

FOR THE MARITIME LAW ASSOCIATION'S CARRIAGE OF GOODS AND MARINE INSURANCE COMMITTEES

April 2020

I. COVID-19: WITH FOULED LANDS AND SEAS, WILL FORCE MAJEURE SHIELD SUPPLY, LOGISTICS AND TRANSPORTATION CHAINS

A. Introduction

A mysterious illness that causes pneumonia-like symptoms originating in a small food market in China. The cause of the illness, COVID-19, is a new or “novel” strain of the coronavirus, which is a family of viruses that includes the common cold. With no known cure or vaccination, the virus is rapidly spreading across the globe with impunity. Now classified as a pandemic, the virus causes millions of people to be incapacitated and claims the lives of the young and old, in wealthy and poor countries alike.

To mitigate the rate of the virus’s spread, governments issue travel restrictions and bans, mandate social distancing, require hundreds of millions of people to stay at home, and order closure of all but a few essential businesses. While initially a choke of the supply side, the spread of the virus has created a significant decrease in demand. As transportation and logistics are the “economies in motion,” the dramatically slowed world economies have caused breaks in, and unprecedented challenges to, the transportation and logistics chains.

The initial focus of this paper is to provide some background about the virus and identify the state of it from a human and economic perspective. The paper then shifts to the virus’s dramatic impact on the supply and logistics chains, with a peek at issues the transportation industry is likely to face after the first wave of the pandemic abates. The third section of the paper explores the application of *force majeure*, with guidance on a rubric to consider when providing counsel to those unable to meet their contractual commitments.

The Association and Committees acknowledge and thank our Young Lawyer presenters, Kristina Prete, Kristi Thompson, and Sara Kuebel for their significant contributions.

II. COVID-19’S PATHOGENIS

A. Background

On March 11, 2020, the World Health Organization (WHO) announced that the novel coronavirus can be characterized as a pandemic with the infection rate on the rise both nationally and internationally.¹ But what is a pandemic and how is it different from an epidemic? Simply, an epidemic is defined as a rise in the number of cases of a disease beyond what is normally expected

¹ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, WhiteHouse.gov, March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

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in a geographical area.²

A pandemic is a disease that has spread across many countries and affects a large number of people.³ Thus, given the ease of modern travel, it seems future epidemics can be expected to morph into pandemics.

B. What's in a Name

COVID-19 is an abbreviation for the disease “coronavirus disease 2019,”⁴ having been provisionally named 2019-nCoV when it emerged sometime in early December 2019 in mainland China.⁵

Coronaviruses derive their name from the fact that “under electron microscopic examination, each virion is surrounded by a “‘corona,’ or halo” due to the presence of “viral spike peplomers emanating from each proteinaceous envelope.”⁶ (“Corona” the Latin word “coronam” for crown.)

Some of the most common and challenging diseases are caused by coronaviruses.⁷ Coronaviruses are a “large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats.”⁸ One of the viruses that ‘causes the common cold is a coronavirus.⁹ Both the Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS) were also caused by coronaviruses.¹⁰ SARS-CoV-2 is the coronavirus that causes COVID-19.¹¹ SARS-CoV-2 is a beta coronavirus, like MERS-CoV and SARS-CoV, all of which originate in bats.¹²

C. Importance of Basic Hygiene

Like many respiratory viruses, COVID-19 can spread in tiny droplets released from the nose and mouth of an infected person as they sneeze or cough, which can produce up to 3,000

² What's the Difference Between an Epidemic and Pandemic?, U.S. News, March 13, 2020, <https://health.usnews.com/conditions/articles/whats-the-difference-between-an-epidemic-and-pandemic>

³ *Id.*

⁴ *Id.*

⁵ The global fight against coronavirus, BBC, February 10, 2020, <https://www.bbc.com/future/article/20200210-coronavirus-finding-a-cure-to-fight-the-symptoms>

⁶ Middle East Respiratory Syndrome (MERS), Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/mers/photos.html>

⁷ The global fight against coronavirus, BBC, February 10, 2020, <https://www.bbc.com/future/article/20200210-coronavirus-finding-a-cure-to-fight-the-symptoms>

⁸ Situation Summary, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

⁹ The global fight against coronavirus, BBC, February 10, 2020, <https://www.bbc.com/future/article/20200210-coronavirus-finding-a-cure-to-fight-the-symptoms>

¹⁰ *Id.*

¹¹ Coronavirus: Will hot drinks protect you from Covid-19?, BBC, April 3, 2020, <https://www.bbc.com/future/article/20200403-coronavirus-will-hot-drinks-protect-you-from-covid-19>

¹² Situation Summary, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

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droplets in a single cough.¹³ The majority of particles are projected onto surfaces up to six feet away (think social distancing), but some smaller particles can become aerosolized and remain airborne¹⁴ (think wearing a mask). More importantly, anyone not washing hands thoroughly after visiting the bathroom could contaminate objects subsequently touched¹⁵ because there is some evidence that the gastrointestinal tract may shed the virus and fecal-oral transmission may be possible.¹⁶

Although the CDC says that someone who touches their face after touching a contaminated surface is not thought to be the main method of transmission, the CDC and other authorities emphasize that both hand washing and frequent disinfection of touched surfaces are key to preventing the spread of the virus.¹⁷

COVID-19 can be mild to severe, with the most prevalent severe illness occurring in older adults.¹⁸ Infection is estimated to have an average incubation period of five days and commonly causes fever, cough, myalgia, and pneumonia.¹⁹

III. COVID-19'S HUMAN TOLL

On January 5, 2020, the WHO publicly acknowledged pneumonia of unknown cause in Wuhan City, China.²⁰ In mid-January, cases were reported in Thailand and Japan,²¹ and days later in Washington, the first travel-related case was announced.²² Just 45 days later, China confirmed over 75,000 cases including 2,666 deaths.²³ By March 30, more than 175 countries and territories had reported cases of COVID-19.²⁴

With rapid spread domestically, President Trump declared a National Emergency on March 1 due to the extent of COVID-19 outbreak in the United States. One month after that declaration, the CDC reported 239,279 cases within the United States.

As of April 5, 2020, the WHO reported 1,133,758 confirmed global cases and 62,784

¹³ Covid-19: How long does the coronavirus last on surfaces?, BBC, March 17, 2020, <https://www.bbc.com/future/article/20200317-covid-19-how-long-does-the-coronavirus-last-on-surfaces>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Characteristics of pediatric SARS-CoV-2 infection and potential evidence for persistent fecal viral shedding, *naturemedicine*, March 13, 2020, <https://www.nature.com/articles/s41591-020-0817-4#ref-CR10>

¹⁷ Covid-19: How long does the coronavirus last on surfaces?, BBC, March 17, 2020, <https://www.bbc.com/future/article/20200317-covid-19-how-long-does-the-coronavirus-last-on-surfaces>

¹⁸ Situation Summary, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

¹⁹ Characteristics of pediatric SARS-CoV-2 infection and potential evidence for persistent fecal viral shedding, *naturemedicine*, March 13, 2020, <https://www.nature.com/articles/s41591-020-0817-4#ref-CR10>

²⁰ The federal government's coronavirus response, *Brookings*, March 31, 2020,

<https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>

²¹ *Id.*

²² *Id.*

²³ Characteristics of pediatric SARS-CoV-2 infection and potential evidence for persistent fecal viral shedding, *naturemedicine*, March 13, 2020, <https://www.nature.com/articles/s41591-020-0817-4#ref-CR10>

²⁴ Characteristics of pediatric SARS-CoV-2 infection and potential evidence for persistent fecal viral shedding, *naturemedicine*, March 13, 2020, <https://www.nature.com/articles/s41591-020-0817-4#ref-CR10>

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confirmed global deaths.²⁵

As of April 8, the U.S. death toll was up to 14,817.²⁶ As of April 12, Wyoming was the last remaining state to have no COVID-19 fatalities²⁷ but just a day later, even that rural state reported its first COVID-19-related death, marking the latest grim milestone that COVID-19 has killed at least one person in all fifty states.²⁸

As of April 13, the number of U.S. cases has exceeded a half-million people with the domestic death toll passing 21,000.²⁹

As COVID-19 makes its way through society, the number of reported cases and fatalities both nationally and internationally continue to increase. Nevertheless, consideration of the human impact from past significant events in recent history provides some perspective.

