MUCH ADO ABOUT SOMETHING: THE FORESEEABILITY PROBLEM IN BREACH OF CONTRACT CLAIMS ARISING OUT OF INTERNATIONAL ECONOMIC SANCTIONS

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INTRODUCTION

Russia's 2022 invasion of Ukraine catalyzed a waterfall of political and economic upheaval across a world already reeling from the continuing COVID-19 pandemic. According to the World Bank, global trade in oil and natural gas from Russia and agricultural products from Ukraine suffered immense setbacks.[1] The Russian invasion and subsequent response from Western nations, in particular, disrupted numerous commercial agreements, many of which were directly impacted by the imposition of economic sanctions by the United States government.[2] A 2022 congressional report suggests that these economic sanctions resulted in hundreds of billions of dollars lost for the Russian economy, as well as a mass exodus of foreign companies from the Russian market, resulting in political and economic instability.[3]

Russia's military offensive will likely result in a host of contractual legal issues coming to the fore over the next several decades. Russia-Ukraine sanctions-related commercial litigation governed by United States law is already slowly trickling into United States courts.[4] However, given that many commercial contracts customarily include mandatory arbitration provisions, courts will not

1. See *Russian Invasion of Ukraine Impedes Post-Pandemic Economic Recovery in Emerging Europe and Central Asia*, THE WORLD BANK (Oct. 4, 2022), https://www.worldbank.org/en/news/press-release/2022/10/04/russian-invasion-of-ukraine-impedes-post-pandemic-economic-recovery-in-emerging-europe-and-central-asia.

2. Peter Neger & Bryan Woll, *Applying U.S. Contract Law Amid Ukraine-Related Sanctions*, LAW360 (Mar. 24, 2022, 5:44 PM), https://www.law360.com/articles/1476924/applying-us-contract-law-amid-ukraine-related-sanctions.

3. CONG. RSCH. SERV., IFI2092, THE ECONOMIC IMPACT OF RUSSIAN SANCTIONS, https://crsreports.congress.gov/product/pdf/IF/IF12092 (last updated Dec. 13, 2022).

4. *See, e.g.*, Joe Schneider, *Carlyle Aviation Sues Insurers Over Seized Planes Leased to Russian Airlines*, INS. J. (Nov. 1, 2022), https://www.insurancejournal.com/news/international/2022/11/01/692558.htm.

have occasion to fully evaluate these claims for several years.[5] Instead, arbitrators will be met with the foreseeability problem that accompanies invocation of force majeure clauses and other common law defenses to breach of contract.

Part I of this Comment briefly discusses the legal foundation for economic sanctions both under United States and international law. Next, Part II explains how force majeure clauses operate in the background of contract disputes. Part III introduces the "foreseeability problem" generally, and details different analyses courts employ to evaluate force majeure depending on whether the jurisdiction has adopted a requirement that the force majeure event be foreseeable. Then, Part IV explores common law defenses to nonperformance of a contract complicated by economic sanctions that could be workable altneratives to force majeure clauses. Finally, Part V analyzes the contours of the "foreseeability problem" in the specific context of cases involving economic sanctions.

Ultimately, this Comment argues that while courts tasked with evaluating breach of contract cases arising out of economic sanctions may choose to adopt a straightforward approach to force majeure interpretation, the complications of a foreseeability approach could have costly implications for global commercial contracts. This Comment thus argues that until courts have occasion to reach the issues discussed below, litigants should focus their breach of contract defenses on the common law defenses of illegality and public policy.

I. OVERVIEW OF ECONOMIC SANCTIONS

At the outset, it is important to explore how international economic sanctions operate at both a domestic and international level. Sanctions in the international context are a proverbial stick used to penalize states, individuals, or other actors that "endanger [the issuing entity's] interests or violate international norms of behavior."[6] International sanctions most often take the form of economic sanctions, which "are defined as the withdrawal of customary trade and financial relations for foreign- and security-policy purposes."[7] Economic sanctions vary in type and scope, but may include travel bans, asset freezes, arms embargoes, capital restraints, foreign aid reductions, and other restrictions on trade and economic activity.[8]

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5. Marco P. Falco, *Business Contract Arbitration Clauses: Why the Words Matter*, LAW360 CANADA (May 18, 2023 2:07 PM), https://www.law360.ca/articles/46864/business-contract-arbitration-clauses-why-the-words-matter?category=analysis.

6. Jonathan Masters, *What Are Economic Sanctions*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/what-are-economic-sanctions (last updated Aug. 12, 2019, 8:00 AM).

7. *Id.*

8. *Id.*

The scope of this Comment is limited to economic sanctions issued by the United States government. While a brief overview of the broad international and domestic legal authorities for economic sanctions follows, it should be noted that the legitimacy, enforceability, and mass use of economic sanctions are expansive topics of legal and political scholarship that are well beyond the scope of this Comment.

A. Sanctions Under International Law

To begin, there is no general prohibition against economic sanctions in international law.[9] In fact, examples of economic sanctions have existed in international relations since 432 B.C. "when Athens imposed a trade embargo on its neighbor Megara."[10] The modern international legal order is often considered to have begun after World War I with the formation of the League of Nations, which continued to promulgate sanctions as a tool of international relations.[11] For example, the League imposed a sweeping economic sanctions package against Benito Mussolini's Italy after his invasion of Ethiopia in 1935.[12] The sanctions included an arms embargo, freeze on financial transactions, and significant export and import restrictions.[13] Various sanctions regimes have continuously been promulgated since 1935, and the recent trend has been towards issuing sanctions known as "smart sanctions" designed to "minimize the suffering of innocent civilians."[14]

Today, the international legal authority for sanctions is largely grounded in the United Nations Charter, which contemplates the imposition of sanctions as collective security mechanisms available both to member states and to the UN as an international body.[15] Article 2 of the Charter lays out the expectations and rights of UN member states.[16] A majority of scholars do not believe that economic coercion through sanctions fall under Article 2(4)'s prohibition against "the threat or use of force" that is "inconsistent with the

9. Syed Ali Akhtar, *Do Sanctions Violate International Law?*, ECON. & POL. WKLY. (Apr. 27, 2019), https://www.epw.in/engage/article/do-sanctions-violate-international-law.

