HOW PARTIES CAN USE COVID-19 TO EXCUSE PERFORMANCE OF CONTRACTS

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ABSTRACT

In today's world, where living in a global pandemic is the new norm, contracting parties are finding ways to use COVID-19 as an excuse to get out of their contracts. This paper analyzes both how parties can use contract excuses when they have a force majeure clause and also how parties can use contract excuses when their contracts are silent regarding force majeure events. There is a vast history of contracts and excuses. With this historical lens, I conduct a case analysis of the frustration of purpose, impossibility, and change in law contract excuses with regard to COVID-19 in a present-day case— Victoria's Secret Stores, LLC v. Herald Square Owner, LLC. In the final discussion of the paper, I analyze the outcome of the case and its likely effect on future similar contracts.

TABLE OF CONTENTS

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INTRODUCTION

This paper analyzes both how parties can use contract excuses when they have a force majeure clause and how parties can use contract excuses when their contracts are silent regarding force majeure events. Part 1 goes through the history of contracts and excuses. It first lays out the common law foundation of excuses. Then it analyzes several statutes and principles regarding contract excuses, including the Uniform Commercial Code, the French Civil Code, the United Nation's Convention on Contracts for the International Sale of Goods, and the Principles of European Contract Law. Part 2 of this paper is a case analysis of the frustration of purpose, impossibility, and change in law contract excuses in a present-day case with regard to COVID-19— *Victoria's Secret Stores, LLC v. Herald Square Owner, LLC*.[1] In this case, Victoria's Secret sued Herald Square, the landlord of their flagship store in New York. Victoria's Secret argued that COVID-19 and New York Governor Andrew Cuomo's stay at home order's mandating the shutdown of retail businesses have frustrated the purpose of the lease, making it impossible for Victoria's Secret to keep paying the monthly rent of roughly $1 million. In Part 2, I analyze Victoria's Secret's and Herald Square's arguments. I discuss in Part 3 the outcome of the case and its likely effect on future leases. I will also examine why I respectfully disagree with the Supreme Court of the State of New York County of New York's ruling in favor of Herald Square.

PART 1: HISTORY OF CONTRACT EXCUSES

Parties may be excused from their contracts under the law, by breach, according to the agreement, or if performance is prevented.[2] Part 1 of this paper examines this latter type of excuse with regard to force majeure events. Generally,

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[1] Victoria's Secret Stores, LLC v. Herald Square Owner, LLC, 136 N.Y.S.3d 697 (N.Y. Sup. Ct. 2021).

[2] 17B C.J.S. *Contracts* § 590 (updated 2021).

a force majeure event is an event beyond the parties' control, which prevents performance under a contract and may excuse nonperformance.[3]

A few scenarios portray how a party can use a force majeure to excuse performance under their contracts. One scenario is when the parties do not draft a force majeure clause into their contract. In this case the nonperforming party would argue that they are excused under the common law or relevant code/statute—applying the excuses of impossibility, frustration of purpose, impracticability, change in law, or force majeure. A second scenario is when parties do include a force majeure clause in their contract, allocating the risks associated with particular circumstances beyond the parties' control that would affect performance of their contracts.

A force majeure clause excuses nonperformance of contractual obligations resulting from certain causes.[4] Examples include acts of God, acts of a public enemy, acts of government, labor disputes, and severe weather conditions.[5]

Force majeure clauses are narrowly construed and will usually only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified in the contract.[6] Courts interpret catch all phrases using "ejusdem generis," meaning the court will consider the unclassified event to fall within the force majeure clause if it is within the same class or type as the other items listed in the clause.[7] The range of excuses without a force majeure clause are applied even more narrowly than the range of excuses with a typical force majeure clause.[8]

To excuse nonperformance, the force majeure event must have caused the prevention of performance of the contract. A party must prove that the failure to perform was proximately caused by the force majeure.[9] For example, if the stay-at-home orders, business shutdowns, and supply shortages caused by COVID-19

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[3] Beardslee v. Inflection Energy, 25 N.Y.3d 150 (2015) (citing Kel Kim Corp. v. Central Mkts., 70 N.Y.2d 900, 902 (1987)); 30 Williston on Cont. Force Majeure Clauses § 77:31 (updated 2020).

