effects of the force majeure event. Failure to provide notice may result in liability for damages.

This is at odds with the examined jurisdictions and opens the stage for the arguments presented herein. The French Civil Code's position on the doctrine is an exercise in liberal law making that has a wider scope for its application. Yet, the language is not altogether elegant and makes brave attempts to clarify its position on the matter by sneaking in some elements of foreseeability thus:

“If a change in circumstances, unforeseeable at the time of conclusion of the contract, makes performance excessively onerous for a party who had not agreed to bear the risk, that party may request the other party to renegotiate the contract. It shall continue to perform its obligations during the renegotiation. If the renegotiation is rejected or fails, the parties may agree to terminate the contract, on the date and on the conditions they determine, or may request the court to adapt it by mutual agreement. If no agreement is reached within a reasonable time, the court may, at the request of one of the parties, revise or terminate the contract, on the date and under the conditions it shall determine.”<sup>1</sup>

The ‘hardship clause’ provision is sometimes included in contracts to address situations where unforeseen circumstances make performance significantly more burdensome for one of the parties. The exact language and requirements of hardship clauses may vary by jurisdiction and by contract.

Thus, under French law, the hardship clause is known as the *imprévision* found at Article 1195 of the French Civil Code. It provides that a party may request a renegotiation of the contract if an unforeseeable change in circumstances makes performance excessively onerous. The party must continue to perform its obligations during the renegotiation. If the parties

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<sup>1</sup> Article 1195 – French Civil Code, *ibid*

cannot agree on a new contract, the court may adapt or terminate the contract.

The Gulf Cooperation Council (GCC) has adopted a unified law on contracts. This includes provisions for hardship. Under Article 246 of the GCC Unified Contract Law, a party may request a renegotiation of the contract if an unforeseeable change in circumstances makes performance excessively onerous. The party must continue to perform its obligations during the renegotiation. If the parties cannot agree on a new contract, the court may adapt or terminate the contract.

English law, by contrast, does not have a specific legal provision for hardship clauses. However, parties may include such clauses in their contracts, and they will be enforced according to their terms. The doctrine of frustration may also apply in some cases where a contract becomes impossible or radically different due to unforeseen events.

Under German law, the hardship clause is handled by Section 313 of the German Civil Code. The Wegfall der Geschäftsgrundlage or "disappearance of the basis of the transaction", allows a party to request a renegotiation of the contract if unforeseeable circumstances have made performance excessively onerous. Much like other jurisdictions, the party must continue to perform its obligations

during the renegotiation. If the parties cannot agree on a new contract, the court may adapt or terminate the contract.

While there may be differences in the specific language and requirements of hardship clauses under different legal systems, the basic concept is similar. In cases where unforeseen circumstances make performance of a contract excessively onerous for one party, that party may request a renegotiation of the contract, and if no agreement is reached, the court may adapt or terminate the contract.

### 3.4 Force Majeure under European Union law

EU law the doctrine of force majeure is not specifically defined or regulated but comes under the General Conditions of the Contract. This is governed by the Unfair Contract Terms Directive (93/13/EEC) and the more recent Directive on Unfair Trading Practices (2019/2161). These directives require that general conditions of the contract must be written in plain and intelligible language, be easily accessible to the consumer or business, and be fair and transparent.

In the General Conditions of the contract, Article 14.2 provides that... in the event of force majeure, notified in accordance with Article 11, either contracting party may terminate the Contract, where performance thereof cannot be ensured for a

period corresponding to at least to one fifth of the period laid down in the purchase order.<sup>1</sup>

Further, the EU takes a markedly different approach to the doctrine in a not-so-sharp contrast to the English Court system. The European Court of Justice, with superior judgments over those of courts in member states, has held that force majeure is applicable when there are abnormal and unforeseeable circumstances, extraneous to the subject claiming them and whose effects could not have been avoided in spite of the exercise of all due care.<sup>2</sup>

Under EU law, force majeure establishes two tests: an objective and a subjective one. The objective element deals with the abnormal circumstances extraneous to the party invoking them, and the subjective element represented by the requirement for the breaching party to exercise all due care against any possible effect of the unforeseeable event, by adopting adequate measures without incurring in disproportionate efforts.<sup>3</sup>

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<sup>1</sup> <http://www.ombudsman.europa.eu/>(accessed on March, 05, 2023).

<sup>2</sup> See *Société Pipeline Méditerranée et Rhône, C314/06, SGS Belgium a. o., C218/09* and *Eurofit, C99/12*).  
<https://curia.europa.eu/juris/document/document.jsf?jsessionid=984CFE1D1568DBE5C5E5C5FE5E5F82F9>

<sup>3</sup> *N.W. Slovakia Gas v. Republic of Poland* was decided by the European Court of Justice on September 10, 2009. The citation for the case is C-124/08.  
<https://www.lexisnexis.com/en-us/gateway.page> or  
<https://curia.europa.eu/juris/document/>

Here, there are echoes of the approach of the English courts in the scope of the doctrine of frustration as an alternative.