10. Uri Friedman, *Smart Sanctions: A Short History*, FOREIGN POL'Y (Apr. 23, 2012, 2:33 AM), https://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/.

11. IMF, *The Sanctions Weapon*, Finance & Development (June 2022), https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder.

12. *Id.*

13. *Id.*

14. Masters, *supra* note 6.

15. *See* U.N. Charter art. 2, ¶ 5–6; *see also* U.N. Charter arts. 39–51.

16. U.N. Charter, art. 2.

purposes of the United Nations."[17] This is a logical interpretation given that any other reading would render later articles of the Charter inconsistent.[18] Article 41 of the Charter explicitly illustrates permissible uses of unarmed force, including "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication."[19]

However, the evolution of customary international law does impose some guardrails on sanctions. Generally, lawful sanctions imposed against an actor should include five components: (1) the actor must have violated or continues to violate a primary rule of international law, (2) good faith efforts have been attempted to deter or induce the actor to cease its violation, (3) the sanctions are proportional to the violation, (4) the sanctions are appropriately tailored or limited, and (5) the sanctions are terminable upon the actor's cessation of its violation.[20]

The general acceptance of proportional and appropriately applied sanctions does not mean that actors view all sanctions as legal, however. For example, Iran–which has recently been the target of expansive economic sanctions regimes–has attempted to challenge the legality of sanctions under treaty law and other international legal principles.[21] Iran has a lawsuit before the International Court of Justice ("ICJ") which suggests that in addition to the general customary rules of sanctions, there may also be treaties, UN General Assembly resolutions, and general principles of international law that inform the legality of sanctions.[22] For the purposes of this Comment, however, international economic sanctions as a general economic concept are assumed to be valid under international law and capable of interrupting contractual relationships.

B. Economic Sanctions Under United States Law

Within the United States, international economic sanctions are governed by a patchwork of legal authorities including acts of Congress, executive orders, decisions of agencies, and the Constitution itself. As a nation-state under international law, the United States' jurisdiction to prescribe law includes "certain conduct outside its territory by persons not its nationals that is directed

17. J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180 (1986).

18. *Id.* at 181.

19. U.N. Charter, art. 41.

20. Anthony D'Amato, *Groundwork for International Law*, 108 AM. J. INT'L. L. 650, 670 (2014).

21. *See* Certain Iranian Assets (Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. (June 14) (arguing that U.S. sanctions violate the Treaty of Amity and international law).

22. *See id*. *See generally* Henderson, *supra* note 17, at 187–93.

against the security of the state or against a limited class of other state interests."[23] This constraint of international law on the United States, paired with the Constitution's provisions on prescriptive jurisdiction, form the legal basis of the United States' authority to promulgate economic sanctions.[24] Article 1 of the Constitution vests legislative powers in the Congress of the United States and authorizes Congress to make laws related to economic sanctions, while Article 2 outlines the authority of the Executive to do the same.[25]

One foundational authority governing sanctions promulgated by the United States is the International Emergency Economic Powers Act ("IEEPA"). IEEPA was enacted in 1977 "to govern the President's authority to regulate international economic transactions during wars or national emergencies."[26] IEEPA forms the basis of most–if not all–Executive action related to sanctions.[27] On average, 1.5 IEEPA emergencies are declared every year, which may result in sanctions targeting thousands of persons or entities.[28] IEEPA also includes the power to impose "secondary sanctions" on individuals and entities who are outside U.S. jurisdiction and cannot be legally required to adhere to sanctions.[29] These secondary sanctions are broadly applicable to those "suspected of transacting with sanctioned or sanctionable entities."[30] Further, IEEPA sanctions often last for decades, which means that once sanctions regimes are imposed, they are not quickly undone.[31] Congress can also crystallize executive orders imposing sanctions by codifying them to ensure they are not revoked later on.[32]

In addition to legal authorities governing imposition of sanctions, there are also authorities governing execution and monitoring of sanctions. Once sanctions are imposed, the Office of Foreign Assets Control ("OFAC") in the Department of the Treasury "administers and enforces economic and trade sanctions based on U.S. foreign

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23. RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE U.S. § 402 (1987).

24. *Id.*, cmt. j.

25. U.S. CONST. art. I §§ 1, 8; *id.* art. II.

26. Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Operation of International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701 to 1707*, 183 A.L.R. Fed. 57 (2003).

27. Andrew Boyle, *Checking the President's Sanctions Powers*, BRENNAN CENTER FOR JUSTICE 3 (June 10, 2021), https://www.brennancenter.org/sites/default/files/2021-06/BCJ-128%20IEEPA%20report.pdf.

28. *Id.*

29. *Id.* at 8.

30. *Id.*

31. *Id.* at 3.