[4] 77A C.J.S. *Sales* § 370 (updated 2021).

[5] *Id.*

[6] In re Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012); *see also Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8 (2009) (explaining that force majeure clauses are to be narrowly interpreted and only if the specific event that prevents a party's performance is included in the clause will that party be excused).

[7] 102 Am. Jur. 3d *Proof of Facts* § 401 (2008).

[8] Nycal Offshore Dev. Corp. v. U.S., 743 F.3d 837, 846 (Fed. Cir. 2014) (explaining that the "defense of frustration of purpose is given a narrow construction because it defeats the explicit terms of the parties' agreement"); *see also Kel Kim Corp.*, 70 N.Y.2d at 902 (reasoning that while impossibility has been recognized in the common law, courts narrowly apply this defense, in part due to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances).

[9] 30 Williston on Cont. Force Majeure Clauses § 77:31 (updated 2020).

resulted in a party's failure to perform, and their contract does not address these circumstances, that nonperforming party may be excused.[10]

The force majeure event also must not be capable of mitigation. In the absence of express language, an obligation to take reasonable steps to mitigate can be implied if the clause defines force majeure as events beyond the reasonable control of a party.[11] Subject to the terms of the contract, a party seeking to enforce a force majeure clause to excuse nonperformance must prove that there were no further steps that could have been taken to avoid or mitigate the consequences.[12]

Additionally, when considering the applicability of a force majeure clause, courts analyze in part whether the event was foreseeable.[13] The idea is that if the event was foreseeable, the parties would have allocated the risks of the event in the contract.

The common law and subsequent doctrines have accounted for force majeure events in various ways. The common law approach does not recognize an excuse by the specific category name of "force majeure." Traditionally, under the common law, if parties wanted to escape liability, they had to explicitly excuse performance in their contracts regarding force majeure events.[14] However, the common law has softened this harsh absolute contract liability paradigm by forming the excuses of impossibility and frustration of purpose, which have several variations.[15] Taking the softer approach a step further, the Uniform Commercial Code[16] prescribes commercial impracticability as an excuse under Article 2-615. Under the Uniform Commercial Code, a delay in delivery or even a non-delivery is not a breach of the contract if the circumstances laid out in section 2-615(a) are met.[17] Another example of how force majeure has been codified is in the United

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[10] Robin L. Nolan & Adam F. Aldrich, *Navigating Commercial Leases and Real Estate Loans During Covid-19*, COLO. L. (June 2020), https://cl.cobar.org/features/navigating-commercial-leases-and-real-estate-loans-during-covid-19/.

[11] Shannon Rose Selden et al., *Roundtable: Contract Enforceability in the Age of Covid-19*, 21 BUS. L. INT'L. 209, 228 (2020).

[12] Fred R. Pletcher & Anthony A. Zoobkoff, *Force Majeure (And Other Useful French Profanities) In Resource Agreements*, 59 ROCKY MT. MIN. L. INST. 17-1, 17-11 (2013).

[13] *Id.* at 17-4[3][b].

[14] James R. Gordley, *The Death of Contract*, 89 HARV. L. REV. 452, 453 (1975).

[15] Taylor v. Caldwell, 122 Eng. Rep. 309, 314 (K.B.) (1863) (coming up with the excuse of impossibility); Krell v. Henry, 2 K.B. 740 (1903) (coming up with the excuse of frustration of purpose.); Mineral Park Land Co. v. Howard, 172 Cal. 289, 290 (1916) (coming up with the excuse of impracticability).

[16] The Uniform Commercial Code is a comprehensive set of laws governing all commercial transactions in the United States. Uniformity throughout American jurisdictions is one of the main objectives of this Code. It is not a federal law, but a uniformly adopted state law that has been universally adopted. The American Law Institute and National Conference of Commissioners on Uniform State Laws, U.C.C. *General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute*, Text General Comment (2020); Uniform Law Commission, *Uniform Commercial Code* https://www.uniformlaws.org/acts/ucc.

[17] U.C.C. § 2-615 Excuse by Failure of Presupposed Conditions states:

Nations Convention on Contracts for the International Sale of Goods,[18] which provides that a party is not liable for a failure to perform any of their obligations if they prove that failure was due to an impediment beyond their control that was not foreseeable and could not be mitigated.[19]

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (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.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
>
> U.C.C. § 2-615.