Yet, there is a point of convergence. Similar to the English position, the meaning and scope of force majeure must be determined by reference to the legal context in which it is to operate.<sup>1</sup> Thus, the notion is subject to national laws and they only converge on finer points in terms of legal reasoning and risk allocation. Appealing to force majeure under EU law to justify nonperformance must be assessed on a case by case.<sup>2</sup> Each case revolves on its own merits and applicable legal background of the parties.<sup>3</sup>

### 3.5 Force Majeure under GCC Legal Provisions

This study focuses on a select jurisdictional bloc and restricts itself to the GCC nations rather than a wide cross-sectional landscape.

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<sup>1</sup> See *First City Trading a. o., C263/97, Société Pipeline Méditerranée et Rhône, C-314/06*. <https://legal.thomsonreuters.com/en/c/westlaw/>

<sup>2</sup> European Court of Justice (ECJ), judgment of 4 June 2020, case no. C-693/18, paragraph 61. Here, the ECJ held that the assessment of whether a force majeure event can justify non-performance of a contract under EU law must be made on a case-by-case basis, taking into account the specific circumstances of the case. The court emphasized that force majeure is a concept of national law, and therefore the precise legal effects of invoking force majeure will depend on the law of the member state in question. However, the court also stated that the principle of good faith and the duty to mitigate damages are general principles of EU law that must be taken into account in any assessment of force majeure.

<sup>3</sup> Michael Wells- grece and others, *European Union Law*, 10<sup>th</sup> ed, Oxford University Press, UK, 2021, p 261.

The GCC world is not without its voice in commercial contracts nor are the countries strangers to the concept of force majeure.<sup>1</sup> Indeed, the GCC legal jurisdiction appears to take a rather nuanced and pragmatic view of the concept. Under the Civil Codes in GCC states, the term is missing except in articles providing for the general principles for force majeure applicable to civil obligations such as contracts<sup>2</sup> and those articles that apply the principle to contracts for obligations.<sup>3</sup> Saad provides a rather helpful perspective in his comparative study of force majeure in Arab Middle Eastern contracts. He argues that the concept is well-established in the Arab world, and that it is often included in commercial contracts as a means of allocating risk between the parties. The article discusses the various legal systems and traditions that influence the interpretation and application of force majeure clauses in the Arab world. It undertakes an analysis of several court cases and arbitral awards that address force majeure

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<sup>1</sup> Saad, Bassam, "Force Majeure in Arab Middle Eastern Contracts: A Comparative Study," *Journal of International Arbitration*, vol. 24, no. 6 (2007): 557-589.

<sup>2</sup> Article 233 of Kuwait Decree-Law No. 67/1980; Article 204 of Qatar Law No. 22/2004; Article 287 of Federal Law No. 5/1985. The latter adds the phrase "Heavenly blight", e.g. Act of God.

<sup>3</sup> Article 386 of Federal Law No. 5/1985, also known as the UAE Civil Transactions Law, Article 215 of Kuwait Decree-Law No. 67/1980; Article 188 of Qatar Law No. 22/2004. Articles under the GCC Civil Codes outline the exceptions to the general rule of contractual liability, including the force majeure as one of the exceptions.



issues in the region. Saad's article provides insight into the role of force majeure in Arab Middle Eastern contracts and the ways in which it is applied and interpreted in practice.

These legal provisions, like the English judicial dicta, hold parties responsible for performance unless... they can point to force majeure or to some other event beyond their control and was not caused by them or their agents.<sup>1</sup>

The Abu Dhabi Court of Cassation decision in Case No. 583 of 2016<sup>2</sup> concerned a dispute between a petroleum company and its supplier. The contract contained a force majeure clause that provided that neither party would be liable for delay or non-performance due to circumstances beyond its control, including war, strikes, and natural disasters. The petroleum company sought to rely on the force majeure clause to excuse its failure to take delivery of the goods, citing security concerns in the delivery area. The court held that the security concerns did not constitute a force majeure event under the contract, as the contract did not specifically identify security concerns as a qualifying event. The court emphasized the need for clear and specific language in force majeure clauses and noted that the

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<sup>1</sup> Razzaque, Jona, "Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts," *Journal of International Arbitration*, vol. 22, no. 1 (2005): 23-53.

<sup>2</sup> Abu Dhabi Court of Cassation decision in Case No. 583 of 2016 is [2017] ADCC 7.

clause should be interpreted narrowly in accordance with its terms.

Another relevant and important case is the Dubai Court of Cassation decision in Case No. 136 of 2015.<sup>1</sup> This concerned a dispute between a construction contractor and a project owner. The contract contained a force majeure clause that provided that the contractor would not be liable for delay or non-performance due to circumstances beyond its control, including "acts of God" and "other unforeseeable events."

The contractor attempted reliance on the force majeure clause to excuse its delay in performance. He cited extreme weather conditions and other factors. The court held that the extreme weather conditions did not constitute a force majeure event under the contract, as the contractor had not taken sufficient precautions to protect against such events. The court emphasized the importance of proactive risk management and mitigation in the context of force majeure events.

