

Legal Allocation of Risks: A Computational Analysis of Force Majeure Clauses

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Abstract : This article analyzes the effect of supervening events in contracts. Contracts serve an important function: allocation of risks. In spite of its importance, the case law and the doctrine are messy and inconsistent. This article provides a fresh look at excuse doctrines (i.e., force majeure, impracticability, impossibility, and frustration) with a focus on force majeure clauses. The article makes the following contributions: First, it furnishes a new conceptual and theoretical framework of excuse doctrines. By distilling the decisions, it shows that excuse doctrines rests on the triangle of control, foreseeability, and contract language. Second, it analyzes force majeure clauses used by S&P 500 companies to understand the stickiness and similarity of such clauses and the events they cover. Third, using computational and statistical tools, it analyzes US cases since 1810 in order to assess the weight given to the triangle of control, foreseeability, and contract language. It shows that the control factor plays an important role in force majeure analysis, while the contractual interpretation is the least important factor. The Article concludes that it is the standard for control -whether the supervening event is beyond the control of the party- that determines the outcome of cases in the force majeure context and not necessarily the contractual language. This article has important implications on COVID-19-related contractual cases. Unlike the prevailing narrative that it is the language of the force majeure clause that's determinative, this article shows that the primarily focus of the inquiry will be on whether the effects of COVID-19 have been beyond the control of the promisee. Normatively, the Article suggests that the trifactor of control, foreseeability, and contractual language are not effective for allocation of legal risks in times of crises. It puts forward a novel approach to force majeure clauses whereby that the courts should instead focus on the degree to which parties have relied on (expected) performance, in particular during the time of crisis.

Keywords : contractual risks, force majeure clauses, foreseeability, control, contractual language, computational analysis

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