[18] The United Nations Convention on Contracts for the International Sale of Goods is an international treaty governing the sale of goods. This treaty creates a private right action in all federal courts under Article VI of the U.S. constitution. Amir Shachmurove, *Here Lions Roam: CISG As the Measure of A Claim's Value and Validity and A Debtor's Dischargeability*, 34 EMORY BANKR. DEV. J. 461, 486 (2018).

[19] Article 79 states:

> (1) 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.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
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> (a) he is exempt under the preceding paragraph; and
>
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) the exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

Then there is the French Civil Code,[20] which recognizes a force majeure event whether or not the parties have expressly included a force majeure clause in their contracts.[21] The French Civil Code also encourages parties to renegotiate their contracts if one party experiences onerous hardship.[22] Accounting for changing

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> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1980, S. TREATY DOC. No. 98-9, 1489 U.N.T.S. 3. (1983).

[20] The French Civil Code was substantially revised in 2016—in part recognizing force majeure as the only case where a breaching party can be exonerated from liability. *See* Ordinance No. 2016-131 of February 10, 2016 on the reform of contract, the general regime, and the proof of obligations; see also Alejandro Lopez Ortiz & David Bakouche, *The 2016 Amendment to the Napoleonic Civil Code: A French Revolution for Construction Contracts,* MAYER BROWN (DEC. 5, 2016), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2016/12/the-2016-amendment-to-the-napoleonic-civil-code-a/files/dec2016afrenchrevolutionforconstructioncontracts/fileattachment/dec2016afrenchrevolutionforconstructioncontracts.pdf.

[21] Article 1218 states:

> In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.
>
> If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1.

Code civil [C. civ.] [Civil Code] art. 1218 (Fr.).

[22] Article 1195 state:

> If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligation during renegotiation.
>
> In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

Id. art. 1195.

circumstances slightly differently, the Principles of European Contract law[23] excuse non-performance if it was due to an impediment beyond the parties' control.[24] Additionally, the Principles of European Contract law prescribes an excuse for a change in circumstance.[25] These principles mandate that entrusting

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[23] The Commission for European Contract Law, a private group consisting of experts from each of the member countries, has created 130 Principles of European Contract Law. The PECL consist of blackletter rules, comments, and notes attempting to fill gaps and explain inconsistencies in European law. Dr. Ulrich Drobnig, *Unified Private Law for the European Internal Market*, 106 DICK. L. REV. 101, 108 (2001).

[24] Article 8:108 Excuse Due to an Impediment states:

> (1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
>
> (2) Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.
>
> (3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

PRINCIPLES EUR. CONT. L. art. 8:108 (COMM'N ON EUR. CONT. L.), available at https://www.trans-lex.org/400200/_/pecl/#head_123.

[25] Article 6:111 Change of Circumstances state:

> (1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.
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> (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
>
> (a) the change of circumstances occurred after the time of conclusion of the contract,
>
> (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
>
> (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
>
> (3) If the parties fail to reach agreement within a reasonable period, the court may:

performance to another does not provide an excuse.[26]

The common law, statutes, and codes vary in subtle ways. In the following sections I will go into further detail about how parties can use excuses under these doctrines.

A. Common Law

The first contract cases under the common law followed the principle of absolute contractual liability.[27] One of the earliest cases that demonstrates this principle is *Paradine v. Jane*.[28] In this case, Jane leased land from Paradine.[29] When Jane failed to pay rent, Paradine sued for breach of the lease.[30] In defense, Jane argued that he could not pay rent due to the war; however, the King's Bench was unpersuaded by this argument.[31] The court explained that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good."[32] The takeaway from *Paradine* is that if a party wants freedom from liability of a force majeure event, then they need to expressly include the force majeure event as an excuse for non-performance of the contract. After *Paradine*, the common law

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> (a) terminate the contract at a date and on terms to be determined by the court; or
>
> (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.
>
> In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

Id. art. 6:111.

[26] Article 8:107 Performance Entrusted to Another states:

> A party who entrusts performance of the contract to another person remains responsible for performance.

Id. art. 8:107.