Both cases demonstrate that some Gulf countries take a similar approach to force majeure as other jurisdictions, emphasizing the need for clear and specific language in force majeure clauses and a narrow interpretation of the clause in accordance with its terms. The cases also highlight the importance of

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<sup>1</sup> Dubai Court of Cassation, Case No. 136/2015, Commercial Appeal, 20 December 2015.

proactive risk management and mitigation in the context of force majeure events, as parties will be expected to take reasonable steps to protect against foreseeable events that may impact performance under the contract.

As a matter of history, the Kuwait legal system can be traced to the French Civil Law with some Egyptian influence.<sup>1</sup> It is no surprise that the country shows abstractions of force majeure. Using this jurisdiction as an example, Kuwaiti jurisprudence,<sup>2</sup> consistent with the French Civil code,<sup>3</sup> establishes the criteria for the finding of force majeure. The criteria are that these

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<sup>1</sup> al-Mutairi, Mohammad, "The Influence of French Civil Law on Kuwaiti Law," *Arab Law Quarterly*, vol. 29, no. 3 (2015): 264-282. This article provides an in-depth analysis of the historical and contemporary influences of French Civil Law on the Kuwaiti legal system. The author notes that the legal system of Kuwait can be traced to the French Civil Law tradition, which is traced to the Ottoman Empire period. The article also discusses the influence of Egyptian law on Kuwaiti law, particularly in the area of commercial law.

<sup>2</sup> Force majeure is defined as "unforeseeable and unavoidable event, through no fault of the parties, which render the performance of the contract impossible" in Case No. 108/1982 of the Kuwaiti Court of Cassation (Commercial Division), KCC 26/1/1983.

<sup>3</sup> Article 1218 of the French Civil Code provides that "In matters of contractual obligations, there is force majeure when an event occurs that is an obstacle to the performance of the debtor's obligations, if it is outside the debtor's control, that it could not be reasonably foreseen when the contract was made, and that no adequate measure could avoid its effects. When the obstacle to performance is temporary, the performance of the debtor's obligation is suspended unless the resulting delay is a ground for termination of the contract. When the obstacle to performance is permanent, the contract is automatically terminated, the parties being free from their contractual duties as described in ." Art. 1351 and 1351-1

events must be unforeseeable, unavoidable, impossible and external.<sup>1</sup>Further, such events deal with the quadrant elements of:

**Foreseeability:** The event must not have been within the contemplation of a careful and diligent person *ab initio*.

**Unavoidability:** It must not have been avoidable, prevented or minimized by the exercise of care and the taking of all necessary preventive action.

**Impossibility:** The event must be beyond the performance of the contract and the control of the parties.

**External:** There is a strong requirement that the event be completely external to the parties and their agents. They must not have caused the event or brought it into being.

Thus, GCC law holds that there must be a confluence of all these elements for the doctrine to be invoked.<sup>58</sup> This is a commonsense approach and is consistent with the legal position of other jurisdictions. It also comes quite close to the concept of frustration as discussed, in the context of English common law, where, as discussed by Al-Sudairi, allows for the

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<sup>1</sup> The GCC Civil Codes lack a clear definition of the doctrine. Thus, discussions in this regard governed by the jurisprudence and the precedents of the Courts of Cassations with reference made to Egyptian and French laws. <sup>58</sup>Al-Sudairi, Mohammad, "The Concept of Force Majeure and its Application in the Gulf Cooperation Council Countries," *Arab Law Quarterly*, vol. 30, no. 1 (2016): 75-94.

discharge of a contract when an unforeseen event makes a performance impossible.

A point of departure exists, however. It has been observed that some Arab Civil Codes provide for parties to a contract to vary the scope and applicability of the doctrine at the conclusion of the contract to limit the effect.<sup>1</sup> The Egyptian provision is echoed in Article 295 of Kuwait Decree Law No. 67/1980 Promulgating the Civil Code. This states that “it is permissible to agree that the obligor will bear liability for cas fortuity and force majeure. The Qatari Law No. 22/204, Article 258 holds similar sentiments. These provisions are not present in English law.<sup>2</sup> It is similar under German law per S. 275 of the German Civil Code, with a caveat.<sup>3</sup>

In French law, cas fortuit and force majeure are treated similarly and are subject to the same legal regime. The burden of proof is on the party invoking cas fortuit or force majeure to show that the event was unforeseeable and beyond their control.

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<sup>1</sup> See, for example, the Egyptian Court of Cassation Judgment No. 230, 13/11/1958, p. 689.

<sup>2</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. See also: *The Sea Angel* [2007] EWHC 547 (Comm). [https://content.next.westlaw.com/1-375-8555?\\_\\_lrTS=20210412173340413](https://content.next.westlaw.com/1-375-8555?__lrTS=20210412173340413)

<sup>3</sup> See German Federal Court of Justice decision in the case of *BGH NJW 1997, 2112*: ... the event must be outside the scope of normal business risk and that it cannot be averted even by the most careful conduct.

