The Relationship Between Force Majeure Clauses and the Excuse Defenses

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THE RELATIONSHIP BETWEEN FORCE MAJEURE CLAUSES AND THE EXCUSE DEFENSES

Gregory Crespi*

ABSTRACT

Many commercial contracts include force majeure clauses that excuse the parties from performing some or all of their obligations upon the occurrence of specified supervening events. The law is unclear as to the proper relationship between such clauses and the assertion of common law or statutory excuse defenses such as impossibility, impracticability, or frustration of purpose with regard to supervening events that are outside of the scope of such clauses. In particular, under what circumstances, if any, should a force majeure clause be regarded as preclusive of these excuse defenses with regard to those supervening events that the clause does not cover? In addition, should the determination that a particular supervening event is outside of the scope of a force majeure clause then be relevant for the determination of the merits of a subsequent excuse defense that is based upon that event? The judicial authority on these questions is surprisingly sparse, and I offer some recommendations as to how the courts should address these issues.

THE PROBLEM POSED BY FORCE MAJEURE CLAUSES FOR EXCUSE DEFENSES

A force majeure clause is a contractual provision that excuses one or more of the parties to a contract from performing some or all of their obligations upon

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the occurrence of specified supervening events. I would like in this brief article to consider a subtle and interesting legal question that is posed by such clauses: what is the proper relationship between a force majeure clause and the common law or statutory excuse defenses of impossibility, impracticability, or frustration of purpose with regard to supervening events that disrupt or frustrate performance, but that are outside of the scope of the clause?

Contract law is largely about giving effect to the joint intentions of the parties, for force majeure clauses as well as for other contractual provisions. Assume for a moment that a contract has a force majeure clause, and then one of the parties to the contract who is later being sued for breach seeks to be excused from their unmet performance obligations because of a supervening event that arguably significantly disrupted or frustrated their performance. Assume also that the reviewing court determines that this particular event is outside of the scope of that clause with respect to that party, and that no other provisions of the contract provide for an excuse. Assume that the party being sued then seeks to assert one or more common law or statutory excuse defenses: impossibility, impracticability, or frustration of purpose. What inferences should a reviewing court draw regarding the intent of the parties with regard to allowing any of those defenses from the existence of the force majeure clause that does not extend to cover that supervening event?

There are several different interpretive possibilities here, with very different implications for the availability and possible success of the excuse defenses. A court may choose to regard the force majeure clause as being a complete statement of the parties' intent as to the particular supervening events that might justify excusing performance, and therefore preclusive of any common law or statutory excuse defenses with regard to other possible supervening events that are outside of the scope of that clause. A court may, however, instead regard

2. See, e.g., Va. Power Energy Mkts., Inc. v. Apache Corp., 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (“As we interpret the parties’ contract, including the force majeure provisions, our primary concern is to determine the parties’ intent.”).
3. Courts generally interpret force majeure clauses narrowly as to their scope of application, since such clauses are in derogation of the central principle of contract law that people are required to perform their obligations. A Latin maxim sometimes invoked by courts as support for doing this is “inclusio unius est exclusio alterius,” which expresses the idea that if one thing is specified in a document then other similar things are impliedly excluded. See, e.g., Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *61 n.629 (Del. Ch. Oct. 1, 2018).
4. Let me make clear that I am not addressing in this article the question of whether and when a force majeure clause that expressly excludes mere payment obligations from its scope, as many such clauses do, overrides the ability of a person to assert excuse defenses with regard to those payment obligations that are disrupted by one of those supervening events that are included under that clause. There is active controversy regarding whether such a force majeure clause, which pretty clearly would preclude the impossibility and impracticability defenses with regard to the payment obligations disrupted by such an event, also precludes the frustration of purpose excuse defense with regard to those payment obligations. See generally Andrew A. Schwartz, Frustration, the MAC Clause, and COVID-19, 55 U.C. DAVIS L. REV. 1771, 1808–13 (2022); Glenn D. West, COVID-19 and Lease Obligations: Does a Force Majeure Clause Override the Frustration of Purpose Doctrine?, GLOB. PRIV. EQUITY WATCH (Jul. 7, 2022). This article addresses only excuse defense issues that arise with regard to subsequent events that are not included under the applicable force majeure clause. Id.
the exclusion of the particular supervening event at issue from the force majeure clause as not preclusive of excuse defenses arising from that event, and possibly also as providing some evidence that the event was unexpected and perhaps even not reasonably foreseeable by the parties, particularly if the clause is otherwise quite broad in scope, satisfying the first threshold required element of each of these several excuse defenses. This inference would not hinder and would perhaps even aid the case for excuse. Or a court may choose to regard the force majeure clause as simply not relevant to ascertaining the parties’ joint intentions with regard to allowing or applying the elements of common law or statutory excuse defenses with regard to the supervening event at issue that is not covered by that clause.