[27] Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L. J. 117, 144 (1992) (stating that for centuries, common law courts would not go beyond the express bargain and rigorously applied absolute contracts rule among other contracts principles).

[28] Paradine v. Jane, 82 Eng. Rep. 897 (1647).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

did not recognize a force majeure excuse without express inclusion in the contract—even during times of war.[33]

Excuses under the common law have become less strict than absolute contract liability.[34] For example, in *Taylor v. Caldwell*, the excuse of impossibility of performance was introduced.[35] Impossibility of performance occurs when it is apparent that the parties contracted on the basic assumption of the continued existence of a particular person or chattel, and the person or chattel is destroyed.[36] In *Caldwell*, Caldwell leased a Garden and Music Hall to Taylor for performances.[37] With no fault of either party and prior to the performances the music hall burned down.[38] The King's Bench in *Caldwell* created an implied excuse by law.[39] The court implied a condition precedent —continued existence of the Garden and Music Hall—to performance into the contract on the theory that the implied condition was a basic assumption of both parties in entering the lease agreement. Consequently, the court held that because the Music Hall burned down without the fault of either party, the condition precedent did not occur, and it was impossible to lease the music hall. Therefore, both parties were excused from the contract.[40]

The impossibility excuse has been broadened over the years. For example, in *Mineral Park Land co. v Howard*, the impracticability defense emerged.[41] Rather than create an entirely new excuse, the Supreme Court of California in *Mineral Park Land* fit the doctrine of impracticability into the existing category of impossibility—explaining a contract is impracticable when it is impossible in the eyes of the law.[42] In this case, Howard was to extract an agreed-upon amount of gravel from Mineral Park's property.[43] After extracting about half the gravel, Howard determined that the rest could only be extracted with great expense and

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33 *But cf.* Pollard v. Shaffer, 1 U.S. 210, 213 (1787) (reasoning that war did form a basis for an excuse and shielding the lessee from liability for the damage the British army (the enemy) caused when it took over the premises because 1) this was not an ordinary accident; 2) this was not contemplated by either party; and 3) under equality of equity both parties experienced a loss).

34 *Kel Kim Corp.,* 70 N.Y.2d at 902 (explaining that it was not until the late nineteenth century that impossibility of performance was an accepted defense).

35 *Caldwell*, 122 Eng. Rep. at 314.

36 *Id.*

37 *Id.* at 311.

38 *Id.*

39 *Id.* at 314.

40 Taylor v. Caldwell, 122 Eng. Rep. 309 (reasoning that the plaintiffs are excused from taking the gardens and paying the money, and the defendants are excused from performing their promise to give the use of the Hall and Gardens and other things. The court treated the music hall as if it never existed. Therefore, because there was a basic assumption that the music hall exists to perform under the contract, the contract was literally impossible to perform).

41 *Mineral Park Land Co.*, 172 Cal. at 290.

42 *Id.* at 293.

43 *Id.* at 290.

delay.[44] In *Mineral Park Land*, the court explained 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."[45] Applying this rule, the *Mineral Park Land* court held that because the cost of completing the project was so great and had the effect of making performance impracticable, the situation is not different from that of a total absence of earth and gravel—which would make the contract impossible to perform.[46] Therefore, the court concluded that Mineral Park should not have recovered damages for Howard's inability to perform.[47] The doctrine of impracticability has come to be recognized as commercial impossibility or impracticability.[48] Impracticability is a more lenient version of impossibility but stricter version of simple economic hardship, as economic hardship is not recognized as an excuse under the common law.[49]

In addition to impracticability, a change in law can excuse performance under the doctrine of impossibility.[50] Where a change in law makes the contract so vastly different from what could reasonably have been within the contemplation of the parties at the time of contracting, and a reasonable person in turn would not have entered into the contract in the first place, the impossibility excuse may apply.[51] A change in law does not excuse the promisor from their obligation if it remains possible to perform the contract in such a way that its essential purpose can be accomplished. For a party to use impossibility as a defense due to governmental action, the party must show that it did not contributed to or cause the impossibility.[5253] Case law suggests that impossibility due to change in law does not excuse performance if the impossibility prevents performance only

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44 *Id.* at 291.