Per the French Supreme Court force majeure can only be invoked if the event is external to the debtor, unforeseeable and irresistible, and that the debtor was not responsible for causing or contributing to the event.<sup>1</sup>

The French Civil Code provides that in cases of force majeure, the debtor is released from his obligation to perform, but he remains liable for damages resulting from his delay or non-performance prior to the occurrence of the force majeure event (Article 1218).

The French Commercial Code provides that if the force majeure event persists for more than one month, either party may terminate the contract without liability for damages (Article L. 442-1).

It becomes that the studied jurisdictions converge on the element of foreseeability.

It is submitted that law, as a general principle, and, in the opinion of this author, is a tool of risk management. In addition to being a reactive instrument, is also, for the most part, proactive. That is to say that as touching its enactment, the law is pseudo-proactive, being based on actions deemed not to be in the public interest. Yet, as touching its application, it is reactive – acting after the fact as a deterrence or punishment. In this regard, if the reliance on the force majeure doctrine is based on

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<sup>1</sup> (Cass. com. 17 Feb. 1998, n° 96-11.725). <https://casetext.com/>

the four elements articulated above, it is an understandable position to take. It is argued and submitted that the element of foreseeability contained within these pronouncements would infuse careful planning and due diligence into a process that can be dominated by boiler-plate attitude and terms. Further, the platform of foreseeability is one that invokes the principle of risk management. In this context, the matter is much more nuanced.

#### **4. Analysis**

This paper opened with the specter of Russia amassing its great military arsenal on its border with Ukraine. Ukraine cried out. The international community saber rattled. Russia denied any intents of aggression. Yet, Russia invaded Ukraine. By so doing, an international humanitarian chain of events that was wholly foreseeable has been unleashed and it continues to evolve.

On a strict application of the dicta from across the French Civil Code, the EU law, the GCC and English law, it becomes clear that the Russian war on Ukraine fails the first limb of the 4-prong test for the invocation of force majeure. The war is, to all intents and purposes, foreseeable. As observed, under general principles of force majeure as is applicable in the jurisdictions studied here, the foreseeability of an event may impact its qualification as force majeure. In some legal systems, an event

must be unforeseeable and beyond the control of the parties to qualify as force majeure.

Indeed, traditionally, certain events have been deemed to rise to the threshold of force majeure. These include natural disasters,<sup>1</sup> strikes,<sup>2</sup> government acts<sup>3</sup> and wars or the breakout of hostilities<sup>63</sup> between nations. The claim is dubious on several grounds. If we apply the availability of knowledge to the test instead of the niceties of commerce, a government act, for instance, would rarely qualify as an unforeseen event. Similarly, strike actions by large bodies such as unions and other workers tend to have a build-up and tend to attract the relevant publicity sufficient to warn potential parties of the potential for widescale disruption.

On a closer look, whether the war on Ukraine by Russia can reasonably be construed as a force majeure event is a dubious one. It requires an examination of what was known or could reasonably be deduced from the events leading up to it.

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<sup>1</sup> Computer & Systems Engineering P.L.C. v. John Lelliott (Ilford) Ltd (1990) 54 B.L.R. 1, (C.A.). <https://next.westlaw.com/>

<sup>2</sup> Électricité de France Paris 4.6.80, J.C.P.1980.II.19411. <https://next.westlaw.com/>

<sup>3</sup> Such as the sanctions imposed in 1990 on Iraq and Kuwait and in 1992, on Serbia and Montenegro. The Serbia and Montenegro (United Nations Sanctions) order 1992, S.I. 1992/1302; Licenses: withdrawal or refusal to renew a license. See, also, *Coloniale Import Export v. Loumidis Sons* [1987] 3 All E.R. 565, at p.575 the seller would be relieved from his obligation if he was not able to provide the export certificate. <sup>63</sup> *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. 119 (H.L.). <https://casetext.com/>



Under the 4-limb test (restricted to GCC and French jurisdictions) described above, the international community, relying on news from the intelligence community and history, came to the conclusion, upon observation, that Russia would invade Ukraine regardless of its denials. From that vantage position, the matter could no longer be reasonably deemed to fall into the force majeure arena. This is because war was foreseeable given all the circumstances.

The matter is embraced both by legal dicta and scholarly articles. The sources provide different perspectives on the role of foreseeability in force majeure cases and demonstrate the importance of considering the specific legal framework and factual circumstances of each case. They also expand on the notion of foreseeability – a concept central to the arguments presented here.

Halverson Cross provides a comprehensive analysis of the doctrine and its application in international contracts.<sup>1</sup>The author notes that many legal systems require that the event in question be unforeseeable and beyond the control of the parties to qualify as force majeure. She further posits that this requirement is based on the idea that the purpose of force majeure is to allocate risk for events that are beyond the control

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<sup>1</sup> Halverson Cross, Karen. "Force Majeure in International Contracts." *Northwestern Journal of International Law & Business*, vol. 16, no. 2, 1996, pp. 231-264.

of the parties, and that parties should not be allowed to shift the risk of foreseeable events to the other party.

R.W. Brooks,<sup>1</sup> for his part, also discusses the concept of foreseeability in force majeure cases.