The judicial authority that deals directly with these particular questions of contract interpretation is very sparse, as is the advice publicly provided by major law firms to their clients or potential clients. As to the possible preclusive interpretation of a force majeure clause that does not extend to the particular supervening event at issue, the Seventh Circuit Court of Appeals in 1986 recognized in dicta but did not resolve the question (under Indiana law) as to whether a force majeure clause should preclude the assertion of excuse defenses with regard to supervening events that are outside of the scope of that clause.

6. See e.g., UMNV 205–207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2, 2021 WL 956069, at *6 (Mass. Super. Feb. 8, 2021). The most widely accepted statement of the elements of the impossibility defense is contained in RESTATMENT (SECOND) OF CONTRS. §§ 262–64 (AM. L. INST. 1981). The most widely accepted statements of the elements of the impracticability defense are contained in the Restatement and the Uniform Commercial Code. Id. § 261; U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 2023). The most widely accepted statement of the elements of the frustration of purpose defense is contained in RESTATMENT (SECOND) OF CONTRS. § 265. All of these defenses require as a threshold requirement that the supervening event was unforeseeable or at least unexpected at the time of contracting. Id. §§ 261–65; U.C.C. § 2-615.


9. My impression from reviewing a number of cases dealing with excuse defenses asserted with regard to supervening events that have been found by a court to be outside of the scope of the relevant force majeure clause is that most courts simply do not consider the possibility that the force majeure clause may shed light on the intentions of the parties with regard to allowing or instead precluding common law or statutory excuse defenses with regard to those particular supervening events, nor consider that it may indicate whether the parties expected that event to occur, but simply address any excuse defenses asserted as though the force majeure clause was not present. See id.

10. See Vanessa L. Miller et al., Three Key Defenses to Contractual Performance: Force Majeure, Commercial Impracticability, and Frustration of Purpose, FOLEY & LARDNER LLP (Sept. 15, 2022), https://www.foley.com/insights/publications/2022/09/3-defenses-contractual-performance-force-majeure/ (suggesting in its “Overview” that courts will likely find force majeure clauses to be preclusive of excuse defenses for supervening events that are outside of the scope of the clause: “[i]f the force majeure [supervening] event is not listed or is expressly excluded, however, courts are likely to find that the risk of that event should remain with the obligor.”).

11. N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 277 (7th Cir. 1986) (“[W]e need not decide whether a force majeure clause should be deemed a relinquishment of a party’s right to argue impracticability or frustration, on the theory that such a clause represents the integrated expression of the parties’ desires with respect to excuses based on supervening events . . . ”). That court found that even were the assertion of the impossibility excuse defense to be
In a later 2022 case the District Court for the District of New Hampshire dealt with a force majeure clause that excused one contractual party on the basis of a particular supervening event but not the other party, and the party who was not excused by the clause sought to assert a common law excuse defense. The court, applying New Hampshire law, was also unclear whether that force majeure clause that did not include that supervening event as a basis for an excuse for that party should be regarded as relinquishing that party’s rights to assert a common law or statutory excuse defense with regard to that event. In a second 2023 hearing of the case, the same court referred approvingly in its discussion to the earlier Seventh Circuit ruling noted above that recognized this uncertainty and certified the question to the New Hampshire Supreme Court for resolution. In April of 2024 the Supreme Court of New Hampshire responded to this certified question by ruling that the common law excuse defenses remain available to a party for those supervening events that are not covered with respect to that party by a force majeure clause, unless they are expressly waived elsewhere in the contract. While the context of this case was the relatively unusual situation where a force majeure clause excused one party but not the other party with regard to a particular supervening event, the rationale of the opinion clearly extends to the more common situation where a force majeure clause does not refer to a particular supervening event with regard to either party, where under this ruling either party would then be allowed to assert a common law excuse defense with regard to that supervening event if they chose to do so. The court rejected the idea that a force majeure clause would implicitly preclude assertion of the common law excuse defenses for supervening events not covered by that clause.