32. ABIGAIL A. GRABER, CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION, at 19 (Mar. 29, 2021).

policy and national security goals."[33] OFAC maintains and publishes lists of "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries," as well as groups that are "designated under programs that are not country-specific."[34] Sanctions that are country-based may be (1) comprehensive, which means they cover "all transactions with the country and its nationals," or (2) limited, which means they prohibit "only certain types of transitions with the target country or with certain persons in the government of that country."[35] Activity-based sanctions "address particular actions, and the targets can be anywhere in the world."[36]

While United States companies and individuals are expected to immediately abide by sanctions, foreign entities may also be prohibited from engaging in transactions with sanctioned countries, individuals, or groups if they have sufficient "contacts" with the United States or "conduct their transactions in U.S. dollars."[37] OFAC exercises its discretion to claim jurisdiction over foreign companies and individuals broadly, increasing the power of United States sanctions regimes.[38] Thus, the impact of economic sanctions is far-reaching and can create challenges in a number of legal relationships, including in contractual obligations.

II. FORCE MAJEURE IN OPERATION

With the aforementioned principles of sanctions in place, the remainder of this Comment turns to the interplay between contracts and economic sanctions – specifically, the role of force majeure clauses. Force majeure clauses are standard provisions that can be found in almost any contractual agreement.[39] These clauses typically cover "an event or effect that can be neither anticipated nor controlled," including "both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)."[40]

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33. *Office of Foreign Assets Control*, U.S. DEPARTMENT OF THE TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Nov. 20, 2023).

34. *Id.*; Office of Foreign Assets Control*, Specially Designated Nationals List – Data Formats & Data Schemas*, U.S. DEPARTMENT OF THE TREASURY, https://ofac.treasury.gov/specially-designated-nationals-list-data-formats-data-schemas (last updated Nov. 17, 2023).

35. Boyle, *supra* note 27, at 7.

36. *Id.*

37. *Id.* at 8.

38. *Id.* at 8 (discussing OFAC's claim of jurisdiction "over a Taiwanese company that transferred oil to an Iranian company, simply because that Taiwanese company had previously filed for bankruptcy in U.S. court").

39. *See* J. Hunter Robinson et. al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 1, 8 (2020) (explaining that "[f]orce majeure clauses may be found in any contract," particularly construction and real estate contracts.

40. *Force Majeure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Typically, what constitutes a force majeure "event" is determined by the language in the clause itself, which will delineate events the parties have included or excluded.[41] Parties might choose to negotiate specific events for inclusion or exclusion in order to dictate the application, effect, and scope of the force majeure clause.[42] For example, in *Sage Realty Corp. v. Jugobanka, D.D.*,[43] which involved a contractual dispute arising from the imposition of United States sanctions on Yugoslavian entities after the end of the Bosnian War, the relevant agreement's force majeure clause contained the following exclusion:

> [t]he obligation of Tenant to pay rent hereunder…shall in no way be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease…by reason of any rule, order or regulation of any department of subdivision thereof of any government agency.[44]

More commonly, parties may opt for boilerplate or "catch-all" language that typically consists of: "acts of God, war, government regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder…," etcetera.[45]

As creatures of common law, force majeure provisions are governed by state law in the United States.[46] A court's analysis of a force majeure clause thus can vary significantly by jurisdiction. Still, there are some foundational principles that courts tend to follow. For example, in breach of contract cases, the party invoking force majeure as an affirmative defense bears the burden to prove that the event causing the breach: (1) qualifies as a force majeure event, and (2) was not caused by the party's own fault or negligence.[47]

Courts typically construe force majeure clauses narrowly and will "only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified."[48] Importantly, force majeure clauses do not excuse a party's nonperformance "dictated by economic hardship" or because of a "mere increase in expense."[49] Rather, the party asserting the force majeure clause as a defense must prove that an event within the clause "was beyond its control and without its fault or negligence."[50] However, one aspect of

41. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed.).
42. *Id.*
43. No. 95 CIV. 0323, 1998 WL 702272 (S.D.N.Y. Oct. 8, 1998).
44. *Id.* at *4.
45. WILLISTON, *supra* note 41.
46. Robinson et. al., *supra* note 39, at 4 ("the application of force majeure principles can vary from jurisdiction to jurisdiction and case to case.").
47. WILLISTON, *supra* note 41.
48. *Id.*
49. *Id.*
50. *Id.*

force majeure interpretation that remains unclear is whether and to what extent courts include a "foreseeability" component.

III. THE FORESEEABILITY PROBLEM

Because force majeure interpretation has evolved through common law, courts' analyses reveal different approaches to whether a force majeure event must have been foreseeable or unforeseeable for the clause to adhere.[51] For example, Alabama and Maine have limited case law on force majeure clauses, with the primary analysis in reported decisions centering on the definition of force majeure with no evaluation of foreseeability.[52]

Conversely, consider the variance in states that have directly addressed foreseeability. Alaskan courts tend to require unforeseeability for force majeure events in certain types of contracts like oil and gas leases.[53] California and Florida have robust force majeure case law reflecting the most common practice where foreseeability is typically only an issue for catch-all or boilerplate language, and the rule is that "unless a contract explicitly identifies an event as force majeure, the event must be unforeseeable at the time of contracting to excuse performance."[54] In Idaho, even if a force majeure clause does not expressly use the word "foreseeability," courts are expected to engage in a foreseeability analysis.[55] By

51. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181 (Tex. App. 2018) (explaining that "foreseeability of force majeure events is rooted in the common law of the force majeure doctrine"). *See generally* Robyn S. Lessans, Comment, *Force Majeure and the Coronavirus: Exposing the "Foreseeable" Clash Between Force Majeure's Common Law and Contractual Significance*, 80 MD. L. REV. 799, 809–10 (2021).