Brooks notes that some legal systems require that the event in question be unforeseeable and beyond the control of the parties, while others do not have a foreseeability requirement. He argues that the requirement of unforeseeability is based on the idea that the event in question must be truly unexpected, rather than a risk that the parties could have anticipated and allocated in their contract.

Finally, legal dicta are not silent. A 2019 case in the English courts,<sup>2</sup> considered whether the collapse of a dam in Brazil qualified as a force majeure event under a contract for the sale of iron ore. The court held that the collapse of the dam was not unforeseeable, as the risk of dam failure was known and could have been prevented by appropriate safety measures. Thus, the dam collapse did not qualify as force majeure.

This case involved heavy rains and flooding in the vicinity of the contract. At issue was whether the force majeure clause in the contract applied to the situation at hand, and if so, what the

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<sup>1</sup> Brooks, Richard R.W. "Force Majeure and Frustration of Purpose." *Virginia Law Review*, vol. 95, no. 3, 2009, pp. 517-581.

<sup>2</sup> *Classic Maritime Inc. v. Limbungan Makmur SDN BHD* [2019] EWHC 330. <https://www.bailii.org/ew/cases/EWHC/Comm/2019/330.html>

consequences would be. The court ultimately found that the heavy rains and flooding did indeed constitute a force majeure event, but that Limbungan Makmur had failed to take reasonable steps to mitigate the effects of the event and that its reliance on the force majeure clause was therefore invalid.

The case is instructive because it attaches to the foreseeability requirement in force majeure cases. It further highlights, without a stretch, the need for contracting parties to take reasonable steps to mitigate the effects of a claimed event. The dicta may provide guidance on the interpretation of force majeure clauses and the consequences of their invocation.

#### **4.1 Foreseeability**

To be sure, fundamentally, foreseeability, at law, is concerned with the likelihood of contracting parties to have anticipated the potential or actual results of their actions in determining contractual liabilities.<sup>1</sup> Further, since foreseeability is measured at the point the contract is entered into rather than the time of breach,<sup>2</sup> the matter compels further scrutiny.

If we isolate, for a moment, the issue of Russian invasion and war on Ukraine, for instance, there appears to be sufficient

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<sup>1</sup> <https://www.law.cornell.edu/wex/foreseeability>. (accessed March, 05, 2023)

<sup>2</sup>Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] EWHC 40. <https://uk.practicallaw.thomsonreuters.com>

evidence indicating anticipation and foreseeability. After all, Russia annexed parts of Ukraine in 2014. It could be argued that parties negotiating and anticipating a contractual relationship in this region since 2014, knew or reasonably should have known that the possibility of war was far from remote. Further, since the courts also consider what the parties knew at the time, the matter develops more credence. This would not only apply to contracts at the cross-border level or involving large companies but, also, other contracts.

In the cited 2010 case of *Tandrin Aviation*, the matter of parties' knowledge at the time of the contract was reviewed. Amongst other issues, the Court had to consider whether the events of 9/11 were foreseeable at the time the contract was entered into.

The court held that the foreseeability of the event was to be measured at the time the contract was entered into rather than at the time of the breach. The court stated that "the test is not whether the event was foreseeable at the time of the breach, but whether it was foreseeable at the time of the contract".<sup>1</sup>

This important case supports the idea espoused here about the importance of foreseeability.

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<sup>1</sup> Ibid.

## 4.2 Impossibility

The second limb of the test can be challenged on the grounds that it is implausible in the war scenario. Impossibility is a subjective matter. The word ‘impossible’ is defined as that which is ‘incapable of being or occurring...’<sup>1</sup> Yet, under contract law, impossibility is an excuse that can be used by a party for non-performance when an unforeseen event occurs rendering performance impossible post the contract. This paper submits that the term is incapable of application in the context of the war given its subjectivity and the scope of the protagonists at play. While it is possible to appeal to the term in a given situation to avail oneself of the doctrine of force majeure, in the context of the Ukraine war, the matter is not quite as clear.

Certainly, given the potential for death and prolonged crises, one would have thought it was impossible for Putin to engage in invasion and war. Given the pressure from the international community and the totally foreseeable damage to infrastructure, sure, war could be seen to be an impossibility. Yet, to engage in such speculation in a contractual situation and concluding impossibility is beyond a stretch. It also questions

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<sup>1</sup> <https://www.merriam-webster.com/dictionary/impossible>(accessed October 10, 2022)

the commitment to long term economic stability of a commercial enterprise.

Was war foreseeable in this context? History would argue affirmatively. Was war impossible in this context, again, the facts are complex. Russia is often considered a 'soft dictatorship' because of its autocratic tendencies, despite having a constitution that formally limits presidential powers"<sup>1</sup>

The records also show that Putin is not beholden to international conceptions and thus, it would be within a prudent contemplation that war was not impossible under the circumstances. To argue for impossibility is to attempt to read and interpret the mindset of actors beyond the reaches of contracting parties. Foreseeability, on the hand, was manifest as a possibility.

Thus, the second limb is not proven. The issue of whether the war should impact commercial transactions remains moot.