45 *Id*. at 293 (citing 1 Beach on Contr. § 216).

46 *Id*.

47 *Id*.

48 102 Am. Jur. 3d *Proof of Facts* § 401 (2008) (explaining that commercial impracticability is an excuse from performance due to extreme and unreasonable difficulty, expense, injury or loss involved).

49 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

50 20A N.Y. Prac., Contract Law § 8 (updated 2020) (citing In re Flag Telecom Holdings Ltd., 320 B.R. 763, 771 (Bankr. S.D. N.Y. 2005)) (explaining that performance is impossible if it is prevented by law).

51 City of New York v. Long Island Airports Limousine Serv. Corp., 467 N.Y.S.2d 93, 94 (1983), *aff'd*, 62 N.Y.2d 846, 466 (1984) (holding that "the statutory changes have made the contract worthless to LIALS and also made performance of the contract vastly different from what could reasonably have been within the contemplation of the parties when the contract was made and that given these altered circumstances, it is evident that a reasonable man would not have made the subject contract"; therefore excusing LIALS's performance); 20A N.Y. Prac., Contract Law *Impossibility—Application of law* § 8 (updated 2020).

52 84 A.L.R.2d § 3 (1962).

53 *Id.* § 6 (citing *Mascall v Reitmeier*, 145 Minn 214 (1920)).

temporarily.[54] Furthermore, just because a contract becomes more difficult and expensive to perform because of a change in law after its execution does not make performance impossible.[55]

In the early 1900s, the frustration of purpose excuse was recognized under the common law in a series of cases known as the Coronation Cases.[56] In the first coronation case, *Krell v. Henry*, Henry rented a flat from Krell to view the coronation of the King and Queen, which he put down a deposit for.[57] Krell had advertised the room as a way to view the coronation.[58] Unfortunately, the King got sick and the coronation ceremony did not occur.[59] The issue in front of the King's Bench was whether Henry should get his deposit back or whether Krell should receive the full payment of the rent.[60] The court ruled in favor of Henry under a frustration of purpose analysis.[61] The frustration of purpose excuse is based on an implied condition precedent that occurs when both parties contemplated a specific purpose of the contract and that purpose is frustrated by no fault of either party.[62] In *Krell*, it was understood by both parties that the room was let for the purpose of viewing the coronation; so, when the purpose was frustrated because the King got sick, both parties were excused.

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[54] Bank of Boston Intern. of Miami v. Arguello Tefel, 644 F. Supp. 1423, 1426 (E.D.N.Y. 1986) (reasoning that because the Nicaraguan government's decree of certain currency restrictions that barred defendants from repaying the debt in U.S. dollars as provided for in the loan agreement was only temporary because when the defendants moved to the U.S. they weren't barred by the decree anymore.); Scanlan v. Devon Sys., Inc., 89 Civ. 1634 (LMM), 2000 WL 218389, at *2 (S.D.N.Y. Feb. 24, 2000); 28A N.Y. Prac., Contract Law §20:8.

[55] 20A N.Y. Prac. Contract Law § 8 (updated 2020).

[56] *Krell*, 2 K.B. 740 (holding that the purpose of the contract was frustrated when the coronation was cancelled because the king got sick; therefore, there was no obligation to pay the balance); Griffith v Brymer, 19 T.L.R. 434 (K.B.) (1903) (holding that the rental contract of a room to view the coronation was void because the agreement was made on the supposition—mistake—by both parties that nothing had happened which made performance impossible, since both parties at the time of contract did not know that the King was ill); Chandler v. Webster, 1 K.B. 493 (1904) (holding that the frustration of purpose excuse did not apply because under the agreement the plaintiff bound himself to pay the price of the room before the date at which the procession became impossible). These three cases are distinguishable frustration of purpose cases. *Griffith* is about a mutual mistake of material fact, which prevents contract formation altogether. This is different from *Krell*, which was about an excuse to a pre-existing contract. On the other hand, *Chandler* allocates the loss to a party who should have paid an amount prior to the event giving rise to the excuse—highlighting that it is important whether the obligations were due prior to the event or after the event.

[57] *Krell*, 2 K.B. 740.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Krell*, 2 K.B. 740; 20A N.Y. Prac., Contract Law § 20 (updated 2020) (explaining that a party cannot defeat a breach of contract claim on the ground of a failure of the condition precedent if the party has frustrated the performance of the condition).