52. *See* Practical Law Commercial Transactions, *Key Issues When Invoking a Force Majeure Clause: State Law Chart*, https://1.next.westlaw.com/Document/I1e7ec4ae774e11ea80afece799150095/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search) (last visited Nov. 20, 2023).

53. Alaskan Crude Corp. v. State Dep't of Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 420 (Alaska 2011) (stating the rule that "Force majeure clauses extend [mineral] leases only when the nonperformance is 'caused by circumstances beyond the reasonable control of the lessee or by an event which is unforeseeable at the time the parties entered into the contract'").

54. Free Range Content, Inc. v. Google Inc., No. 14-CV-02329, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016); *see also In re.* Flying Cow Ranch HC, LLC, No. 18-12681, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018)(finding that a force majeure event that was not explicitly listed in the clause was subject to a foreseeability analysis).

55. Roost Project, LLC v. Andersen Constr. Co., 437 F. Supp. 3d 808, 821 (D. Idaho 2020).

contrast, in New York and Ohio, courts do not read foreseeability issues into contracts that are otherwise silent on foreseeability.[56]

As illustrated by case law, courts may not have robust or consistent jurisprudence on the issue of foreseeability if it has not been frequently litigated.[57] But as one author notes, "Courts who have addressed this question can be placed into two categories."[58] On one side are courts who import a force majeure clause's "common-law significance" and "tend to impose an unforeseeability requirement upon the force majeure event."[59] This means that in order for the court to allow the force majeure clause to excuse a party's nonperformance, the event contemplated by the clause must have been truly unforeseeable. On the other side are courts who "regard the words of a self-defined force majeure clause as controlling and permit common-law notions to fill in the gaps."[60] These courts are more likely to "not impose an unforeseeability requirement on enumerated force majeure events."[61]

This variance in approach is mirrored not only from state to state, but system to system. Federal courts "have expressly advocated for an interpretive presumption that parties intend common-law components of force majeure, such as unforeseeability, to be read into a contract."[62] But various state courts "allow the terms of an enumerated force majeure clause to control the scope and application of a force majeure analysis."[63]

Yet another differentiating factor dividing courts' analyses is whether the force majeure event that a nonperforming party bases its defense upon is explicitly listed in the clause or not. Given the potential implications of this difference for litigation arising out of economic sanctions, and because there is an apparent circuit split on enumerated force majeure clauses, this Part focuses on different courts' analyses on force majeure events depending on whether they are explicit or not explicitly identified.

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56. *See* Drummond Coal Sales Inc. v. Kinder Morgan Operating LP "C", 836 F. App'x 857, 867 (11th Cir. 2021) (applying New York law); *see also* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989).

57. *See, e.g.*, Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 451 (Mich. Ct. App. 2015) (explaining "[t]his Court has previously observed that there is a paucity of Michigan cases interpreting force-majeure clauses…and that remains the case today").

58. Lessans, *supra* note 51, at 810.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 812.

A. When Force Majeure Event is Explicit

At least two circuits have come to different conclusions about whether, and under what circumstances, a force majeure event that is explicitly included in the clause must be unforeseeable for the clause to adhere.[64] The Third Circuit and the Fifth Circuit have each had occasion to address whether "specifically listed" events require a showing of unforeseeability, coming to opposite conclusions.[65]

In *Eastern Air Lines v. McDonnell Douglas Corp.*,[66] the Fifth Circuit addressed an appeal for damages for breach of contract in favor of an airline against a jet plane manufacturer.[67] The lower court was unconvinced by the manufacturer's argument that the delays leading to its breach of contract were the result of "escalation of the war in Vietnam," finding in part that "any excusing event must have been unforeseeable."[68] The Fifth Circuit disagreed and explained that underlying general contract principles is an understanding that "a promisor can protect himself against foreseeable events by means of an express provision in the agreement."[69] Thus, argued the court, "when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable."[70] The Fifth Circuit concluded that the lower court erred in finding that "specifically listed" events "must have been unforeseeable at the time the contracts were entered into."[71] This holding set up a foreseeability clash with the Third Circuit several years later.

In *Gulf Oil Corp. v. FERC*,[72] the Third Circuit adopted a "showing of unforeseeability" requirement.[73] Gulf Oil breached its obligations to deliver daily oil supplies to a Texas gas corporation under a contract which included among its enumerated list of twenty-seven force majeure events mechanical breakdowns, equipment downtimes, and maintenance repairs.[74] The Third Circuit held that Gulf Oil could not invoke the use of force majeure absent a showing that "the events which delayed its performance were unforeseeable and infrequent."[75] Explaining its reasoning, the Third Circuit noted that "it is possible to accurately describe an event at its initial occurrence as

64. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 182 (Tex. Ct. App. 2018).
65. *Id.*
66. 532 F.2d 957 (5th Cir. 1976).
67. *Id.* at 961.
68. *Id.* at 980.
69. *Id.* at 992.
70. *Id.*
71. *Id.*
72. 706 F.2d 444 (3d Cir. 1983).
73. *Id.*
74. *Id.* at 448–49 n.8, 453.
75. *Id.* at 454.

unforeseeable and later because of the regularity with which it occurs, to find that such a description is no longer applicable."[76] The court determined that the mechanical repairs which interrupted Gulf Oil's delivery of gas had become so frequent and predictable that they could no longer be considered an excuse to nonperformance, even if they were specifically enumerated within the force majeure clause.[77] Importantly, the court articulated the insufficiency of arguing that "because the mechanical repairs were listed in the contract, they were force majeure events."[78]

B. When Force Majeure Event is Not Explicitly Identified

The majority of states appear to read a foreseeability requirement into force majeure clauses only when the force majeure event is not explicitly enumerated or a catch-all provision is used.[79] One recent appellate case from Texas provides an illustrative discussion.[80] *TEC Olmos, LLC v. ConocoPhillips*[81] involved breach of an oil and gas drilling contract as the result of changes in global supply and demand for oil.[82] The contract included a force majeure clause that explicitly listed several events as well as a "catch-all" provision.[83] Drawing on common law principles, the court imported an "unforeseeability" requirement to 'fill the gaps' in the [catch-all] force majeure clause."[84] The court explained:

> To dispense with the unforeseeability requirement in the context of a general "catch-all" provision would, in our opinion, render the clause meaningless because *any event* outside the control of the nonperforming party could excuse performance, even if it were an event that the parties were aware of and took into consideration in drafting the contract.[85]

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76. *Id.* at 453.