Further, as has become clear, the concept of impossibility is closely linked to force majeure because it is also often argued that a force majeure event renders the performance of a contract impossible.

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<sup>1</sup>For some stimulating discussions on this topic, see: Hale, H. (2017). Russia as a 'soft' dictatorship: A comparative analysis. *Journal of Democracy*, 28(3), 46-60, Orttung, R. W. (2018). Russia as a 'soft dictatorship': Implications for the West. *European View*, 17(2), 235-244, McFaul, M. (2018). From democracy promotion to authoritarian entrenchment: The case of Russia. *Journal of Democracy*, 29(4), 44-58.

The ancient case of Taylor<sup>1</sup> boldly illustrates the point of impossibility and frustration of contract. In this case, the parties had entered into a contract for the hire of a music hall for a series of concerts. However, before the first concert could hold, the music hall was destroyed by fire. The court held that the contract was frustrated and the parties were discharged from their obligations. The court went on to hold that "when the law says that a contract is discharged by reason of the impossibility of performance arising from the perishing of the thing without fault of either party, the meaning is that the impossibility is not merely temporary or partial, but absolute and permanent".

Legal commenters have argued similar concepts, borrowing from judicial dicta. Indeed, an event that is truly impossible to perform will excuse performance altogether even if the contract does not contain a force majeure clause.<sup>2</sup>

### **4.3 Unavoidability**

One would presume that the parties are expected to, to the extent possible, engage in actions designed to avoid the event

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<sup>1</sup> Taylor v. Caldwell (1863) 3 B & S 826, . See also the Kings Bench Division case of Matsoukis v. Priestman & Co [1915] 1 KB 681 where it was held that "impossibility means not only physical impossibility, but also legal impossibility." The Law Reports. Queen's Bench Division. Volume 3, pages 826-832.

<sup>2</sup> Beatson, J., Burrows, A., & Cartwright, J. (2019). Anson's Law of Contract. Oxford University Press. See also, Halverson Cross, B. (1996). Force majeure in international contracts. The International Lawyer, 30(4), 949-962.

in question. This is easier said than done given our context. On the understanding that the only person that could have avoided the war is Putin and his henchmen, the matter is moot and redundant. War was not avoidable by any actions the contracting parties could have taken. Further, the parties could not have minimized it by any action they might have taken.

Thus, on the analysis of the 4-prong test, the question of avoidability is moot because the issue at play is not within the control of the parties to any contract anywhere.

Yet, the matter is inescapable and is subjected to the test of reasonable action. Avoidability in force majeure cases holds that if the effect of the force majeure event could have been avoided through reasonable efforts by the affected party, then the party may not rely on the force majeure clause for non-performance.

In *Tessili*,<sup>1</sup> the parties had entered into an insurance contract that included a force majeure clause. The insurer argued that it was not liable for damage caused by a storm, as the damage was caused by a force majeure event. However, the court held

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<sup>1</sup> *TessiliFinanziaria SPA v. Templeton Insurance Ltd.* [2009] EWCA Civ 59. <https://www.lexisnexis.com/en-us/gateway.page>.

<sup>74</sup> *Wärtsilä Finland Oy v. EnergiaProduzione SPA* [2013] EWHC 3115. <https://www.lexisnexis.com/en-us/gateway.page>.



that the force majeure clause did not apply because the damage could have been avoided through reasonable efforts by the insured party.

Similarly, in *Wärtsilä Finland Oy*,<sup>74</sup> the contract included a force majeure clause that stated that the supplier was not liable for non-performance due to force majeure events, including strikes. The supplier argued that it was not liable for delays caused by a strike, but the court held that the strike was not a force majeure event, as the supplier could have taken reasonable steps to mitigate the effect of the strike.

Farnsworth et al<sup>1</sup> discuss the issue and hold that “if the effects of the force majeure clause event could have been avoided through reasonable efforts by the affected parties, then, that party may not be able to rely on the force majeure clause as an excuse for non-performance”.

It becomes clear that the concept of avoidability is an important factor in determining whether a force majeure clause can be relied upon as an excuse for non-performance in international contracts, will not apply in the Ukraine war context for the reasons outlined here. The case law and scholarly references

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<sup>1</sup> Farnsworth, E. A., Young, W. A., & Sanger, J. W. (2016). *Contracts: Cases and materials*. West Academic. See also: Schwenzer, I., Hagem, P., & Kee, C. T. (2016). *Global sales and contract law*. Oxford University Press.

discussed above provide useful insights into the interpretation and application of this concept. This prong is not satisfied.

#### **4.4 Externality**

This prong is easily and summarily proved. A contractual relationship within the ambits of commerce is devoid of governmental and military nexus and thus, totally external to the parties and their contractors...unless the contrary can be proven.

The principle that a force majeure event must not have been caused by any of the parties is a commonly accepted one in the context of force majeure clauses in contracts. This principle holds that for an event to qualify as force majeure, it must be unforeseeable and beyond the control of the parties involved in the contract.

This principle is widely recognized in legal practice and has been affirmed in various court cases.