The most severe pandemic in recent history was the 1918-1919 Spanish flu, aka “H1N1.”³⁰ The Spanish flu was a human influenza virus that was able to infect and replicate in pigs (swine) - the reason for the nickname “swine flu” for H1N1.³¹ An estimated 500 million people - one third of the world population at the time - were infected.³² The CDC estimated that there were at least 50 million fatalities from that pandemic, with about 675,000 of those being in the United States.³³

World War II caused approximately 25 million battle-related hospitalizations and roughly 418,500 American casualties.³⁴ The entire 20 year Vietnam War conflict claimed about 58,220 American lives.³⁵

The terrorist attack of September 11, 2001 claimed 2,752 souls.³⁶

From 2009 to 2010, H1N1 resurfaced but was not as fatal as it was 90 years prior. The

²⁵ Coronavirus disease 2019 (COVID-19) Situation Report – 76, World Health Organization, April 5, 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200405-sitrep-76-covid-19.pdf?sfvrsn=6ecf0977_2

²⁶ How the Coronavirus Death Toll Compares to Other Deadly Events from American History, Time, April 9, 2020, <https://time.com/5815367/coronavirus-deaths-comparison/>

²⁷ See Coronavirus has killed at least one person in all 50 states: Wyoming reports first death, USA Today, April 14, 2020, <https://www.usatoday.com/story/news/nation/2020/04/13/coronavirus-wyoming-first-death-last-state-mark-gordon/2987542001/>

²⁸ *Id.*

²⁹ Coronavirus Disease 2019 (COVID-19) Cases in U.S., CDC, updated April 13, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

³⁰ 1918 Pandemic (H1N1 virus), CDC, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>

³¹ 1918 Flu Resulted in Current Lineage Of H1N1 Swine Influenza Viruses, ScienceDaily, May 1, 2009, <https://www.sciencedaily.com/releases/2009/04/090430111640.htm>

³² 1918 Pandemic (H1N1 virus), CDC, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>

³³ *Id.*

³⁴ Research Starters: Worldwide Deaths in World War II, The National WWII Museum, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-startersworldwide-deaths-world-war>

³⁵ Vietnam War U.S. Military Fatal Casualty Statistics, National Archives, <https://www.archives.gov/research/military/vietnam-war/casualty-statistics>

³⁶ September 11: Photos of the Worst Terrorist Attack U.S. Soil, History, <https://www.history.com/news/september-11-attacks-photos>

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CDC estimates that there were anywhere between 151,700 and 575,400 global deaths from H1N1 during those years, with 80 percent of those occurring in people under the age of 65.³⁷ The H1N1 pandemic caused about 12,000 deaths in the United States.³⁸

COVID-19 is projected to cause more deaths in the U.S. than any other pandemic, save for the Spanish flu 100 years ago.³⁹ As well, COVID-19 is slated to claim more U.S. lives than those from any war or armed conflicts, save our Civil War and World War II.⁴⁰ It is no wonder we have declared war on this insidious and largely invisible invader.⁴¹

IV. FINANCIAL IMPLICATIONS OF COVID-19

COVID-19 has and will continue to have a major effect on the United States economy. To date, the White House and Congress have issued three tranches of emergency spending bills and financial and tax relief packages.

March 6, 2020- President Trump signed an \$8.3 billion emergency spending bill⁴² called phase one of stimulus efforts.

March 13, 2020- A State of Emergency was declared releasing up as much as \$50 billion to state and local governments.⁴³

March 18, 2020- Phase two of stimulus, provides an estimated \$100 billion extension of paid leave to workers and tax credits to employers.⁴⁴

March 27, 2020- Phase three "CARES" act stimulus of \$2.2 trillion in cash payments, federal lending, and small business loans with elements for forgiveness in exchange for employment commitments.⁴⁵ This includes \$200 billion to transportation and entertainment related entities.⁴⁶

³⁷ 2009 H1N1 Pandemic (H1N1pdm09 virus), Centers for Disease Control and Prevention, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html>

³⁸ *Id.*

³⁹ How the Coronavirus Death Toll Compares to Other Deadly Events From American History, Time, April 9, 2020, <https://time.com/5815367/coronavirus-deaths-comparison/>

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² Where That \$8.3 Billion In U.S. Coronavirus Funding Will And Won't Go, NPR, March 6, 2020, <https://www.npr.org/sections/health-shots/2020/03/06/812964894/where-that-8-3-billion-in-u-s-coronavirus-funding-will-and-wont-go>

⁴³ President Trump Declares National Emergency As Coronavirus Pandemic Grows, NPR, March 13, 2020, <https://www.npr.org/2020/03/13/815420295/trump-to-discuss-coronavirus-amid-growing-crisis-scrutiny-of-his-response>

⁴⁴ McConnell Vows Senate Will Work At 'Warp Speed' And Won't Leave Washington Until Deal is Passed, Kaiser Health News, March 18, 2020, <https://khn.org/morning-breakout/mcconnell-vows-senate-will-work-at-warp-speed-and-wont-leave-washington-until-deal-is-passed/>

⁴⁵ House passes historic \$2 trillion coronavirus economic rescue bill, TechCrunch, March 27, 2020, <https://techcrunch.com/2020/03/27/cares-act-stimulus-package-covid-19/>

⁴⁶ Congress and White House agree on relief bill aimed at boosting the economy during the COVID-19 crisis, KSN, March 25, 2020, <https://www.ksn.com/news/health/coronavirus/congress-and-white-house-agree-on-relief-bill-aimed-at-boosting-the-economy-during-the-covid-19-crisis/>

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TBA- Phase four federal relief in excess of \$2 trillion related to infrastructure is under discussion.⁴⁷

This is apart from state and federal government financial relief programs.

Meanwhile, within the past few months, the Federal Reserve has reduced the federal funds rate from 1.75% to 0.25%, with a current target rate as low as 0%.⁴⁸ Interest free credit has become the norm to allow the American people to borrow money for present housing and other necessities while the economy is frozen. However, borrowing on existing fixed-rate credit and stay-at-home orders will result in increased consumer debt and likely result in increased consumer bankruptcies starting in late 2020.

A rush of commercial bankruptcies is not anticipated over the coming weeks because of the current limited access to the courts⁴⁹ and because of standstill action by local governments. Therefore, although such bankruptcies are virtually inevitable in the current economic climate, there will be a quiet before the storm.

V. INFRASTRUCTURE OPPORTUNITIES

Among the most essential workers right now are not only those working in hospitals and grocery stores but also those working to deliver packages, keep water running, and ensure electronic data transmission.⁵⁰ This crisis offers a rare opportunity to jumpstart long-term infrastructure careers for millions of prospective workers nationally.⁵¹ “Just as our infrastructure systems require generational investment, so too do our infrastructure workers. Hiring, training, and retaining a new generation of infrastructure workers will help drive our recovery and create a strong, more resilient infrastructure system for the future.”⁵² This may be a happenstantial ray of light to an otherwise dark and stormy period.

VI. TRANSMISSION OF COVID-19 FROM INANIMATE OBJECTS

COVID-19 is capable of surviving on surfaces and thus remains infectious on inanimate objects. There are multiple factors that impact the survival of the virus on surfaces, including the type of material and its temperature along with other associated environmental conditions,⁵³ with

⁴⁷ Phase 4 Coronavirus Infrastructure Spending To Start At \$2 Trillion, Forbes, March 31, 2020, <https://www.forbes.com/sites/waynecrews/2020/03/31/phase-4-coronavirus-infrastructure-spending-to-start-at-2-trillion/#5c6a20cc7099>

⁴⁸ Open Market Operations, Federal Reserve, <https://www.federalreserve.gov/monetarypolicy/openmarket.htm>

⁴⁹ Will COVID-19 cause a flurry of bankruptcies?, WWL, March 27, 2020, <https://wwl.radio.com/articles/will-covid-19-cause-a-flurry-of-bankruptcies>

⁵⁰ COVID-19 is a chance to invest in our essential infrastructure workforce, Brookings, April 7, 2020, <https://www.brookings.edu/blog/the-avenue/2020/04/07/covid-19-is-a-chance-to-invest-in-our-essential-infrastructure-workforce/>

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Can you get infected with COVID-19 from imported Chinese products?, China.org.cn, March 26, 2020, http://www.china.org.cn/opinion/2020-03/26/content_75863072.htm

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consistent cool temperature, lack of UV exposure, and significant humidity fostering its viability.⁵⁴

On steel, COVID-19 can survive for 48 to 72 hours, whereas the virus can only last on copper for only 4 hours.⁵⁵ So, your old pennies will be safe after just a few hours. The virus can survive on cardboard for 24 hours and on plastic for anywhere from 48 to 72 hours.⁵⁶ “In general, because of poor survivability of these coronaviruses on surfaces, there is likely very low risk of spread from food products or packaging.”⁵⁷

According to the CDC, “[a]lthough the virus can survive for a short period on some surfaces, it is unlikely to be spread from products or packaging that are shipping over a period of days or weeks at ambient temperatures.”⁵⁸ There is currently no evidence to support transmission associated with imported goods and there also has not been any cases of the virus in the United States associated with imported goods.⁵⁹ In fact, between March 14 and April 11, there was a 27% increase for shipping 40-foot containers from China to the North American West Coast.⁶⁰ “Maritime shipping rates increasing from China to North America are a direct result of the imbalance between supply and demand for container shipping capacity.”⁶¹

Because of a combination of high occupant density and metal surfaces and controlled temperatures, the airline industry is being crushed by a huge drop in travel.⁶² The industry might be able to last a few months like this or maybe just a few weeks before it is crippled and tens of thousands of workers are laid off or furloughed.⁶³ Airports and airlines are nearly empty; many flights that have not been canceled carry fewer than a dozen passengers.⁶⁴ On March 24, the TSA screened only 331,000 people nationwide, compared to more than 2.4 million on the same day in 2019, an 86 percent drop.⁶⁵ Cruise lines are also shutting down or scaling back by laying off employees and Amtrak has lost tens of thousands of riders.⁶⁶

As to ocean cargo, goods often pass through unstable outdoor temperatures and

⁵⁴ Will COVID-19 cause a flurry of bankruptcies?, WWL, March 27, 2020, <https://wwl.radio.com/articles/willcovid-19-cause-a-flurry-of-bankruptcies>

⁵⁵ Here's How Long Coronavirus Lasts on Surfaces. But does it really matter?, NBC 10 Philadelphia, March 26, 2020, Updated March 28, 2020, <https://www.nbcphiladelphia.com/news/coronavirus/heres-how-long-coronaviruslasts-on-surfaces-and-in-the-air-but-does-it-really-matter/2341502/>

⁵⁶ *Id.*

⁵⁷ Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Could maritime rate increase from China signal recovery for domestic trucking?, Freight Waves, April 11, 2020, <https://www.freightwaves.com/news/could-maritime-rate-increase-from-china-signal-recovery-for-domestic-trucking>

⁶¹ *Id.*

⁶² With Transportation Industry In Trouble, Workers Wait For Federal Aid Package, NPR, March 24, 2020, <https://www.npr.org/2020/03/24/820543004/transportation-industry-warns-coronavirus-has-hurt-its-bottom-line>

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

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environments that reduce the chances of the virus's survival.⁶⁷ It is reported that such a combination of conditions is not likely in shipments by sea.⁶⁸

At least physical transmission of COVID-19 via surfaces of imported goods is thought not to be a reason for freezing of the cargo supply chain. Nevertheless, the impacts on the transportation and logistics chains have been dramatic.