77. *Id.* at 453–54 (explaining that "[t]he element of uncertainty that defines unforeseeability is negated by the regularity with which the events occurred.").

78. *Id.* at 454.

79. *Compare* Roost Project, LLC v. Anderson Constr. Co., 437 F. Supp. 3d 808, 821 (D. Idaho 2020) (explaining that courts should engage in a foreseeability analysis for events that are not expressly listed in the force majeure provision), *with* Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445 (Mich. App. 2015) (finding that courts need not engage in a foreseeablity analysis to interpret a force majeure provision).

80. *See TEC Olmos*, 555 S.W. 3d at 182–85.

81. *Id.*

82. *Id.* at 179–180.

83. *Id.* at 179.

84. *Id.* at 184 (quoting Sun Operating LTD. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998)).

85. *Id.*

Key to the court's reasoning was its concern for avoiding an "overly broad definition of force majeure" in accordance with traditional common law principles.[86]

Courts in California follow the same rules of construction and also read a foreseeability requirement into boilerplate or catch-all force majeure clauses.[87] In granting a motion to dismiss a breach of contract claim based on a force majeure defense, a United States District Court applied California law and held that "unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such."[88]

However, there are some state courts who have reached different conclusions as to the relevance of foreseeability when force majeure events are not explicitly listed.[89] For example, in a case involving a breach of contract arising out of an alleged "trade war" between the United States and China, a Michigan appellate court suggested that the court could find no Michigan cases to "support a conclusion that the foreseeability of a force-majeure event is relevant to the interpretation of a force-majeure clause."[90] There, the litigant invoking force majeure argued that the case should have been allowed to proceed to discovery so "the issue of the foreseeability of China's alleged illegal actions in the solar market and the parties' intent with regard to allocation of risk [could] be explored."[91] The court disagreed and construed the force majeure clause narrowly, rejecting any foreseeability arguments where the force majeure event was not explicitly listed.[92]

These cases illustrate the uncertainty awaiting litigants who have already included or might consider including sanctions-related force majeure clauses in their contracts. Basic contract principles favor giving meaning to the parties' intentions as explicitly expressed in their written agreement, so conventional wisdom suggests that litigants who fear their contracts may be disrupted by sanctions in the future should negotiate force majeure clauses with explicit coverage for sanctions. However, if litigants do so and are met with a breach of contract action in a court that shares the Third Circuit's

86. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 185 (Tex. App. 2018).

87. Free Range Content, Inc. v. Google, Inc., No. 14-CV-02329, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016).

88. *Id.*

89. *See, e.g.*, Morgan St. Partners, LLC v. Chicago Climbing Gym Co., No. 20-CV-4468, 2022 WL 602893, at *5 (N.D. Ill. Mar. 1, 2022) (rejecting a plaintiff's argument that "foreseeability is paramount" for evaluating a force majeure clause that did not explicitly mention the COVID-19 pandemic).

90. Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 454–55 (Mich. App. 2015).

91. *Id.* at 455.

92. *Id.* at 456.

attitude towards foreseeability in explicit force majeure clauses, they may be subject to an unwelcome holding.

On the other hand, litigants may not contemplate the possibility of sanctions and thus may rely on catch-all force majeure language to defend against breach of contract arising out of sanctions. The trouble with this approach, however, is that courts are more likely to include a foreseeability requirement in their analyses.[93] This opens litigants up to judges acting as political and foreign policy analysts who opine as to whether the parties should have foreseen a deterioration in relations between states leading to the imposition of sanctions. And while Supreme Court Justices have historically been asked to wade into the depths of foreign policy as a consequence of their rulings on multi-dimensional economic and political questions, there should be a measure of wariness towards granting such consequential authority to district and state court judges who may lack the expertise and time to carefully engage in such an analysis.[94]

Faced with these options, or perhaps by sheer mistake, litigants may end up without a sanctions-related force majeure provision entirely. Without such a provision, there are still some common law defenses available to litigants, such as impracticability/impossibility, illegality, or public policy. However, these defenses do not entirely dispense with—and in some cases actually enhance—the problem of the foreseeability requirement.

IV. OTHER DEFENSES

A. Impracticability and Impossibility

The shared common law origins of force majeure and impracticability (sometimes called impossibility) plays a key role in understanding how foreseeability can complicate a court's analysis of alternative common law defenses. Impracticability and force majeure are similar but separate defenses to nonperformance. Impracticability excuses either "contracting party from performance in the fact of an act of God" such as "natural planetary elements or unforeseen, dramatic events."[95] Even though it often covers "acts of God," a force majeure clause is intended to relieve liability where "nonperformance is due to causes beyond the control of a person who is performing under a contract."[96]

The clearest distinction between the two defenses is most easily understood temporally—when and how they are raised. As a

93. Lessans, *supra* note 51, at 810.

94. *See* Noah Feldman, *When Judges Make Foreign Policy*, THE NEW YORK TIMES MAGAZINE (Sept. 25, 2008), https://www.nytimes.com/2008/09/28/magazine/28law-t.html.

95. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed.), Westlaw (database updated May 2023).

96. *Id.*

contractual provision, a force majeure clause can only be invoked if the contract actually includes the clause.[97] Conversely, impracticability is a common law defense available to litigants even when a contract contains no force majeure clause.[98]

Foreseeability is the key aspect of the impracticability defense to breach of contract, which has three general requirements:

> (1) the occurrence, or nonoccurrence, of the event causing the impracticability was unexpected; (2) performance of the duty by the promisor would be extremely difficult and burdensome, if not impossible; and (3) the promisor did not assume the risk of the event's occurrence or nonoccurrence.[99]

Thus, in cases where litigants raise an impracticability defense, the court will almost always investigate the foreseeability of the event alleged to have caused the breach. One interesting example comes from the Fifth Circuit opinion in *National Iranian Oil Co. v. Ashland Oil*.[100] While *National Iranian Oil Co.* occurred in the context of an arbitration dispute, it revealed the court's foreseeability analysis when determining whether a party can assert impossibility or impracticability.[101]

Beginning in 1973, Ashland Oil contracted with the state-owned National Iranian Oil Company ("NIOC") to supply Ashland with crude oil.[102] Following the takeover of the United States Embassy in Tehran in 1979, then-President Carter issued several executive orders imposing sanctions against Iran, including banning imports of Iranian crude oil.[103] When Ashland refused to pay NIOC under the agreement, NIOC attempted to compel arbitration proceedings, which resulted in the Fifth Circuit's opinion quoted in part at the outset of this comment.[104] Among the court's evaluation of the arbitration claims is a helpful discussion of foreseeability as it relates to the defense of impossibility or impracticability.

As to the first element of the defense as articulated at the time—that the asserting party must not have been able to foresee the event—the Fifth Circuit held that it was "unimaginable" that the "NIOC–an instrumentality of the Republic of Iran–could not reasonably have foreseen" at the time of renewing their contract with Ashland that the agreement might be made impracticable by the

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97. *Id.*

98. *See* 30 WILLISTON ON CONTRACTS § 77:1 (4th ed.), Westlaw (database updated May 2023).

99. *Id.*

100. 817 F.2d 326 (5th Cir. 1987).

101. *Nat'l Iranian Oil Co.*, 817 F.2d 326.

102. *Id.* at 328.

103. *Id.*

104. *Id.*

deterioration of relations between Iran and the United States.[105] On the second element of the defense—that the event cannot have been the fault of the party asserting impracticability—the Fifth Circuit held that "as part of the revolutionary Government, NIOC certainly bears responsibility for creating the chain of events" that led to Ashland's breach.[106]

Ashland Oil offers two principles that litigants should be aware of in choosing to invoke the impracticability defense, and potentially force majeure in jurisdictions where foreseeability is imported. First, depending on the political history and recency of conflict-ridden relations between the United States and foreign nations, a court may be willing to find that the imposition of sanctions was foreseeable, even if the parties did not contemplate them at the time of contracting. Second, litigants should be on notice that contracts with state- or quasi-state-owned entities may receive higher scrutiny on the foreseeability component since sanctions typically first target governments and government-owned enterprises.

B. Illegality and Public Policy

Illegality and public policy, which do not typically implicate foreseeability, provide a meaningful defense for nonperformance of a contract complicated by economic sanctions. As a general rule, illegality may be available to litigants as a defense against a breach of contract claim "whenever the performance of an act would be either a crime or a tort."[107] Because parties cannot preemptively contract for something that would be illegal, the defense of illegality is available if, at the time the parties entered into the contract, the promise or obligation was not illegal but later became illegal.[108]

Public policy is an inherently ambiguous term, but courts are routinely asked to articulate what constitutes "public policy."[109] They may define public policy as "that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good,"[110] "laws enacted for the common good,"[111] or policy and statutes that are established in the interests of the public or society."[112] The *Restatement (Second) of Contracts* explains why courts may determine that a contractual promise is void as against public policy:

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105. *Id.* at 333.
106. *Id.*
107. 5 WILLISTON ON CONTRACTS § 12:1 (4th ed.), Westlaw (database updated May 2023).
108. *See id.*
109. *Id.*
110. Calvert v. Mayberry, 440 P.3d 424, 430 (Colo. 2019).
111. *In re* Santiago G., 121 A.3d 708, 722 n.17 (Conn. 2015).
112. *See In re* Estate of Feinberg, 919 N.E.2d 888, 894 (Ill. 2009).

> First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction.[113]

In evaluating both illegality and public policy defenses, courts must often rely on the facts before them and the common law evolution of a court's specific notions of what constitutes public policy, fairness, and illegality, meaning the success of either of these defenses is not automatic.

Unlike the impracticability or impossibility defense, courts do not typically import a foreseeability requirement into the illegality or public policy defenses. For example, *Kashani v. Tsann Kuen China Enter. Co.*[114] involved an American computer manufacturer entering an agreement with a Taiwanese corporation to establish a parts manufacturing plant in Iran.[115] Soon after the manufacturer began arranging financing, the Taiwanese corporation withdrew from the computer industry and refused to proceed with the agreement, arguing it had become illegal and against public policy because it violated executive orders issued by then-President Clinton to sanction Iran by restricting various business and financial transactions.[116] The California Court of Appeals held that the agreement was plainly illegal and violated public policy because the content of the agreement expressly violated the executive orders and other regulations imposing sanctions on Iran, so the corporation's "actual and anticipated performance under the agreement were…prohibited."[117]

Interestingly, the court distinguished between contracts that would be violative of domestic public policy versus international public policy in situations involving arbitration enforcement, indicating that the public policy defense might be evaluated differently in arbitration proceedings as opposed to court proceedings.[118] Ultimately, while the *Kashani* court acknowledged the public policy arguments, its decision was predicated on the more straightforward recognition that the agreement at issue violated an executive order and thus was illegal.[119]

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113. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (AM. L. INST. 1981).