About 40 years later, the Supreme Court of California in *Lloyd v. Murphy* elaborated on the frustration of purpose excuse. The court highlighted how precedent cases require:

> [A] promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counter performance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counter performance remains valuable.[63]

Applying this rule, the court in *Lloyd* first concluded that the risk of war and its consequences requiring restriction of the production and sale of automobiles was, or should have been, foreseeable by the defendant, an experienced automobile dealer.[64] There were specific facts supporting this, including that when the lease was executed the National Defense Act had been law for more than a year.[65] This act authorized the President of the United States to allocate materials and mobilize industry for national defense.[66] If a risk is foreseeable, the underlying idea is that the parties would have allocated the risk by an express condition.[67] Conversely, parties' do not allocate risk when there is a basic assumption. Unlike *Caldwell* and *Krell*, where the courts found an existence of a basic assumption of both parties,[68] in Lloyd there was no such basic assumption of the parties. So, while the parties in *Caldwell* and *Krell* might have foreseen that the opera house might burn down or that the parade would not take place, there was still an excuse because the court found a basic assumption among the parties that did not require an express condition.

In *Lloyd* the court then explained that if governmental regulation does not entirely prohibit the business from operating on the leased premises but rather limits or restricts it—making it less profitable and more difficult to continue—the lease is not terminated and the lessee is not excused from further performance.[69] In other words, the common law does not accept economic hardship as an excuse. Therefore, because the purpose was not destroyed but only restricted, and plaintiffs

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63 *Lloyd v. Murphy*, 25 Cal.2d 48, 49 (1944).

64 *Id.* at 56.

65 *Id.* at 55.

66 *Id.*

67 20A N.Y. Prac., Contract Law § 8 (updated 2020) (explaining that if the parties could have foreseen the change in law at the time of contracting but did not address it in their contract, a claim of impossibility based on the subsequent change may be precluded).

68 In *Caldwell* the assumption was the continued existence of the opera house, and in *Krell* the assumption was that the coronation of the King would take place.

69 *Lloyd*, 25 Cal.2d at 56 (explaining that just because the leased premises was less profitable does not justify terminating the lease and excusing the lessee from performing).

proved that the lease was valuable to the defendant the frustration of purpose excuse did not apply.[70]

In summary, these foundational cases reveal how the common law has evolved with regard to contract excuses. The courts started with the principle of absolute contract liability expressed in *Paradine.* Then the courts began to recognize excuses even if they were not expressly included in parties' agreements. This is seen in *Caldwell*, where the court recognizes the excuse of impossibility when there is an implied condition—based on the basic assumption of the continued existence of a particular object. *Mineral Park Land* expanded impossibility to include circumstances that are commercially impracticable or physically unreasonable. In the Coronation Cases, the courts recognized the excuse of frustration of purpose, and excused the parties from performance when the implied condition precedent was frustrated. The Coronation Cases distinguish among frustration of purpose, mutual mistake, and an obligation prior to the event that frustrates the purpose. However, the common law draws the line at economic hardship, as *Lloyd* holds that economic hardship is not an excuse under the common law.[71] Changes in law that simply produce an economic difficulty and are only temporary will rarely excuse performance.[72] Following in the footsteps of these common law principles, are codes of law, as detailed in sections II, III, IV, and V.

B. The Uniform Commercial Code

The Uniform Commercial Code (UCC) codifies the impracticability doctrine from *Mineral Park Land* and change-in-law as excuses. Under UCC § 2-615(a), the principle of impracticability is implied into contracts, unless the seller has assumed a greater obligation.[73] Under the UCC doctrine of impracticability, a party has a duty to mitigate.[74]

The impracticability excuse will not apply if the pleading party is simply experiencing economic hardship.[75] Under § 2-615, a breaching seller is required to show:

(1) a contingency;

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[70] *Id.* at 58.

[71] *Lloyd*, 25 Cal.2d at 56.; 77A C.J.S. *Sales* § 370; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

[72] *See supra* notes 50-55 and accompanying text.

[73] *See supra* note 17 and accompanying text.