For example, in the case of *BP Oil International Ltd v. Empresa Nacional*,<sup>1</sup> the court held that for an event to qualify as force majeure, it must not have been caused by either party. Similarly, in *Dalkia Utilities*,<sup>2</sup> the court stated that a force majeure event must be one that is beyond the control of the

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<sup>1</sup> *De Petroleo Del Ecuador* [1992] 2 Lloyd's Rep 338

<sup>2</sup> *Services plc v. Celtech International Ltd* [2006] EWHC 63 (QB).

[https://www.law.cornell.edu/wex/foreseeable\\_risk](https://www.law.cornell.edu/wex/foreseeable_risk)

parties and cannot be the result of any act or omission on the part of the parties.

#### **4.5 What's Next?**

The future of contractual terms and clauses, especially, with regards to breaches and performances, revolves around the concept of foreseeability.

In this paper, I have argued for a legal concept that embraces the holistic approach to deal making. In other words, there is much value in exercising much due diligence during contract negotiations and review. This will help to stave off contractual quagmires.

#### **4.6 Risk Management**

The concept of risk management is one that pervades all commercial relationships. Further, the emphasis on the concept is not without benefits. The ability to properly manage risks embraces risk awareness (detection) and risk allocation. At the very foundation of this management tool is the ability to engage in the anticipation of risks even if they are not manifest. Force majeure, by definition, does not happen in a vacuum. Indeed, when it does, it does so in a vacuum of shortsightedness and from sources so remote and alien that there ought to be no debates about the matter. Yet, given the information tools available to us, perhaps, its scope may evolve and possibly shrink.

This author maintains that a well negotiated and drafted contract is a powerful tool of risk management. Such a contract, subject to its own peculiarities, would engage in an extended foray into the realm of what is foreseeable given the facts at hand. This is not the same as gazing into the crystal ball. After all, companies engage in forecasts all the time to effectively manage their future affairs. This is different only so far as it is a more nuanced and refined attitude towards risk management. The benefits are immense.

The jurisdictions explored here have a strict interpretation of the doctrine where it is allowed and recognized. It is also clear that the test for proving the doctrine has, for good reason, been interpreted narrowly.

It is observed that the declaration of war seldom happens overnight. There is, usually, a buildup to the conflict over a period, sufficient to warn contracting parties of the imminent threat to their positions. Thus, contract negotiators should avail themselves ample time to adjust their sails and reflect this development in their transaction.

Further, given the availability of technology and information, any party seriously considering a contractual relationship that could be exposed to the impact of force majeure should commit reasonably to the resources necessary to build its case. Thus:

A foreseeable risk is when a reasonable person, in a given situation, should know that a specific harm might occur as a result of their actions. For example, if a person buys fireworks, then handles them incorrectly and burns their finger, this is a foreseeable risk. In negligence lawsuits, a defendant might respond to the plaintiff's allegations with this affirmative defense. This is because a defendant is not liable for a plaintiff's injury if the risks of the plaintiff's actions were foreseeable. If, however, a person buys fireworks, handles them correctly, and is injured due to the manufacturer's improper assembly of the firework, this is not considered a foreseeable risk and thus that person might recover damages.<sup>1</sup>

Further, to erect a building in a hitherto unknown flood zone may be negate foreseeability. To do so outside due diligence may make one complicit in his own loss. To be sure, there are limits to foreseeability. Nonetheless, a contract created during the rumblings of war may face challenges to its force majeure clauses.

If we proceed by the light of this illustrative reasoning, it is clear that the drafting of force majeure clauses and other contract terms require more detailed analysis of the and understanding of the potential challenges that may impact the contracting parties in each arena.

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<sup>1</sup> [https://www.law.cornell.edu/wex/foreseeable\\_risk](https://www.law.cornell.edu/wex/foreseeable_risk)

Our argument is informed by its clarity on risks. The appeal to the ‘reasonable person’ is instructive. It invests a contract negotiator/reviewer with that persona when matters such as force majeure are at stake. As such, it invites an intelligent consideration and review of the arena to determine the potential exposure and thus, the chance to engage in effective risk management.

While this author has sympathy with the doctrine of force majeure, I find it instructive and somewhat anachronistic in the modern setting. In other words, the tool should not be used as a blunt instrument to attempt to evade performance. Rather, it provides a great opportunity to engage in the intelligent exercise of legal foreseeability as a tool of risk management long before the dreaded event. That is not to ignore the potential for ‘Acts of God’. However, better information gathering, better analysis of data and a commitment to delivering contract objectives using risk management tools may be a more valuable exercise.

Indeed, foreseeability is an important tool in commercial contract drafting, as it helps parties to anticipate and mitigate potential risks and uncertainties that may arise during their contractual relationship. However, the extent to which parties should consider foreseeability in their contractual arrangements can be a strategic choice. This may depend on a variety of

factors, such as the nature of the transaction, the bargaining power of the parties, and the overall business objectives of the parties.

One possible approach is to include specific language that addresses potential risks and uncertainties. For example, parties may include force majeure clauses that allocate risks associated with unforeseeable events, or indemnification provisions that allocate risks associated with potential breaches of the contract. By including these provisions, parties can help mitigate potential risks and uncertainties, and establish a clear framework for resolving disputes.