114. 118 Cal. App. 4th 531 (2004).

115. *Id.* at 536.

116. *Id.* at 536–37.

117. *Id.* at 548.

118. *See id.* at 555 (explaining that "[t]here is an 'important distinction between domestic and international public policy…According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations…'") (internal citations omitted).

119. *Id.* at 548.

Another example is a case from the United States Court of Federal Claims involving a motion to dismiss a breach of a government contract between the United States Agency for International Development ("USAID") and Transfair International, Inc. to deliver humanitarian relief supplies to Eritrea.[120] In fulfilling its obligations under the agreement, Transfair subcontracted with a British company which ultimately hired Iranian aircraft to deliver the supplies.[121] USAID refused to pay the contract amount based on a defense that Transfair was in violation of OFAC sanctions. In response, Transfair filed a claim with the contract officer who found that "public policy considerations counseled against payment, which would be the equivalent of a transfer of government funds directly to an Iranian organization."[122] The Court of Federal Claims reversed this decision at the motion to dismiss stage for two primary reasons: first, the court held that it must be determined whether a primary subcontractor should be held responsible for the illegal conduct of its subcontractor, and second, the court held that the illegality defense was not absolute, but rather subject to a fact intensive balancing test.[123] The court suggested that such a balancing test might weigh: (1) the promisee's culpability, including what it knew about the alleged illegality, (2) the promisor's corresponding culpability and knowledge of the illegality, (3) whether forfeiture would serve the public purposes at issue or serve as a deterrent against future violations, and (4) whether forfeiture resulting from nonenforcement of the agreement would be proportional to the illegality.[124]

These cases teach that when choosing among the available common law defenses to breach of contract, litigants can avoid the foreseeability problem by relying on illegality or public policy defenses. Impossibility or impracticability almost always require a court to inquire into the foreseeability of the event giving rise to the defense. Thus, if litigants are concerned about whether a court will read foreseeability into their force majeure clause, they should not expect to find a safe haven in the impossibility or impracticability defense. Thus, litigants should carefully consider whether the balancing approaches to illegality and public policy discussed above may instead be more advantageous to their position. Still, because of the canons of construction for contracts, if the litigants do have a force majeure provision that includes either explicit sanctions-related events or more general catch-all language, courts may begin and end their analyses with the force majeure clause, bringing litigants back to the foreseeability problem.

120. Transfair Int'l, Inc. v. United States, 54 Fed. Cl. 78, 78 (2002).
121. *Id.*
122. *Id.* at 80.
123. *Id.* at 87.
124. *Id.* at 85.

V. THE FORESEEABILITY PROBLEM REDUX: SANCTIONS CASES

The remainder of this Comment turns to cases which directly implicate force majeure or common law defenses in breach of contract cases arising directly out of sanctions. These cases do not appear to be often litigated to their full extent because of contractual arbitration provisions and the numerous other grounds on which a case may be decided or dismissed. Still, the cases that have been reported, combined with the general principles discussed above, provide a framework by which pending sanctions-related cases may be understood. As qualified previously, the discussion in this Part does not address the causation or culpability requirements of force majeure, or other elements of common law defenses. Instead, the focus is on the most unclear hurdle of them all: foreseeability.

A. A Straightforward Approach

Most likely, courts will adopt a straightforward approach to foreseeability in adjudicating sanctions-related litigation. In 1985, the Eighth Circuit reviewed an appeal from Iran after it lost a summary judgment motion to McDonnell, an American aircraft parts manufacturer over a breach of contract dispute.[125] Ten years earlier, the parties had entered into an agreement which included a force majeure clause explicitly excusing the manufacturer from nonperformance caused by "acts of the United States Government and embargoes."[126] After the Iranian Revolution in 1979, when the U.S. Treasury Department and State Department imposed limitations on commercial dealings with Iran, McDonnell stopped shipping parts to the Iranian government.[127] The Iranian government sued for breach of contract, and the Eighth Circuit held that the economic restrictions imposed by the United States fell within the force majeure clause and excused McDonnell's nonperformance.[128] Similarly, the Southern District of New York concluded in a 1998 case that the language of a force majeure clause which said the parties' obligations would not be excused by "any rule, order or regulation…of any government" included executive orders and OFAC sanctions imposed against Yugoslavian entities in the wake of armed conflict in the Baltics.[129]

The ease with which these courts came to a decision regarding force majeure clauses should not be lightly disregarded. These cases

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125. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 343 (8th Cir. 1985).

126. *Id.*

127. *Id.* at 344.

128. *Id.* at 347–48.

129. *See* Sage Realty Corp. v. Jugobanka, D.D., No. 95 CIV 0323, 1998 WL 702272, at*1, *4–*5 (S.D.N.Y. Oct. 8, 1998) (discussing the reasonable foreseeability of sanctions for a related frustration of purpose defense).

illustrate the straightforward approach available to courts evaluating contractual provisions under traditional canons of construction. If, as is the case when analyzing any disputed contractual provision, the court's aim is to give meaning and effect to the parties' intentions when interpreting a force majeure clause, the court can rely on the terms of the agreement and end its analysis.[130] This is just what the Eighth Circuit did in *McDonnell* and the Southern District of New York did in *Sage Realty*.