[74] *See supra* note 17 and accompanying text quoting UCC § 2-615(b); Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law. the Approach of the Cisg, Picc, Pecl and Dcfr*, 15 VJ 233, 238 (2011).

[75] 20A N.Y. Prac. § 12 (updated 2020) (distinguishing one, a contingency impacting the ability of a party to get supplies necessary to fulfill a contract and in turn making performance more costly, with two, an increase in the price of raw materials, even if unanticipated, making performance unprofitable, and explaining that § 2-615 excuses the former but not the latter).

> (2) the impracticability of performance in light of the occurrence of that contingency; and
> (3) that the nonoccurrence of the contingency was a basic assumption of the parties.[76]

Contingencies include war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like.[77] If the contingencies cause a marked increase in cost or prevent the seller from securing supplies necessary for his performance, it is within the contemplation of § 2-615 and may be excused.[78] To explain further, if a condition assumed to exist that was the basic assumption of the transaction and it no longer exists, then the party seeking excuse may use defense of impracticability. However, if there is an express provision drafted into the contract that would cover the force majeure type event, then the contract should be followed.

In addition to the impracticability excuse, UCC § 2-615(a) also prescribes a change in law excuse. This excuse means that the UCC does not make the present action of the seller depend on the eventual determination of the legality of the particular governmental action.[79] Comment 10 to § 2-615(a) states that:

> The seller's good faith belief in the validity of the regulation is the test under this section and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.[80]

A seller is excused from performing their obligation under the contract if their performance of the contract would be illegal due to a change in the law, which they in good faith did not know about when entering into the contract. This excuse is justified from a policy perspective. The drafters of the UCC would not encourage parties to violate or risk violating the law. Like with frustration of purpose, a change in law does not make performance impossible. Rather, the foundation for

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[76] Dell's Maraschino Cherries Co., Inc. v. Shoreline Fruit Growers, Inc., 887 F. Supp. 2d 459, 478 (E.D.N.Y. 2012) (citing. Canusa Corp. v. A & R Lobosco, Inc., 986 F.Supp. 723, 731 n.6 (E.D.N.Y.1997)); 20A N.Y. Prac. § 12 (updated 2020).

[77] UCC § 2-615, off. cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 1977).

[78] *Id*.

[79] *Id*. off. cmt. 10.

[80] *Id*.

the change in law excuse is to prevent parties from having to choose between violating the law or breaching their contracts.

How would the UCC apply to COVID-19? The UCC would only provide an excuse if the seller or buyer did not assume the obligation to perform under particular circumstances regarding COVID-19. If there is evidence that the absence of a pandemic was a basic assumption of the deal, this will strengthen a party's argument to be excused under UCC § 2-615. Usually, a basic assumption of the deal relates to the deal itself and not a background condition. The existence of the opera house in *Caldwell* and the room advertised for the parade in *Krell* are examples of basic assumptions relating to the deals at issue. To the extent that COVID-19 has impacted supply chains, parties could argue that the basic assumption of having steady supply chains no longer exists and plead for excusal under UCC § 2-615. This is because having access to a supply chain is similar to the basic assumptions in *Caldwell* and *Krell* since it relates to the deal. If a party can show that its delay or non-delivery has been made impracticable by a contingency, then it may be excused under UCC § 2-615.

The change in law language of § 2-615(a) could also be used to plead an excuse. This could apply to changes in law made in response to the COVID-19 pandemic.

C. The French Civil Code

On a freedom of contract versus economic regulation spectrum, the French Civil Code (FCC) leans closer to the economic regulation side, though parties are free to negotiate for an assumption of greater liability.[81] Unlike the common law and the UCC, the FCC recognizes force majeure per se,[82] even if the parties do not expressly include a force majeure clause in their contracts.[83] However, courts do not find instances of force majeure lightly.[84] Under Article 1218 of the FCC,[85] an event falls within the legal definition of force majeure, if all the following conditions are met:

1. It prevents performance of an obligation by the debtor;
2. It is beyond the debtor's control;

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[81] Selden et al., *supra* note 11, at 223.

[82] *See supra* note 21 and accompanying text.