VII. TRANSPORTATION AND SUPPLY CHAINS- THE FREEZE, THE THAW AND THE FLOOD

A. The Freeze

1. China on Lockdown

As the Chinese New Year holiday period drew to a close in late January 2020, instead of production ramping up in the typical post-holiday annual fashion, the Chinese government shut down transportation and borders between its cities and towns to stop the spread of the novel coronavirus which was gripping the country. Millions of migrant workers, a primary source of labor for Chinese factories, who had traveled hundreds of miles from their work sites to attend holiday celebrations, were unable to return to work. Consumer demand within China was falling. Factories, which were already experiencing a slowdown due to the extended holiday period, were shuttered for weeks longer than anticipated as COVID-19 took its toll. The affect was a dramatic slowdown in China's economy, especially the manufacturing sector. This slowdown would foreshadow the forthcoming global recession set in motion by the decrease in consumer demand and manufacturing output as the coronavirus spread around the world.⁶⁹

As China went into lockdown, in the month of February Chinese manufacturing indexes and export volumes reflected the strain. According to data published by Haver Analytics, the purchasing managers' index (PMI) for manufacturing output from China showed a huge decrease in output in the month of February. The PMI fell to a record low of 35%, down from 50% in January.⁷⁰

⁶⁷ See Can you get infected with COVID-19 from imported Chinese products?, China.org.cn, March 26, 2020, http://www.china.org.cn/opinion/2020-03/26/content_75863072.htm

⁶⁸ See *id.*

⁶⁹ Emily Feng, *Coronavirus is Shuttering Factories – And Affecting Global Manufacturing*, NPR.org (Feb. 14, 2020), <https://www.npr.org/2020/02/14/806155636/coronavirus-is-shuttering-chinese-factories-and-affecting-global-manufacturing>.

⁷⁰ Robert Brusca, *China's PMI Spurt ... Is It Over Already? Hardly*, Haver Analytics (Mar. 31, 2020), <http://www.haver.com/comment/comment.html?c=200331D.html>.

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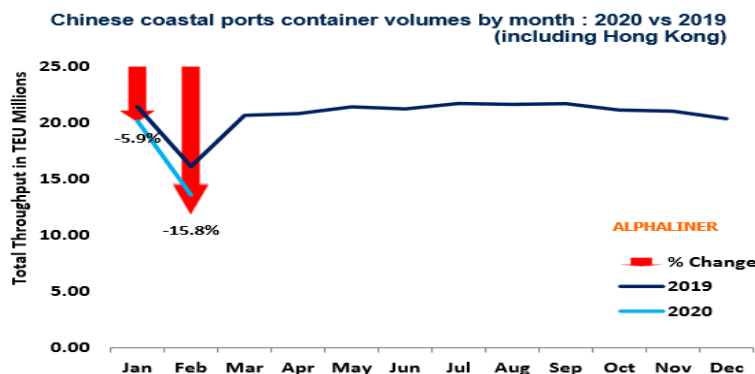


Source: Haver Analytics.

Note: Index for China is a simple average of the PMI provided by Caixin and the National Bureau of Statistics.

This was the lowest rate on record, and well below the 50-point mark that separates monthly growth from contraction. The sub-index of manufacturing production looked even bleaker, at 27%, while a reading of new orders was also under 30%.⁷¹ The Chinese economy was poised for one of the biggest contractions since the 1990s.⁷²

A freeze in the Chinese economy was also reflected in overall decreased import and export volumes to/from China. For the month of February, throughput volumes at China's coastal ports was down nearly 16%.⁷³



As the freeze spread abroad, overseas orders fell sharply. A report published in late April by the China National Textile and Apparel Council showed a decline in production orders in this important manufacturing sector. Only 9% of manufacturers were receiving 80% or more of their normal export orders, and more than 61% said orders were less than half of their normal amounts. Textile and apparel imports to the United States from China plunged 31.7% to \$2.47 billion in

⁷¹ China factory activity shrank at its fastest rate on record in February, CNBC.com (Feb. 28, 2020), <https://www.cnbc.com/2020/02/29/china-pmi-factory-activity-shrank-at-fastest-rate-on-record-in-february.html>.

⁷² *Id.*

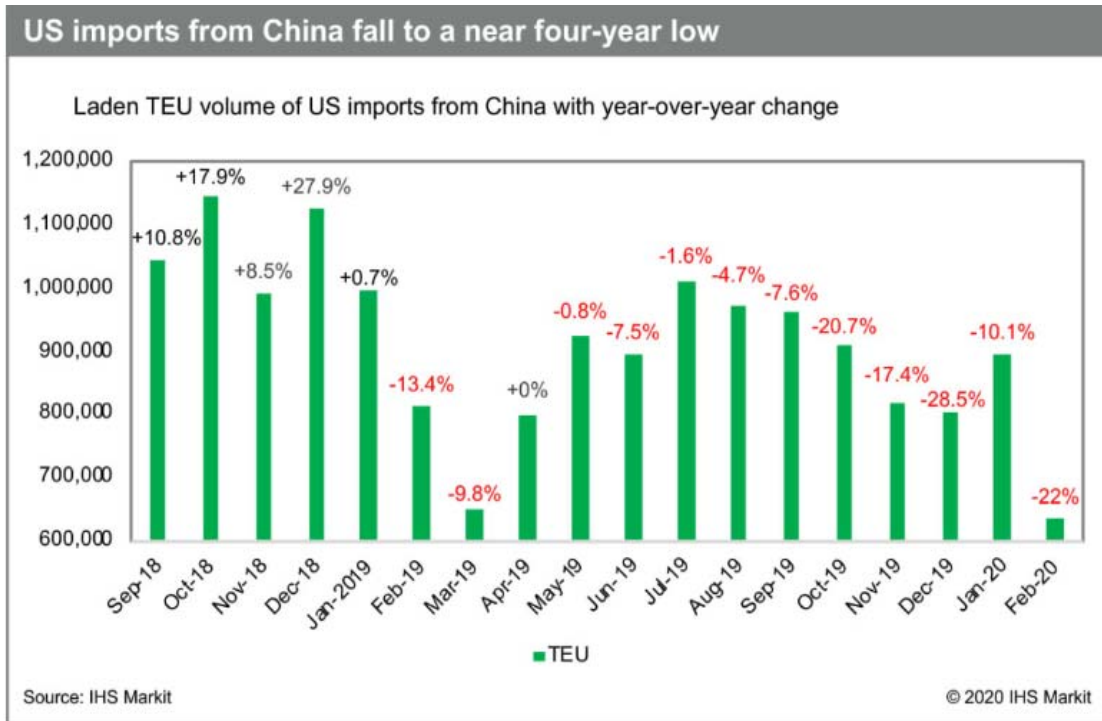
⁷³ Chinese ports lose 10.1% of their volumes in last two months, AlphaLiner, Weekly Newsletter. Vol. 2020, Issue 12 (Mar. 25, 2020), www.alphaliner.com.

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January.⁷⁴ Overall U.S. imports from China and Asia hit 3- and 4-year lows in February as well. As shown in Figure 1, U.S. imports from China were down 22% compared to February 2019. Meanwhile, as shown in Figure 2, total imports to the U.S. from Asia were down 10.1% over February 2019.⁷⁵

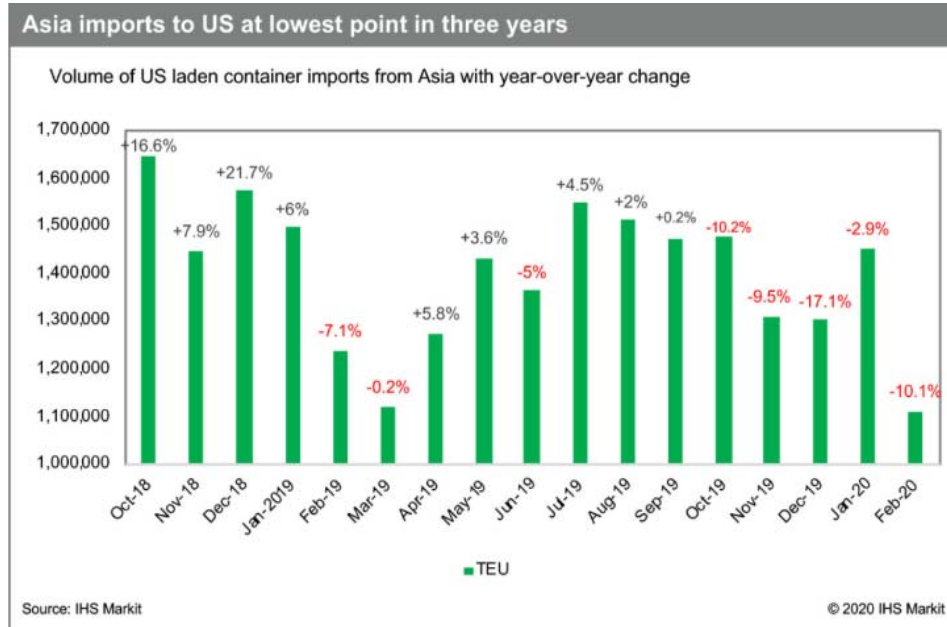
Figure 1:



⁷⁴ Samantha McDonald, *China's Exports Take a Hit as the Country Faces and New Wave of Coronavirus Cases*, Footwear News (Apr. 6, 2020), <https://footwearnews.com/2020/business/manufacturing/china-exports-factory-coronavirus-cases-1202961678/>.