There are also a few somewhat distinct but related cases in which a force majeure clause expressly excludes certain consequences of supervening events (such as the failure to meet lease or mortgage payment obligations) from being excused rather than omitting those underlying supervening events themselves that cause these failures from the scope of the clause, where the clause has been

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13. Priv. Jet Servs. Grp., LLC v. Tauck, Inc., No. 20-CV-1015-SM, 2023 WL 130724, at *3 (D.N.H. Jan. 9, 2023) (“There is no New Hampshire decision directly on point. What seems unresolved under New Hampshire common law is whether by agreeing to the Force Majeure clause as written, Tauck waived its otherwise available contract defenses. That is to say, it is not clear under New Hampshire common law whether a force majeure clause protecting just one of the parties necessarily (albeit by implication) allocates the risks of such force majeure events to the other party, thereby depriving that party of otherwise-available common law defenses, like impossibility of performance and frustration of purpose.”).

14. Id.

15. Id. at *12.


17. See id. at *4.
interpreted as precluding a party from asserting excuse defenses with regard to those failures to make those payments.\textsuperscript{18}

A force majeure clause that specifically excludes from its scope certain payment obligations that could result from any possible supervening events not covered by that clause appears to provide a somewhat stronger basis for inferring that the parties intended to preclude common law or statutory excuse defenses for those consequences than does the omission of a particular subsequent event from the clause as a basis for inferring the intent to preclude those excuse defenses with regard to the any of the consequences of that event.\textsuperscript{19} But the several cases that do draw preclusive inferences from such a payment-performance-excluding force majeure clause provide some general support for courts also drawing inferences as to the parties’ intent from the omissions of particular supervening events from force majeure clauses, inferences that could be relevant when considering either the availability or satisfaction of an element of those excuse defenses with regard to those events.\textsuperscript{20}

The proper resolution of this question as to whether a force majeure clause should be regarded as preclusive of common law or statutory excuse defenses as to subsequent events that are not within the scope of the clause may hinge on whether the force majeure clause at issue is broad enough in scope and also well-considered enough during the contract negotiations to indicate with some confidence the parties’ joint intention that the clause be regarded as the exclusive basis for asserting an excuse defense, or whether instead the particular supervening event at issue appears to not have been within the contemplation of the parties when they agreed to the force majeure clause so that no inferences as to the availability of excuse defenses relating to that event can be drawn.\textsuperscript{21}

A clear parallel exists here with the common judicial determination as to whether to imply conditional relationships between the different parties’ duties

\textsuperscript{18} See, e.g., S. Coll. St., LLC v. Charlotte Sch. Of Law, LLC, No. 18 CVS 787, 2018 WL 3830008, at *5 (N.C. Super. Ct. 2018) (detailing an example of this preclusion where the force majeure clause at issue excludes lease payment obligations from its scope, which is fairly common) (“The fact that the Lease expressly excepts CSL’s rent payment obligation from the protections of the force majeure clause precludes CSL’s argument that it is somehow excused from paying rent because it lost its license to operate a law school [under a frustration of purpose excuse defense argument].”); In re CEC Ent., Inc, 625 B.R. 344, 359–60 (Bankr. S.D. Tex. 2020) (citing approvingly the \textit{S. Coll. St., LLC} case noted above in reaching a similar conclusion regarding the preclusion of a frustration of purpose excuse defense asserted to defend against the failure to make lease payments); Wroblesky v. Hughley, 169 N.E.3d 709, 717 (Ohio Ct. App. 2021) (citing approvingly the \textit{S. Coll. St., LLC} case noted above in reaching a similar conclusion regarding the preclusion of a frustration of purpose excuse defense asserted to defend against the failure to make lease payments). See generally Andrew C. Smith et al., \textit{Tour de Force: The Impact of a Force Majeure Clause (or Lack Thereof) on Other Excuse Doctrines}, PILLSBURY WINTHROP SHAW PITTMAN LLP (Aug. 24, 2020). There is some controversy regarding whether such preclusion should extend beyond the impossibility and impracticability defenses to also preclude the frustration of purpose defense. See Schwartz, \textit{supra} note 4, at 1808–09; West, \textit{supra} note 4.

\textsuperscript{19} See Wroblesky, 169 N.E.3d at 717.