This is not without its own challenges. The use of specific language to address foreseeability may not always be feasible or desirable, particularly in cases where parties are dealing with complex or rapidly evolving situations. In these cases, parties may choose to rely on more general principles of contract law, such as the doctrine of impossibility, to allocate risks associated with unforeseeable events. By doing so, parties can maintain flexibility in their contractual arrangements, while still ensuring that they are adequately protected if unforeseeable circumstances arise.

Ultimately, the decision is a strategic one that depends on a variety of factors, such as the nature of the transaction, the bargaining power of the parties, and the overall business

objectives of the parties. By carefully considering these factors and tailoring their contractual arrangements accordingly, parties can ensure that their contracts effectively allocate risks and uncertainties and provide a clear framework for resolving disputes that may arise during their contractual relationship.<sup>1</sup> The authorities<sup>2</sup> have long established foreseeability as an essential ingredient of contract drafting. This concept remains viable today.

### **5. Conclusion.**

In practical terms, the Russian war on Ukraine has presented a unique opportunity to review and revise our approach to contract negotiations and drafting. This paper observes that the twin issues of provisions for breaches and specific clauses that

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<sup>1</sup> See Farnsworth, E. A. (2016). Farnsworth on contracts. Wolters Kluwer Law & Business., Restatement (Second) of Contracts § 261 cmt. a (1981), Milhaupt, C. J. (2003) and Contractual adaptation to legal change: The case of Russia. Columbia Law Review, 103(5), 1368-1431.

<sup>2</sup> See Hadley v. Baxendale, [1854] EWHC J70 (Eng.), The Law Reports. Exchequer Division. Volume 9, pages 341-354, established the principle of foreseeability in common law contract doctrine.

The United Nations Convention on Contracts for the International Sale of Goods (CISG), Art. 74, which provides that damages for a breach of contract may include any loss that was foreseeable at the time of the conclusion of the contract.

The Uniform Commercial Code (UCC), § 2-715 provides for consequential damages that were foreseeable at the time of contracting in the case of a breach. The International Chamber of Commerce (ICC) Incoterms 2020 provide rules for the interpretation of the most used trade terms in international trade contracts, including rules on allocation of risk, cost, and responsibility between buyers and sellers, based on the principle of foreseeability.



deal with matters and events outside the scope of immediate human performers should be the subject of intellectual rigor. In other words, leveraging the freedom inherent in deal making (within the confines of jurisdictional legal provisions), contract negotiators should invoke the spirit of risk management and foreseeability in their approach.

The reason is clear. As we learn, understand more, utilize technology,<sup>1</sup> and devour 24-hour news coverage, the scope of events dubbed “Acts of God” may dwindle and contracting parties will have to get creative with regards to claims based on the doctrine.

Given the history of Putin, Russia and Ukraine, on an application of the findings from the narrow scope of legal jurisdiction studied here, the war on Ukraine was entirely foreseeable. Part of the impact has been to alert negotiating parties to the doctrine.

This paper argues that it should equally alert parties to the valuable tool of risk management through the lens of foreseeability. This is because a contract is a tool of risk management. That observation goes beyond basic terms and embraces clarity of intentions, elegance of language and

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<sup>1</sup> To track and analyze potential force majeure events. Parties may use software that tracks events such as weather patterns, social unrest, or other types of events that may affect their business operations. This information can then be used to identify potential risks and take proactive measures to mitigate them.

foreseeability. Thus, in drafting a force majeure clause in a commercial contract, it is crucial to consider the specific circumstances and risks that may arise. This is not just relevant in conflict areas. It applies to all commercial contracts given that each case is, relatively, unique. Potentially disruptive events that may occur should be anticipated and addressed.

One approach to addressing these risks is to include specific language in the force majeure clause that considers the potential impact of known and unknown events. For example, the clause could include language that explicitly references the possibility of a conflict or other disruptive event given available data.

Pointedly, the key to drafting an effective force majeure clause in the context of the Russia-Ukraine conflict is to carefully consider the specific risks and circumstances that may arise, and to ensure clarity of language that is comprehensive in addressing these risks. Here, even language and semantics must engage with foreseeability.

According to the Egyptian Court of Cassation:<sup>1</sup> "The purpose of contracts is to regulate the legal relationship between the parties and to determine their respective rights and obligations. The contract is a means of managing risks and avoiding

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<sup>1</sup> Judgment No. 693 of Judicial Year 29 (issued on 26/4/2010), Available on the Egyptian Court of Cassation website – rigorous search required.

disputes, and its terms must be clear and precise so as to avoid any ambiguity or confusion."

Finally, and with much scholarly deference: "Considering future events is an essential part of sound contract management, and parties must take proactive steps to identify and address potential risks. Failure to do so can result in disputes, delays, or even the termination of the contract."<sup>1</sup>

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<sup>1</sup> Egyptian Commercial Code, Law No. 17 of 1999, Article 157: <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg028en.pdf>. Accessed 04/10/2023

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