⁷⁵ Bill Mongelluzzo, *US imports from China crash to near-four-year low*, Journal of Commerce (Mar. 12, 2020), https://www.joc.com/maritime-news/container-lines/us-imports-china-crash-near-four-year-low_20200312.html.

Figure 2:



The American economy began to feel the pain of the coronavirus weeks before the first states starting issuing stay at home orders and shuttering retail businesses and restaurants. Looking at the throughput volumes in the Ports of Long Beach and Los Angeles, which is the largest port complex in the U.S. and which is heavily exposed to China/Asia trades, the signs of the devastation to come were evident. The Port of Long Beach reported a 17.9% decline in import volumes during February, and the Port of Los Angeles was hit even harder, with import volumes down by 22.5% year over year.⁷⁶

B. Ripple Effects

As manufacturing in China fell in late January and February, so too did the price of oil, spurred on by lower consumption and a glut on the market due to a price war between Saudi-Arabia and Russia. In early March, VLSFO in the bunkering hub of Singapore was assessed at \$418 per metric ton by the Oil Price Information Service (OPIS), down 43% from OPIS' Jan. 8 assessment of \$740/metric ton. The VLSFO market in Rotterdam was pegged at \$392.50/metric ton, down 33% from early January, while New York was assessed at \$462.50/metric ton, a decline of 28% over the past two months, according to OPIS data.⁷⁷

According to IHS Markit, world demand for oil in the first quarter of 2020 “will decline by the largest volume in history — even exceeding the declines during the 2009 financial crisis [...] Owing to the unprecedented stoppage of Chinese economic activity in February and the spread of the coronavirus disease 2019 (COVID-19) outside of China, we estimate that world oil

⁷⁶ Mark Bocchetti, *US ports did better with exports than imports as virus spread*, Roll Call (Mar. 20, 2020), <https://www.rollcall.com/2020/03/20/us-ports-did-better-with-exports-than-imports-as-virus-spread/>.

⁷⁷ Kevin Saville, Associate Managing Editor, *COVID-19 Adding Fuel to VLSFO Freefall*, Journal of Commerce (Mar 6, 2020), https://www.joc.com/maritime-news/covid-19-adding-fuel-vlsfo-freefall_20200306.html.

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demand will be 3.8 (million barrels per day) lower than a year earlier. Never before has such a quarterly drop been recorded.⁷⁸

Even while the reduction in the price of bunkers became a rare silver lining for vessel operators in the midst of a major and sudden international trade slowdown, helping to decrease overall vessel operating costs, the hit to volumes in the Asia-North America trade lanes began to take a toll on carriers. Container carriers reacted in an effort to stabilize rates by pulling capacity from the market. Combined, ocean carriers blanked over 200 sailings through March 30 to match capacity with demand.⁷⁹ All those blanked sailings resulted in a 40% capacity reduction overall on the Transpacific trades (Asia-North America) as of beginning of April.⁸⁰ Blank sailings are expected to continue beyond April, and to spread beyond the Transpacific trades to the Transatlantic and even Indian subcontinent trades, as the economies of Europe and India struggle to manage the effects of the virus. More than 250 sailings are scheduled to blank in the second quarter alone, and several high-capacity strings are being withdrawn completely: for example, the 2M alliance's AE-2 Swan service, which deploys twelve 23,000 TEU ships on the Asia-North Europe route, is being fully canceled in the second quarter.⁸¹ Many industry analysts are calling it the worst capacity crisis ever- which will result in more than 3 million TEUs – which represents nearly 30% of total capacity- becoming inactive.⁸²

Vessel capacity is not the only thing being crunched by the global economic recession. Shortages in container equipment are also being reported worldwide, due to port congestion and also spurred on by the record-setting blanked sailings, as previously discussed.⁸³ Container xChange noted the growing disruption to cargo movement, the lengthy turnaround times for cargo that is still moving and the almost complete absence of empty containers and blank sailings as the reasons for the severe shortages.⁸⁴ Now U.S. and European exporters are struggling due to the lack of empty equipment for their exports of raw materials to Asia.⁸⁵ The availability of containers in Hamburg, Rotterdam, and Antwerp in Europe, and in Long Beach and Los Angeles in the U.S., are at the lowest levels ever recorded, according to Bloomberg news.⁸⁶

⁷⁸ *Id.*

⁷⁹ *Box lines face major losses if rates fall*, Lloyd's List Daily Briefing (Apr. 7, 2020), <https://lloydslist.maritimeintelligence.informa.com/daily-briefing>.

⁸⁰ *Capacity crunch risks return of rolling and no-shows*, Lloyd's List Daily Briefing (Apr. 3, 2020), <https://lloydslist.maritimeintelligence.informa.com/daily-briefing>.

⁸¹ *Inactive containership fleet set to breach 3Mteu mark*, AlphaLiner, Weekly Newsletter. Vol. 2020, Issue 14 (Apr. 8, 2020), www.alphaliner.com.

⁸² *Id.*; Katrine Gronvald Raun, *Container sector faces its worst capacity crisis ever*, Shipping Watch (Apr. 8, 2020), <https://shippingwatch.com/carriers/Container/article12067889.ece>.

⁸³ *Blanked sailings to increase equipment shortages*, Lloyd's List Daily Briefing (Apr. 8, 2020), <https://lloydslist.maritimeintelligence.informa.com/daily-briefing>.

⁸⁴ Greg Knowler, *Coronavirus leaves Europe exporters without empty containers*, IHS Markit (Mar. 27, 2020), <https://ihsmarkit.com/research-analysis/coronavirus-leaves-europe-exporters-without-empty-containers.html>.

⁸⁵ *Id.*

⁸⁶ Jen Skerritt, *There Aren't Enough Containers to Keep World Trade Flowing*, Bloomberg News (Mar. 19, 2020), <https://www.bloomberg.com/news/articles/2020-03-18/there-aren-t-enough-containers-to-keep-world-trade-flowing>.

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C. The Thaw

Just as the spread of COVID-19 around the world has caused a wave of national lockdowns, so too will the world economy begin to reopen in waves. It will not happen all at once, and those countries who begin to rebound sooner will likely remain somewhat hamstrung by the fact that the rest of the world may be stages behind. What will the world economy recovery look like?

According to the editors of the Drewry Container Insight newsletter, with so much uncertainty in international trade at the moment, “the only thing that is certain is that 2020 will be volatile from a supply-demand perspective.” Container carriers must juggle the competing priorities of keeping capacity low while demand stays low while also being ready to spring into action to by adding capacity to the market as trade recovers in different parts of the world.⁸⁷

It is anticipated that through April and into mid-May we will see cargo from Asia continuing to move, however that cargo may not move past the retailers’ distribution centers and warehouses if the U.S. remains largely on lockdown.⁸⁸ Currently, there has not been a widespread closure of shore side warehouses due to social distancing orders or a shortage of workers. In fact, warehousing and logistics, an “essential industry” in most states, remains one of the sectors that is currently seeing a shortage of workers. It makes sense, since American consumers have continued to shop for essential items from home, that inventory is now needed at warehouses and distribution centers instead of at retailers’ brick and mortar stores. For example, Amazon recently announced they are hiring 100,000 new warehouse employees.⁸⁹ And Walmart, a growing U.S. competitor in the eCommerce space, also announced plans to hire 150,000 new employees—including full-time, part-time and temporary positions- in distribution and fulfillment centers.⁹⁰

As we have already seen, the largest carriers have pulled significant capacity from the marketplace. But they must do more than that to deal with the looming problems of congestion at destination ports and warehouses. The problem has arisen because of the ripple effect of the virus as it spread around the world: as fulfillment of orders placed during the shutdown of Chinese factories began in mid-March, the destination countries, such as those in Europe and the U.S., were experiencing their own lockdowns and fall in consumer demand. As demand for goods which may have already left the factories at origin has collapsed, these goods must now be stored somewhere until economies begin to thaw.

Container carriers are anticipating this congestion due to this volatility in supply and demand and have begun to offer solutions to their shippers to anticipate market recoveries as they occur. Most prevalent among these are staging solutions for cargo at transshipment hubs.⁹¹ MSC has launched a “suspension of transit” (SOT) program, described as a “flexible cargo service that allows shippers to pause their cargo at one of six MSC transshipment hubs until it is ready to be

⁸⁷ *Coronavirus: rationing container capacity*, Drewry’s Container Insight (Apr. 1, 2020).

⁸⁸ *Blanked sailings to increase equipment shortages*, Lloyd’s List Daily Briefing (Apr. 8, 2020), <https://lloydslist.maritimeintelligence.informa.com/daily-briefing>.

⁸⁹ Kelly McCarthy, *They’re hiring! Companies seek thousands of new employees amid the coronavirus pandemic*, ABC News (Mar. 24, 2020), <https://abcnews.go.com/Business/hiring-companies-seek-thousands-employees-amid-coronavirus-pandemic/story?id=69767851>.

⁹⁰ *Id.*

⁹¹ *Carriers take action as congestion looms*, Lloyd’s List Daily Briefing (Apr. 10, 2020).