\textsuperscript{21} Or when, as is common in practice, the parties simply include a boilerplate force majeure clause in their contract without giving close consideration to its scope. Andrew A. Schwartz, \textit{Contracts and COVID-19}, 73 STAN. L. REV. 48, 55 (2020).
under a contract. The general judicial practice since the seminal English case *Kingston v. Preston* is to imply, as a matter of law, such conditional relationships across the various duties shouldered by the parties when the contract is silent as to whether the parties each intend their duties to be conditional on the other party’s performance, or instead unconditional and absolute without regard to the other party’s performance when no other sufficient evidence of the parties’ intent is available. This implication of a conditional relationship across duties is consistent with the almost universal and often unspoken understanding of the parties to a contract that their obligations are conditional on the other party performing their obligations, unless otherwise agreed. But if in a contract the parties make a significant proportion of their duties expressly conditional on the other party’s performance, but do not do so for some of their other duties, the court may draw the opposite inference that since the parties knew how to and chose to make some of their duties conditional, but not others, their intent is to have those remaining duties be unconditional and absolute, precluding a failure of condition defense to allegations of nonperformance of those duties. In similar fashion, a broad force majeure clause, particularly if there is evidence that its terms were specifically negotiated by the parties, may suggest that it was intended to be preclusive and that the parties do not want to allow common law or statutory excuse defenses to be asserted with regard to supervening events that are outside the scope of that broad clause, although at least one court has ruled that a force majeure clause is not preclusive of the assertion of common law excuse defenses with regard to supervening events that are not listed in that clause, unless there is an express waiver of those defenses elsewhere in the contract.

As I have also noted above, a court may instead conclude the fact that a supervening event is left outside of the scope of a force majeure clause does not show that the parties intended to preclude excuse defenses based upon that event, but instead simply reflects the fact that the event was unexpected and perhaps not even reasonably foreseeable by either party when the contract was entered into. This conclusion by a court would to some extent support allowing the assertion of an excuse defense by a party adversely impacted by the event, satisfying the threshold element of the defenses rather than precluding the assertion of such a defense.

Now, I have not found any cases where courts have explicitly recognized the exclusion of a supervening event from the scope of a force majeure clause as not

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23. Court of King’s Bench, 2 Doug. 689, 689-691 (1773).
25. *See* RESTATEMENT (SECOND) OF CONTS. ch. 9, topic 5, intro. note.
only allowing for the assertion of an excuse defense related to that event but also as providing evidence relevant to a subsequent excuse defense inquiry that the parties regarded the event as unexpected or even unforeseeable. But I suspect that, at least in some instances, courts have implicitly drawn this inference from the exclusion of a particular supervening event from the scope of a broadly drafted force majeure clause and thereby assessed the assertion of excuse defenses based on that event a bit more favorably, at least with regard to the threshold element that the event be unexpected.

Finally, a court may choose to regard a particular force majeure clause as not justifying either of the above inferences with regard to either the availability or the merits of excuse defenses that are based upon subsequent events that are outside of the scope of that clause, but instead may treat the clause as irrelevant to the assessment of any excuse defenses asserted with regard to such events. Such a conclusion as to the intent of the parties would certainly make sense if there was evidence that the parties had regarded the force majeure clause as standard and uncontroversial contractual boilerplate that did not justify meaningful discussion and negotiation. The court would then simply evaluate any common law or statutory excuse defenses that were asserted based on such an event without regard to the force majeure clause.

So what is the best judicial approach here? What approach most closely conforms to established contract interpretation principles, accounting for the desire for accurate determination and implementation of the parties’ intent as well as judicial efficiency concerns?

MY RECOMMENDATIONS

I would like to briefly consider three possible judicial approaches to this question: one being the application of a very simple bright line rule, the second involving a more nuanced and searching inquiry into the intent of the parties as to the desired effect of the force majeure clause, and a third intermediate approach involving a rebuttable presumption as to the parties’ intent with regards to the clause. Each of these approaches has its advantages and disadvantages.

As a possible bright line rule approach, I would suggest that courts simply continue to construe force majeure clauses narrowly, and ignore the presence of the force majeure clause with regard to supervening events that are determined to be outside of its scope, and then evaluate any common law or statutory excuse defenses that are asserted with regard to those supervening events by the usual criteria unless the clause specifically states that some or all excuse defenses are precluded for those particular events. In other words, the default rule would be that courts would draw no inferences one way or the other from the force majeure clause as to whether the parties intended that excuse defenses based on

32. Which appears to be the most common current judicial practice. See id. at 278.
33. See RESTATEMENT (SECOND) OF CONTS. §§ 261–65; U.C.C. § 2-615.
supervening events outside of its scope should be allowed, or instead precluded, or as to why they excluded certain events from the clause, unless the clause specifically states that it is intended to be preclusive of some or all excuse defenses as to those events outside of its scope. Courts would simply proceed to evaluate the merits of any asserted excuse defenses with regard to those events as though the force majeure clause was not present.\footnote{See id. I do not recommend the opposite bright line default rule—that force majeure clauses should be regarded as preclusive of excuse defenses with regard to events not covered unless the clause specifically states otherwise—because I think that most parties would not favor this interpretation of their force majeure clause and would then have the burden of contracting around this rule to achieve their different intent. The bright line rule that I recommend as one option appears to me to be more in line with what the majority of parties would intend, and would therefore burden fewer parties with having to contract around the rule than the opposite bright line rule would.}