If courts uniformly adopted this approach, litigants who contract with states or entities that eventually become targets of economic sanctions could negotiate specific force majeure provisions with this in mind at the beginning of the contractual relationship.Litigants would then have at least some measure of confidence that if all other force majeure elements were proven, they would be successful in their affirmative defense. Yet, the foreseeability problem lurks as a still-unknown potential disruptor to this straightforward approach.

B. The Unknowns of a Foreseeability Approach

Alternatively, courts might import foreseeability into their analyses of sanctions-related litigation, resulting in unknown but potentially far-reaching ramifications. This author could not find a single reported case in the last three decades where a court had occasion to directly address whether they would read a foreseeability requirement into a force majeure clause related to breach of contract arising out of sanctions. However, recent COVID-19 litigation seemingly indicates that such a question on sanctions cases may be forthcoming.[131] Over the past two years, courts have become increasingly skeptical of parties attempting to invoke force majeure clauses to cover pandemic-related breach of contract, finding that the pandemic and its impact on contracts are now foreseeable.[132] Notably, this skepticism seems most common in cases involving catch-all provisions where litigants attempt to stretch the meaning of

130. Rocky Mountain Helium, LLC v. United States, 145 Fed. Cl. 92, 97 (2019).

131. Erin Webb, *Analysis: No Longer Unforeseeable? Force Majeure and COVID-19?*, BL (Nov. 1, 2021, 3:03 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-no-longer-unforeseeable-force-majeure-and-covid-19 (stating that "[s]ome courts have found that the parties' ability to name a risk—like a pandemic or a government shutdown risk—in a force majeure clause means that the risk was not only foreseeable at the time of contracting, but actually foreseen, defeating other defenses to nonperformance, such as impossibility of performance or frustration of purpose.").

132. *Id.*

the force majeure clause to cover the non-explicitly listed pandemic event.[133]

Economic sanctions as a tool of international relations are becoming more prevalent and widespread, with the Russia-Ukraine sanctions among the latest to garner public attention.[134] If "what's past is prologue,"[135] there is a sound argument to be made that, when faced with questions about force majeure applicability to breach of contract arising out of sanctions, courts will look to cases like *McDonnell* and *Sage Realty* to interpret how litigants' force majeure clauses apply to their claims. But in a world where courts have imported foreseeability requirements into force majeure cases like *TEC Olmos* and *Gulf Oil*, and where the recent COVID-19 litigation indicates that courts may consider the relative foreseeability of the force majeure event giving rise to contractual breach, it is possible that courts will turn to state common law and the foreseeability requirements of other common law defenses to read a foreseeability requirement into future force majeure litigation.

This approach could have costly implications for a range of contracts in a variety of industries given the nature of fully globalized trade. Imagine, for example, what would happen if a party today entered into a contract with a Chinese-owned entity that later became the target of United States sanctions. Could a court rationalize its opinion in state common law importation of foreseeability requirements that a force majeure clause and the common law defense of impracticability were unavailable because the sanctions were foreseeable given the slow devolution of relations between the United States and China since the end of the Cold War? While such a hypothetical might seem far-fetched and does not consider the potential relevance of common law defenses, there is certainly case

133. Ryan Franklin & Nicholas Wind, *Force Majeure Clauses in the Aftermath of the COVID-19 Pandemic and the Implications for Government Entities*, A.B.A. BLOG (March 14, 2022), https://www.americanbar.org/groups/government_public/publications/pass-it-on/spring-2022/spring22-franklin-wind-forcemajeure/.

134. Nicholas Mulder, *The Sanctions Weapon*, FIN. & DEV., June 2022, at 20, 20–21. Conflict between Israel and Hamas began in October 2023, just as this Comment was published. While OFAC's sanctions carefully target Hamas affiliates in an effort to avoid direct state-to-state sanctions against Iran, sanctions penalizing money transfers between "Iran-aligned" entities and Gaza provide yet another contemporary example of the increasing prevalance of economic sanctions as an international stick that businesses should not ignore in contract drafting. *See* Press Release, U.S. DEPT. OF THE TREASURY, Following Terrorist Attack on Israel, Treasury Sanctions Hamas Operatives and Financial Facilitators (Oct. 18, 2023) https://home.treasury.gov/news/press-releases/jy1816.

135. William Shakespeare, The Tempest 131 (Barbara A. Mowat & Paul Werstine, eds., Simon & Schuster Paperbacks 2015) (1623).

law discussed in previous Parts that could support this reasoning if the facts and arguments were analogous enough.

CONCLUSION

The question of whether and to what extent foreseeability will impact sanctions-related litigation involving breach of contract claims is uncertain. Though courts will most likely rely on traditional canons of interpretation in evaluating force majeure events that litigants invoke as a shield against sanctions-involved breaches, the divide across state common law over importing a foreseeability requirement into force majeure interpretations lurks as a threat that raises more questions than it answers. Until courts are given an opportunity to develop a coherent body of case law on this question, litigants in cases involving breach of contract arising out of sanctions may be best served by adopting one of the following approaches. First, litigants could deliberately include sanctions in the force majeure clause and negotiate a favorable choice of law provision to ensure the force majeure clause is interpreted under the straightfoward approach adopted by the Eighth Circuit and Southern District of New York. Second, if their dispute reached a court, litigants could emphasize their public policy and illegality common law defenses in an attempt to avoid the question of foreseeability altogether.