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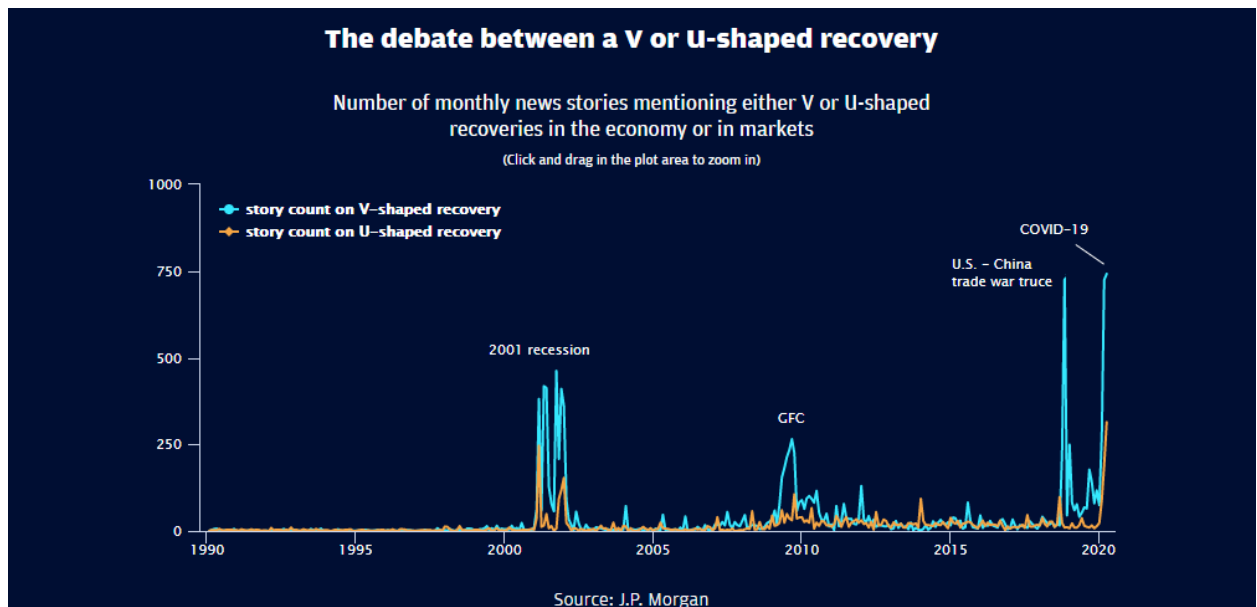
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delivered to a final destination.”⁹² Damco (the freight forwarding arm of Maersk) launched a “Cargo Rescue Program” in the U.S., intended to help ease supply chain congestion caused by the coronavirus impacts. The program includes a “Park and Save” option for customers who need short-term assistance when supply chains are congested, and a “Strip and Store” option for cargo without a functional receiving location.⁹³ The CMA CGM group announced a new delay in transit (DIT) solution similar to the MSC SOT program. Shippers can select the option at booking and plan to store/stage their cargo a predetermined transshipment port for a set period of time.⁹⁴

D. The Flood?

Economists are debating whether the recovery will be sharp and steep- a “V-Shaped” recovery- or more gradual- a “U-Shaped” recovery. According to analysts at JP Morgan, “if recoveries are equal to recessions in duration and magnitude, then the output lost in the downturn will be fully recouped during the rebound.”⁹⁵



While the spread of the virus has not yet slowed down worldwide, a few signs of recovery are starting to emerge, which predict a V-shaped recovery. For one, in China, the recovery has been swift. The PMI that was under 30 in February rebounded up close to 50% by the end of March.⁹⁶ That could mean that the economies of the U.S. and Europe are poised to see a flood of cargo in the coming months. Ocean carriers were certainly hoping so.⁹⁷ But that was before the

⁹² Ben Ames, *Freight carriers look to ease blocked flow of containers during Covid-19 disruptions*, DC Velocity (Apr. 2, 2020)

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *What Will the Recovery Look Like from the COVID-19 Recession?* JP Morgan Research (Apr. 10, 2020), <https://www.jpmorgan.com/global/research/2020-covid19-recession-recovery>.

⁹⁶ *Id.*

⁹⁷ Greg Miller, *Maersk holds out hope for a V-shaped coronavirus recovery*, American Shipper (Feb. 20, 2020), <https://www.freightwaves.com/news/maersk-holds-out-hope-for-v-shaped-coronavirus-recovery>.

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outbreak became widespread.

Despite these optimistic predictions, Sea-Intelligence warns that container volumes could still decline in 2020 overall by 17 million TEU, while ports and terminals by extension would see a throughput drop of 80 million TEU.⁹⁸ However, a strong rebound is predicted toward the end of 2020, or early 2021, driven by a combination of consumers starting to spend money again and businesses needing to not only cater to the increase in demand, but also restock inventories.⁹⁹ "From what we have been seeing over the past week, it now appears clear that we will be getting a demand-driven impact on the supply chain going forward," noted Sea-Intelligence.¹⁰⁰ "This impact is fundamentally different from the China impact, which was driven by a lack of manufacturing capacity, and the demand-driven impact will therefore be global in nature and also potentially much larger."¹⁰¹ Additionally, China's initial reaction to the virus was much different from the west, and the fact that they have an economy completely controlled by the state does not mean that the rest of the world will see the same kind of spike in productivity as lockdowns and restrictions are eased.

But while the flood may not be inevitable, one thing that many industry analysts and insiders agree on is that all players in the supply chain must be ready for the recovery, in whatever shape it comes. In commentary published on the American Shipper website, the World Shipping Council warns that all participants in the global supply chain must ensure that goods keep moving.¹⁰² "In many parts of the world, backups at warehouses, shortages of truck drivers and scheduled deliveries of goods that importers cannot sell are causing cargo owners to leave cargo at the ports. A delay or disruption in one part of the supply chain becomes a bottleneck and will trigger another delay or disruption elsewhere — ultimately affecting the movement of critical food and supplies. [...] Shipping companies are offering solutions including extended transit times, storage in transit and other innovative approaches, but at the end of the day, everyone in the supply chain must remain focused on keeping cargo moving through the ports. This issue cannot become someone else's problem. It is everyone's problem and the pain and the solutions must be shared."¹⁰³

VIII. *FORCE MAJEURE* CLAUSES IN THE FACE OF THE COVID-19 PANDEMIC

A. *Origin of Force Majeure*

A party to a contract may, under certain circumstances, be excused from performing a

⁹⁸ Greg Knowler, *Coronavirus leaves Europe exporters without empty containers*, IHS Markit (Mar. 27, 2020), <https://ihsmarkit.com/research-analysis/coronavirus-leaves-europe-exporters-without-empty-containers.html>.

⁹⁹ Greg Knowler, *Coronavirus leaves Europe exporters without empty containers*, IHS Markit (Mar. 27, 2020), <https://ihsmarkit.com/research-analysis/coronavirus-leaves-europe-exporters-without-empty-containers.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² World Shipping Council, *Commentary: Maintaining flow of goods essential during battle against COVID-19*, American Shipper (Apr. 7, 2020), <https://www.freightwaves.com/news/commentary-maintaining-flow-of-goods-essential-during-battle-against-covid-19>.

¹⁰³ World Shipping Council, *Commentary: Maintaining flow of goods essential during battle against COVID-19*, American Shipper (Apr. 7, 2020), <https://www.freightwaves.com/news/commentary-maintaining-flow-of-goods-essential-during-battle-against-covid-19>.

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contractual obligation when the failure to perform is caused by a “fortuitous event” -- *i.e.* a *force majeure* -- that rendered performance impossible. The phrase “*force majeure*,” which loosely translates to “superior force,” is taken from the French Civil Code.¹⁰⁴ Notwithstanding, the legal principle of *force majeure* dates back to the Roman Empire. In ancient Roman times, legal consequences flowed from the occurrence of a number of supervening events, including fortuitous events (*casus fortuitus*), overwhelming forces of nature (*vis major*), fatal damage (*damnum fatale*), atmospheric catastrophes (*tempestas*), and divine force (*vis divina*).¹⁰⁵ Likewise, Roman law acknowledged the concept of *impossibilium nulla obligatio est* (“there is no obligation to perform impossible things”).¹⁰⁶ This Roman adage originally was limited to obligations that were impossible to perform at the outset of a contract; however, it morphed to also apply to supervening events which rendered performance impossible.¹⁰⁷ Borrowing from the Romans, French civil law adopted *force majeure* in the Code Napoléon in 1804¹⁰⁸ and it quickly spread.

From its humble origins in Roman law, the legal principle of *force majeure* has now become engrained into the civil law and has migrated to common law countries as well. The concept is designed to excuse one or all of the parties from liabilities or obligations under a contract when there has been an occurrence of an extraordinary and unforeseeable event that arose beyond the control of the parties. Such occurrences include acts of God, war, terrorism, labor strikes, government restraints, and a number of other events outside the control of the parties.

With the global outbreak of COVID-19 and the implementation of travel bans, government restrictions, including mandatory stay-at-home orders, regulations, quarantines, and various other restrictive measures, shippers, carriers, and suppliers may seek to invoke *force majeure* as a contractual defense to either suspend or discontinue performance of obligations and limit liability therefore. This is especially true for cargo no longer “in demand” due to what is, effectively, a commercial dead period. It is therefore important to be able to determine what situations truly meet the *force majeure* criteria, and what situations represent an economic “re-trade” of the contract.

IX. ANALYZING THE APPLICATION OF FORCE MAJEURE - FIRST STEPS

A. Burden of Proof

The party seeking to invoke the protections of *force majeure* bears the burden of proving its application.¹⁰⁹ In this regard, the party typically would need to present evidence: (1) proving that the alleged event constitutes a *force majeure* event; (2) demonstrating the party’s performance has been adversely affected by the event; (3) showing the party’s non-performance is beyond its control; and (4) there existed no reasonable steps the party could have taken to avoid the event or its consequences. In today’s global market, contracts typically contain *force majeure* provisions

¹⁰⁴ See, e.g., Code Civil arts. 1148, 1348, 1631, 1730, 1733, 1754, 1755, 1784, 1929, 1934, 1954 (Fr.).

¹⁰⁵ See William W. Buckland, *Elementary Principles of Roman Private Law* 287 (1912). See also Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 759 (1990).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Saul Litvinoff, *Force Majeure, Failure of Cause and Theorie de l’Imprévision: Louisiana Law and Beyond*, 46 La. L. Rev. 1 (1985).