The more nuanced approach would involve a consideration of the scope of the particular force majeure clause involved; an investigation of the circumstances of its preparation and adoption, and of the foreseeability and perceived likelihood at the time of contracting of the particular supervening event at issue; a consideration of the other terms of the contract that may relate in some way to excusing nonperformance; and a consideration of any other relevant extrinsic evidence that might shed light on the intention of the parties with regard to allowing some or all excuse defenses for disruptions arising from supervening events that are not covered by that clause, or as to why the event at issue was excluded from the scope of the clause. The court might also choose to take a contra proferentem approach and therefore construe any ambiguous language in the force majeure clause against its drafter and in favor of the other parties to the contract if one party was primarily responsible for drafting the clause. The court would then draw the appropriate inferences from that investigation as to the intent of the parties as to that clause and proceed accordingly.

The bright line rule approach has the obvious advantage over the more nuanced approach for greater ease of judicial application, and increased clarity and predictability for future contracting parties about the availability of all of the excuse defenses for supervening events that are not included in their force majeure clause. It has, of course, the disadvantage of possibly not reflecting the joint intention of parties that may have wanted to have their force majeure clause to be preclusive of some or all excuse defenses for disruptions arising from supervening events that are not covered by that clause, nor would it clarify the extent to which the parties thought that the particular subsequent event might occur for the purpose of determining whether the threshold requirement of the excuse defenses has been satisfied. This more nuanced approach might, in some instances, better conform to the joint intention of the parties, but it would require a sometimes difficult (and perhaps also expensive and possibly fruitless) effort to unearth probative evidence of the parties’ joint intent.

Between these two polar options I personally favor the simpler bright line rule approach: first because of its much greater ease of judicial application, and second because contracting parties can then draft their force majeure clauses as broadly or narrowly as they wish with the guidance of this clear rule of interpretation as to the clauses’ inapplicability to exclude supervening events in
mind. The more nuanced approach would often be more difficult for judges to apply and would also provide less certainty for future contracting parties as to the availability of common law or statutory excuse defenses with regard to the consequences of unprovided-for supervening events. Now I am not usually a fan of simple bright line rules of law, which are often either over- or under-inclusive, or both, as opposed to broader and more flexible standards that enable courts to more easily incorporate principles of fairness and justice into their rulings. But I believe in this particular instance as to these two polar alternatives addressing the question of the availability of common law or statutory excuse defenses for supervening events that fall outside of the scope of a contractual force majeure clause, the balance of advantages clearly favors the use of a bright line rule that would allow an assertion of excuse defenses with regard to the consequences of those events without regard to the force majeure clause that does not include them, as compared to an exhaustive inquiry into the intent of the parties.

But there is a third possible approach that I think may be on balance better than either of those two polar options. This would be the courts applying the rebuttable presumption that for any supervening events that are outside of the scope of the force majeure clause the parties have intended to allow the assertion of all common law or statutory excuse defenses with regard to their consequences, and that they also do not wish to have the language of the clause bear upon the evaluation of any asserted excuse defenses with regard to those events. This assumption could then be rebutted by sufficient evidence that the parties had a different joint intent. A court could then “adjust the dial,” so to speak, with regard to the strength of this presumption that would have to be overcome to regard the force majeure clause as preclusive of excuse defenses for the consequences of unprovided-for supervening events, or to be used for interpretive guidance with regard to the parties’ expectations as to the likelihood of those events.

With a very strong presumption, this approach would become similar to the bright line rule approach discussed above. With a very weak presumption, this approach would become similar to the more in-depth inquiry into the parties’ intent as discussed above. Each judge or jurisdiction could choose how difficult to make it to overcome this presumption, how convincing the evidence as to the parties’ intent would have to be to have the force majeure clause be regarded as preclusive of common law or statutory excuse defenses for unprovided-for supervening events, or at least to have the clause used to help determine the parties’ expectations as to the likelihood of the event at issue. Such a “tailored” approach to this question allows for both judicial and jurisdictional flexibility, and might provide the optimal balance among the sometimes competing goals of accuracy in reflecting the parties’ joint intent, predictability of results for guiding future contracting parties, and ease in judicial determinations.