¹⁰⁹ See, e.g., *R&B Falcon Drilling Co. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2000); *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1198 (5th Cir. 1981).

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and these provisions will control in the event of a dispute over the performance (or non-performance) of obligations. Notwithstanding, if the contract lacks a *force majeure* provision, or if it fails to address a particular event, such as a pandemic or a government restriction, default rules and legal principles may apply depending upon the jurisdiction, governing law, and industry.

B. Civil Law or Common Law Jurisdictions

As an initial matter, common law jurisdictions and civil law jurisdictions treat *force majeure* differently. In a civil law system, which focuses on the use of statutes, codes, and written law, *force majeure* generally operates as a matter of law. The definition and application of *force majeure* can be found in certain statutes and are implied into any civil law contract. Nonetheless, in accordance with freedom of contract principles, the parties are free to expand or limit those limitations and protections set forth in the applicable law.

In contrast, in common law jurisdictions, such as the United States¹¹⁰ and the United Kingdom, *force majeure* does not operate as a matter of law. Rather, the parties to the contract must expressly include such provisions into their agreement.¹¹¹ Even further, within the United States, each state imposes its own set of legal principles and standards when evaluating the invocation of a *force majeure* clause.

C. Subject Matter of the Agreement

Likewise, depending upon the nature of the contract, *i.e.* the sale of goods, certain statutory regimes may apply with their own force. In the United States, Article 2 of the Uniform Commercial Code (U.C.C.) applies to the sale of goods. Should the parties not contract otherwise, the default provisions contained within the U.C.C. may operate to excuse performance. For example, U.C.C. § 2-615 excuses a seller from the timely delivery of goods contracted for, where his performance becomes “commercially impracticable” because of unforeseen supervening circumstances beyond the contemplation of the parties at the time of the contract. Section 2-615 provides that, unless the seller assumed a greater obligation in the parties’ contract:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

¹¹⁰ This of course excepts Louisiana -- the only state within the United States that is a civil law state. Louisiana’s *force majeure* principles are discussed *infra*.

¹¹¹ “Frustration of purpose” and the doctrine of “impossibility” serve as the common law’s counterparts to the civil law doctrine of *force majeure*.

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(c) The seller must notify the buyer seasonably that there will be a delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Along with § 2-615, § 2-613 contemplates the destruction of specific goods, § 2-614 considers transportation issues and payment problems, and § 2-616 establishes a buyer's rights where the seller is unable to fulfill its contractual obligations.

In addition to United States domestic law, the parties may also consider the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG").¹¹² Over eighty-eight countries have adopted and ratified the CISG, including the United States and China.¹¹³ Article 79 of the CISG provides:

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

D. Suspension or Termination

Notwithstanding, the foregoing Article also dictates that the "exemption provided" only applies for the period during which the impediment exists and only protects a party from damages. In other words, a party may rely on the Article to prevent the recovery of damages for non-performance. Moreover, the Article expressly requires that the party failing to perform must give notice to the other party of the impediment and the effect on its ability to perform. Failure to provide notice can result in liability for damages of non-performance.

As such, in responding to COVID-19 and evaluating whether an entity within the supply or transportation chain can invoke *force majeure* as a defense to non-performance or partial performance, the first step in analyzing the parties' rights and obligations is to determine what law applies. Determining the applicable law to any contractual dispute can be outcome determinative.

X. APPLICATION OF *FORCE MAJEURE* IN THE UNITED STATES - THE CONTRACT CONTROLS

The United States, a common law jurisdiction, does not recognize *force majeure* as a matter of law. Rather, the United States common law has adopted the concepts of "frustration of purpose" and "impossibility."¹¹⁴ The two concepts are distinct doctrines from one another. They are also each akin to *force majeure*, but different. As such, in the United States, save for Louisiana, the parties' contract must contain a *force majeure* provision in order to invoke the doctrine.

Although each state imposes its own set of principles in analyzing *force majeure*, each state

¹¹² United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1981, 52 Fed. Reg. 6262, 6264-80 (1987), 1489 U.N.T.S. 3.

¹¹³ UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods*, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited Apr. 5, 2020).

¹¹⁴ *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

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follows basic principles of contract interpretation. In general, courts look first to the express language of the contract to determine whether an occurrence constitutes a *force majeure* event. Typically, beyond citation to “*force majeure*,” clauses often list specific events that will excuse performance, such as war, terrorism, earthquakes, hurricanes, acts of government, epidemics, pandemics, or quarantine. In this situation, there can be no doubt that COVID-19, a pandemic, qualifies as a *force majeure*, because the parties specifically contemplated such. Nonetheless, even if the listing of qualifying events excludes “pandemic,” a party could also look to acts of government or government regulations/restrictions as the *force majeure* event.

When no relevant event is specifically mentioned, however, courts must then interpret whether the parties intended the event to be covered, *i.e.* whether the parties’ listing of events was meant to be exhaustive or illustrative. The ultimate inquiry normally focuses on whether the event was beyond the control of the parties and unforeseeable at the time of formation of the contract. Moreover, even if an event can be considered *force majeure*, the parties must prove that the event adversely affected their ability to perform. Party intent can be gleaned from the nature of the undertaking, the circumstances surrounding the formation of the contract, the usual and ordinary meaning of the language used, and the credibility of evidence presented.¹¹⁵

Below is a discussion of representative principles and case law under the General Maritime Law, and, those from New York and Texas as representative of United States common law. Thereafter, a discussion of Louisiana law follows to provide an example of how civil law jurisdictions construe *force majeure*.

A. General Maritime Law

In interpreting maritime contracts governed by the General Maritime Law, courts look first to the language of the contract. Pursuant to well-established maritime principles, courts cannot look beyond the written language of a contract to determine the parties’ intent unless a disputed contract provision is ambiguous.¹¹⁶ Likewise, words of a contract must be given their plain meaning. As such, when confronted with a maritime contract containing a *force majeure* provision, a court will utilize contract interpretation principles to determine the parties’ rights and obligations. If any gaps exist, the court will turn to federal common law (and sometimes state law) principles to fill in those gaps.¹¹⁷

It is also important to note that in the context of shipping, some courts may apply more specific contract provisions covering a certain event as opposed to a general *force majeure* provision. For example, in *Continental Grain Co. v. M/T Seabravery*, the U.S. District Court for the Eastern District of Louisiana considered two conflicting provisions contained within a contract of carriage, namely a “Cargo Liability” provision and a “*Force Majeure*” provision.¹¹⁸ In that case, several fleeted hopper barges carrying grain sank due to an allision. The carrier argued that it was

¹¹⁵ See, e.g., *City of Yorkville v. Am. S. Ins. Co.*, 654 F.3d 713 (7th Cir. 2011); *Haworth v. United States*, 461 F. App’x 739 (10th Cir. 2012); *In re RainTree Healthcare Corp.*, 431 F.3d 685 (9th Cir. 2005).

¹¹⁶ See *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332-33 (5th Cir. 1981).

¹¹⁷ *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986) (explaining that the General Maritime Law is “an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.”).

¹¹⁸ C.A. No. 88-4503, 1989 U.S. Dist. LEXIS 5285 (E.D. La. May 3, 1989).

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not liable to the shipper for the loss of the cargo because the loss was caused by an act of God. On the contrary, the shipper argued that a specific contract provision allocated the risk of cargo loss to the carrier. Specifically, the contract provision stated: “[carrier assumes] liability . . . for . . . physical damage to or loss of the shipment howsoever occurring (including but not limited to . . . marine perils and Acts of God).” The district court noted that the two provisions conflicted and were ambiguous. As such, the court turned to fundamental contract interpretation principles. The court noted that when a contract provision is subject to opposing yet reasonable interpretations, “an interpretation is preferred which operates more strongly against the party from whom the words proceeded.” Likewise, the court pointed out that when a contract contains a more specific provision regarding the same subject matter, the specific provision shall control. The district court therefore held that the “Cargo Liability” provision controlled and took precedent over the more general “*Force Majeure*” provision. Accordingly, the court interpreted the contract in favor of the shipper and against the carrier.

Likewise, shippers and carriers should consider causation. In *Hong Kong Islands Line America S.A. v. Distribution Services, Ltd.*, a shipper sought to invoke a *force majeure* clause claiming that ongoing strikes and riots had led to tremendous reductions in certain cargo liftings, thereby allegedly hindering the shipper’s ability to perform under a volume freight agreement.¹¹⁹ The *force majeure* clause specifically provided:

Each party is excused from this contract for reasons of force majeure. Force majeure as used herein shall mean and include, without limitation, strikes, accidents, lockouts, fire, marine, disasters, acts of God, or public enemy, embargoes, riots, civil commotion, government request, abandonment of service, loss or partial loss of market, inability to obtain material, power, equipment, transportation or any other causes affecting the market into which [shipper] will sell its services, including contingencies (i.e., changing markets, business declines, government intervention, etc.) which make [it] impossible or unprofitable for [shipper] to sell its services in the market.

(emphasis added).

Analyzing the contract between the parties, the California federal court held that no *force majeure* event had occurred to excuse the shipper’s non-performance. Although strikes and riots were included within the provision, the shipper had failed to prove that the strikes rendered it “impossible” or “unprofitable” to ship cargo under the contract. The court noted that “[i]t is well-established that in order to constitute a *force majeure*, an event must be the proximate cause of nonperformance of the contract.”¹²⁰ Because the shipper had the ability to ship cargo with the carrier, but chose to ship with other carriers instead, the court rejected the shipper’s claim of *force majeure* because the strikes “did not proximately cause the shortfall.”

When a maritime contract does not contain a *force majeure* provision, the parties may be relegated to common law principles and analogous doctrines. In *Transatlantic Financing Corp. v.*

¹¹⁹ (C.D. Cal. 1991) 795 F. Supp. 983, 987.

¹²⁰ *Id.*, at 989 (citing *Wheeling Valley Coal Corp. v. Mead*, 186 F.2d 219, 223 (4th Cir. 1950); *Oosten v. Hay Haulers, Dairy Employees & Helpers Union*, 291 P.2d 17, 20 (Cal. 1995)).

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United States, the U.S. District Court of Appeal for the District of Columbia recognized that the doctrine of “impossibility of performance” can apply to a charter party.¹²¹ A shipper entered into a voyage charter with a carrier to deliver cargo from Texas to Iran via the Suez Canal. When the Suez Canal closed, the carrier was forced to deviate from the “usual and customary” route by going around the Cape of Good Hope to deliver the cargo. After delivery, the carrier sought recovery quantum meruit for the unexpected expenses arising from the deviation -- the shipper had already paid the agreed upon contract price. Essentially, the carrier argued that pursuant to the voyage charter, the voyage was to be performed by the “usual and customary” route. Because the Egyptian government closed the Suez Canal, performance of voyage charter by the “usual and customary” route became impossible. Notwithstanding, because the carrier still delivered the cargo by traveling around the Cape of Good Hope, the carrier argued that it conferred a benefit upon the shipper “for which it should be paid in *quantum meruit*.”

In examining the carrier’s claims, the appellate court analyzed the doctrine of “impossibility of performance.” Citing common law sources, the court explained that the doctrine of impossibility has relaxed and it is “now recognized that ‘[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.’”¹²² When the issue of impossibility has been raised to alter a party’s performance, the court noted that it would consider three prerequisites for its application: (1) an unexpected contingency must have occurred; (2) the risk of the unexpected contingency must not have been allocated either by agreement or custom; and (3) the occurrence of the unexpected contingency must have rendered performance commercially impracticable. Analyzing the carrier’s arguments, the court noted that although the closure of the Suez Canal rendered the performance of the voyage charter impracticable (because the ship could not follow the usual and customary route), the closure did not render the voyage charter *legally impossible* to perform -- rather, it only rendered it more burdensome. As such, because the shipper paid the contract price of the voyage charter, the carrier could not recover *quantum meruit* for the additional expenses of traveling around the Cape of Good Hope. Likewise, the court noted that in the case of a charter party involving the carriage of goods, if the contract had truly become impossible to perform, the carrier could have returned to an appropriate port and unloaded its cargo.¹²³

In sum, under General Maritime Law, parties should first look to the language of the contract for whether COVID-19 (and its attendant restrictions) may qualify as a *force majeure* event. Should the parties’ contract not contain a *force majeure* provision, the parties may look to common law doctrines and principles for some relief.¹²⁴

¹²¹ 363 F.2d 312 (D.C. 1966).

¹²² *Id.*, at 315 (internal citations and quotations omitted).

¹²³ *Id.*, at 320 (citing *The Malcolm Baxter, Jr.*, 277 U.S. 323 (1928)).

¹²⁴ See *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (collecting cases requiring the occurrence of an unexpected and unforeseen event when applying the doctrine of impossibility); *Asphalt Int’l, Inc. v. Enter. Shipping Corp., S.A.*, 667 F.2d 261, 265 (2d Cir. 1981) (“It appears quite clearly that in maritime cases, when the parties fail to allocate risks by terms of the contract, courts look to certain time-honored doctrines to determine who shall bear the loss. One applicable principle, the so-called doctrine of impossibility of performance, focuses on whether the event producing the loss was unforeseen, as a means of assessing which party assumed the risk.”).

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B. New York

Under New York state law, courts narrowly construe *force majeure* clauses excusing performance due to circumstances beyond the control of the parties. Generally, performance will be excused only if the contract includes the specific event that actually prevents performance. *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012). See also *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902-903 (1987). Furthermore, New York law dictates that “[m]ere impracticality or unanticipated difficulty is not enough to excuse performance.” *Phibro Energy*, 720 F. Supp. at 318. As such, to succeed in asserting *force majeure* under New York law, the party claiming same bears a high burden of proving actual impossibility and not merely commercial impracticability. Each case will be a fact-intensive inquiry, but if substitute or partial performance is available, the party may still be obligated to perform.

In *Constellation Energy Services of New York, Inc. v. New Water Street Corp.*, a New York state court contemplated whether Hurricane Sandy constituted a *force majeure* event thereby excusing non-performance of a party.¹²⁵ The case involved a dispute over a power sale agreement for electrical power to a building and the defendant’s failure to meet the baseline number of kilowatt hours. At the outset, the appellate court reiterated that “when the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of *force majeure*.” In analyzing the specific language of the parties’ agreement, the New York appellate affirmed the lower court’s order denying the defendant’s invocation of the *force majeure* clause as a defense, because the defendant failed to show summarily that its failure to perform was an unavoidable result of the hurricane and failed to show that the tenant’s delayed utilization of energy was beyond the landlord’s control. As such, under New York law, a purported *force majeure* event must be within the language of the agreement and must be the actual cause of the non-performance.

C. Texas

Similar to New York, Texas law dictates that unless specifically contemplated and bargained for in the contract, a *force majeure* event does not excuse performance. “Where the obligation to perform is absolute, impossibility of performance occurring after the contract was made is not an excuse for nonperformance if the impossibility was reasonably anticipated and guarded against in the contract.”¹²⁶ “It is axiomatic that a contractual obligation cannot be avoided simply because the obligation becomes more burdensome than anticipated.”¹²⁷

On the other hand, if a contract does include a *force majeure* provision, the scope and application of the doctrine depends on the terms of the contract.¹²⁸ As with all contract clauses, in

¹²⁵ 146 A.D.3d 557, 46 N.Y.S.3d 25[1st Dept 2017].

¹²⁶ *Metrocon Construction Co., Inc. v. Gregory Construction Co.*, 663 S.W.2d 460, 462 (Tex. Civ. App. Dallas 1983) (internal quotations and citations omitted).

¹²⁷ *Heritage Life Insurance Co. v. Heritage Holding Corp.*, 751 S.W.2d 229, 234 (Tex. Civ. App. Dallas 1988).

¹²⁸ See *Sun Operating Limited Partnership v. Holt*, 984 S.W.2d 277, 289 (Tex. Civ. App. Amarillo 1998); *Va. Power Energy Mktg. v. Apache Corp.*, 291 S.W.3d 397, 402 (Tex. App. Houston 2009) (“The scope and effect of a ‘*force majeure*’ clause depends on the specific contract language, and not on any traditional definition of the term.”). See also *Huffines v. Swor Sand and Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex. Civ. App. Fort Worth 1988, no writ).

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construing the words of the *force majeure* clause, they must be accorded their plain, ordinary, and generally accepted meaning, unless the contract provides otherwise.¹²⁹ As such, when the parties specify certain *force majeure* events, there is no need to show that the occurrence of such an event was unforeseeable.¹³⁰ For example, where bad weather, a *force majeure* event, caused a delay in the delivery of crude oil, the jury found that the buyer was in breach for refusing to accept the delivery because the seller had been excused for the delay in delivery under the *force majeure* provision in the contract.¹³¹ The clause in question specifically listed “floods, hurricanes or other actions of the elements,” as *force majeure* events. Thus, the existence of a *force majeure* event simply suspended the time to perform and did not give the buyer the remedy of repudiation.

On the other hand, in *TEC Olmos, LLC v. Conocophillips Co.*, the court was confronted with a *force majeure* event that had not been specifically contemplated by the parties in their contract -- namely, a downturn in the oil and gas industry.¹³² The parties entered into a drilling contract that contained a *force majeure* provision. When one of the parties failed to perform its obligations by the contractually agreed deadline, it sought to invoke the protections of the *force majeure* clause. The *force majeure* clause at issue listed a number of enumerated events, such as fire, flood, and storm, and also included a “catch-all” provision: “any other cause not enumerated herein but which is beyond the reasonable control of the [p]arty whose performance is affected.” After the parties executed the contract, changes in the global supply and demand of oil caused the price of oil to drop significantly. As a result thereof, one party was unable to obtain financing for the drilling contract, and, thus could not meet the agreed-upon deadline. As a result, that party attempted to invoke the “catch-all” *force majeure* provision. On appeal, the Texas state court had to consider whether a “market change” should be considered a *force majeure* event under the drilling contract’s “catch-all” provision.

In analyzing the contract, the Texas court emphasized that when an alleged *force majeure* event is not specifically listed, but the contract contains a general “catch-all” provision, the court may apply common law notions to “fill the gaps” in *force majeure* clauses.¹³³ Included within these common law notions is the principle that a *force majeure* event must be unforeseeable. Considering this common law principle of foreseeability, the Texas court noted that “[b]ecause fluctuations in the oil and gas market are foreseeable as a matter of law, it cannot be considered a *force majeure* event unless specifically listed as such in the contract.” Accordingly, the Texas court held that the party could not invoke the *force majeure* clause because it failed to show the industry downturn was unforeseeable.

(“Where the obligation to perform is absolute, impossibility of performance occurring after the contract is made is not an excuse for nonperformance if the impossibility might reasonably have been anticipated and guarded against in the contract.”).

¹²⁹ *Holt*, 984 S.W.2d. at 289.

¹³⁰ *Perlman v. Pioneer Ltd. P’Ship*, 918 F.2d 1244, 1247-48 (5th Cir. 1990) (holding that a *force majeure* clause that specified “inability to obtain governmental permits” did not require a showing of unforeseeability when performance was hindered by the inability to obtain permits); *Rowan Cos. v. Transco Expl. Co.*, 679 S.W.2d 660, 664 (Tex. App. Houston 1984, no writ) (holding, without discussing foreseeability, that parties had defined fire as *force majeure* event).

¹³¹ *Texas City Refining, Inc. v. Conoco, Inc.*, 767 S.W.2d 183, 185 (Tex. Civ. App. Houston 1989).

¹³² 555 S.W.3d 176, 184 (Tex. App. Houston 2018).

¹³³ *Id.* at 184 (citing *Holt*, 984 S.W.2d. at 283).

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Although *force majeure* does not operate as a matter of law in Texas, the Texas Business and Commerce Code expressly provides for commercial impracticability as an excuse for non-performance. When a Texas court considers force majeure, the court is relegated to the rules of construction for contracts; whereas, when considering commercial impracticability, a court can find guidance under the rules set forth in the Texas Business and Commerce Code.¹³⁴ As such, parties may also look to Texas statutory law for some relief.

D. Louisiana

Borrowing from its French and Spanish roots, Louisiana long ago adopted a civil law system -- in contrast to the rest of the United States. As such, *force majeure* operates as a matter of law and is implied in every obligation. Under Louisiana law, *force majeure* is embedded in the civil law theory of “cause.”¹³⁵ Cause, or the reason why a party obligates himself, is a necessary element of any obligation.¹³⁶ In other words, if the cause for a contract fails, the entire obligation never existed. Louisiana requires that performance be “truly impossible” to fulfill the requirements of *force majeure* -- because only impossibility can upset the “cause” of an obligation.¹³⁷ As such, a party is not released from its duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome. The *force majeure* event must post “an insurmountable obstacle” in order to excuse performance.¹³⁸ Moreover, Louisiana imposes an overarching duty of good faith in performing contractual obligations.¹³⁹

Louisiana Civil Code article 1873 expressly provides, “[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.”¹⁴⁰ As such, if Louisiana law (or other civil law jurisdiction) governs a contract, the defense of *force majeure* will operate as a matter of law and in accordance with the specific provisions of the Louisiana Civil Code. Of particular note, the Code makes explicit that a fortuitous event encompasses only those events that “could not have been reasonably foreseen.”¹⁴¹ In deciding whether an event can be characterized as fortuitous, Louisiana courts focus more on the reasonableness of the parties’ foresight as opposed to the objective foreseeability of a particular event.¹⁴²

Of particular note, Louisiana courts consistently hold that although hurricanes undoubtedly qualify as *force majeure* events, the hurricane must render the party’s performance truly impossible. Thus, nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner originally contemplated by the party at the time the contract was entered. Stated another way, even in the wake of a hurricane (or pandemic), a party must still pursue reasonable alternatives to render performance in a different manner before

¹³⁴ Tex. Bus. & Com. Code § 2.615.

¹³⁵ *Litvinoff*, supra note 5, at 14-15.

¹³⁶ La. Civ. Code art. 1967.

¹³⁷ See Christopher R. Handy, *No Act of God Necessary: Expanding Beyond Louisiana’s Force Majeure Doctrine to Imprévision*, 79 La. L. Rev. 242, 246 (2019).

¹³⁸ *Payne v. Hurwitz*, 07-0081, p. 8 (La. App. 1 Cir. 01/16/08); 978 So. 2d 1000, 1005.

¹³⁹ La. Civ. Code art. 1983.

¹⁴⁰ La. Civ. Code art. 1873.

¹⁴¹ La. Civ. Code art. 1875.

¹⁴² *McElroy v. Dynasty Transp. Inc.*, 04-0599, p. 4 (La. App. 1 Cir. 03/24/05); 907 So. 2d 69, 71.

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that party can seek to take advantage of the defense of impossibility.¹⁴³ Louisiana law will not excuse non-performance or partial performance, unless there exists no reasonable alternatives.

Similar to most jurisdictions, if the parties expressly include a *force majeure* clause in their contract, the contract language shall control.¹⁴⁴ The aforementioned articles simply provide the default legal regime available to the contracting parties. Notwithstanding, should a contract not specifically contemplate or address pandemics, government restraints, or other fortuitous events arising from the COVID-19 outbreak, Louisiana's default principles will control, thereby requiring a party to prove true impossibility of performance.

XI. EFFECT OF INVOCATION OF *FORCE MAJEURE*

A. Termination or Suspension

Once a party has invoked *force majeure*, the inquiry shifts to analyze the party's performance or ability to perform. Most *force majeure* provisions contemplate performance that has been "prevented," "hindered," or "delayed" with each possibility contemplating different rights and obligations thereunder. Generally speaking, if a party's entire performance has been rendered truly impossible and insurmountable by the occurrence of the event, the party may be entitled to terminate or dissolve the entire contract. On the other hand, if a party can still partially perform and that partial performance is still of value to the counterparty, the counterparty's performance may also be reduced proportionately. If partial performance is of no value, however, the contract may be terminated. Likewise, if a party's performance will merely be delayed, the *force majeure* provision may simply allow additional time within which to perform and negate the possibility of consequential damages or damages for that delay.

B. Timing of Notice

Many contractual and statutory provisions require that a party claiming *force majeure* notify the other party of their inability to perform. A party typically must give prompt, timely, or seasonable notice or notice within a certain delineated time. Once a *force majeure* provision has been triggered, the party's performance can be suspended during that time (if not rendered truly impossible, in which case performance is fully excused). That said, once the *force majeure* event has passed, the suspension of the time to perform will be lifted and a party will be required to render its contractual performance or face damages.

C. Mitigation

Numerous *force majeure* clauses also expressly impose a requirement that the party claiming *force majeure* take reasonable steps to mitigate the effects and consequences of the alleged *force majeure* event.¹⁴⁵ Likewise, in the context of shipping, the General Maritime Law does not deviate from this general principle: "[t]he damage rule in admiralty cases generally does not differ from ordinary contract rules. As in any other action for contract damages, a shipper is

¹⁴³ See *Payne*, 978 So. 2d 1000.

¹⁴⁴ *Hanover Petroleum Corp. v. Tenneco, Inc.*, 521 So. 2d 1234, 1239 (La. App. 3 Cir. 1988).

¹⁴⁵ See, e.g., *S&B/Bibb Hines Pb 3 Joint Venture v. Progress Energy Fla., Inc.*, 365 F. App'x 202, 205 (11th Cir. 2010) (noting that contract contemplated mitigation of losses).

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under a duty to mitigate his losses.”¹⁴⁶ Nonetheless, depending upon the contractual provisions, the duty to mitigate can vary among jurisdictions. In *Sun Operating Limited Partnership v. Holt*, a Texas state court refused to impose¹⁴⁷ a requirement that the party claiming *force majeure* use due diligence to overcome the effects of the occurrence. Whereas, in *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, the U.S. Third Circuit Court of Appeal imposed a duty to mitigate.¹⁴⁸ On the other hand, an Illinois district court also held that a nonperforming party must seek reasonable alternative methods of performance.¹⁴⁹ Nonetheless, the overwhelming majority of jurisdictions impose a duty to mitigate on a party seeking the shelter of a *force majeure* provision.

In sum, parties seeking to invoke *force majeure* as a contractual defense to non-performance, partial performance, or delayed performance should first turn to the language of the contract. Determining whether performance has been excused under a contract is a jurisdiction-specific and, highly fact-intensive inquiry depending upon the contract and the circumstances as a whole. Shippers and carriers must also keep in mind that in certain jurisdictions in order to invoke *force majeure* as a defense, COVID-19 must have rendered their performance truly impossible -- not just more burdensome or expensive.

XII. CONCLUSION:

The speed of the COVID-19 spread confirms the world is an ever-shrinking place. While the internet brings us virtually face to face with others across the globe, our travels and physical connections also demonstrate our neighbors are both near and far, where one person's health is connected to the well-being of many.

The pandemic has shown our production and consumption are also intimately connected. Supply chains are better called “supply and demand chains,” as a break in supply may not simply cause an increase in price. Instead, the rippling effect of a supply-side disruption can result in an increase or a decrease in demand. That does not take into account governmental or emotional impacts on such things.

The pandemic has exposed the delicate balance in our transportation and logistics chains. When supply or demand, or both, become unstable, transportation and distribution vendors and supplies must likewise adjust. The necessity to reposition vessels and containers, and the bottlenecks at terminals are examples of the challenges facing carrier and terminal interests, as well as their partners.

Although those in the chains of connection may call their counter-parts “partners,” to relieve or ease the burden of contractual commitment, we are experiencing claims of *force majeure* and for insurance relief.

Before declaring *force majeure* and risking claims of repudiatory breach, parties and their counsel are well advised to consider the applicable jurisdiction, i.e., common or civil law, followed

¹⁴⁶ *M. Golodetz v. Lake Anja*, 751 F.2d 1003, 1112 (2d Cir. 1985) (internal citations omitted).

¹⁴⁷ 984 S.W.2d 277, 282 (Tex. Civ. App. Amarillo 1998).

¹⁴⁸ *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444, 542 (3d Cir. 1983).

¹⁴⁹ *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245 (N.D. Ill. 1974).

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by a review of the wording of the *force majeure* clause(s). Is pandemic a listed *force majeure* event , claimed to be within a catch all or is the affected party arguing that an act of God is preventing performance?

Is total or partial performance terminated or suspended and, have notice provisions been met? And is the party truly doing its best to mitigate the scope, duration, and effect of its suspended or compromised performance?

The pandemic is truly dynamic and fluid. We must remain vigilant in promoting the physical and mental safety and well-being of people, followed by the consistent review of the changing economic conditions to best guide our families, friends, and clients in these turbulent times.

It is in those aspects that the members and friends of our esteemed Association can facilitate resolution of imbalances and hold the lamps high when contest becomes the preferred or necessary pathway of getting there.

It is hoped this paper highlights a few of the myriad of issues surrounding this unfortunate development in our human condition.

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