[83] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1218 (Fr.).; Selden, *supra* note 11, at 222; Brad L. Peterson et al., *COVID-19 Contractual performance – Force Majeure clauses and other options: a global perspective*, Mayer & Brown (Mar. 20, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/covid19-contractual-performance-force-majeure-clauses-and-other-options-a-global-perspective.

[84] Selden, *supra* note 11.

[85] *See supra* note 21 and accompanying text.

3. It could not have been reasonably foreseen at the time of conclusion of the contract; and
4. It has effects that cannot be avoided by appropriate measures.[86]

The likelihood of a party successfully relying on a force majeure event to excuse performance under the FCC can be improved where the contract explicitly provides for a force majeure excuse and allocates the risks.[87] However, the FCC, unlike the common law, recognizes hardship as an excuse.[88] Parties can modify this default rule in their contracts.[89] Additionally, this default rule only applies to contracts made after 2016.[90]

Proving hardship, under the FCC, has a lower threshold than force majeure.[91] The following conditions must be met for hardship to excuse performance:

1. There must be a change of circumstances;
2. Unforeseeable at the time the contract is concluded; and
3. Rendering performance excessively onerous for a party who had not accepted the risk of such change.[92]

Because hardship has a lower standard, it is easier to successfully argue than force majeure. Comparatively, the doctrine of impracticability dances with the idea of a hardship as an excuse—it works on an "economic hardship plus" principle.

Interestingly, the FCC does not expressly require a party to mitigate its damages in the event of contractual non-performance due to a force majeure event.[93] However, since codification, the mitigation principle has made appearances in some areas of French law, including leasing, insurance, and the international sale of goods.[94] Both common law and civil law principles focus on whether the nonperforming party could have overcome or at least mitigated the

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86 Selden, *supra* note 11, at 223.

87 *Id.*

88 *See supra* note 22 and accompanying text; *see also* James R. Ferguson, *Arbitrating Covid-19 Contract Disputes Under Civil And Common Law Principle*s, 38 ALTERNATIVES TO HIGH COST LITIG. 134, 143 (2020).

89 Selden, *supra* note 11, at 225.

90 *Id.*

91 *Id.*

92 *Id.*

93 Solène Le Pautremat, *Mitigation of Damage: A French Perspective*, 55 THE INT'L AND COMP. L. 205, 206 (2006), www.jstor.org/stable/3663317; Peterson et al., *supra* note 83.

94 Le Pautremat, *supra* note 93, at 206; Selden, *supra* note 11, at 223 (listing four conditions for force majeure to exist, including that it has "effects that cannot be avoided by appropriate measures").

effects of the triggering event by employing a commercially reasonable alternative.[95]

How would the FCC apply to COVID-19? Under Article 1218, COVID-19 meets the requirements. Generally, it has been difficult to argue that epidemics and pandemics fall under force majeure before French courts.[96] For example, courts have held that Ebola, H1N1, SARS and Dengue fever were foreseeable and had avoidable circumstances; therefore, the necessary conditions were not met for these epidemics to qualify as force majeure.[97] COVID-19 is different from these past epidemics due to the unprecedented effects that have resulted, including closure of businesses, isolation measures, and transport restrictions.[98] In fact, the French Prime Minister made a public procurement indicating that the coronavirus is a force majeure.[99] Additionally, in the Paris Commercial Court a French major successfully relied on force majeure to avoid buying nuclear power from the seller, as the impact of COVID-19 had reduced electricity prices in France.[100]

D. The United Nations Convention on the International Sale of Goods

The United Nations Convention on the International Sale of Goods (CISG) was created in 1980 to cover international sale of goods transactions. The CISG applies automatically to transactions involving international sale of goods between buyers and sellers located in countries that have adopted the CISG.[101] However, the parties can choose to exclude its application or to vary the effect of any of its provisions.[102] Because the CISG is the product of a compromise among many

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95 Ferguson, *supra* note 88, at 145.

96 Selden, *supra* note 11, at 222.

97 *Id.*

98 *Id.*

99 *Id.* at 224; Reuters Staff, *France: "force majeure" can be declared over coronavirus in contracts with smaller firms*, REUTERS: EMERGING MKTS. (Feb. 28, 2020, 4:14 AM), https://www.reuters.com/article/us-china-health-france-economy/france-force-majeure-can-be-declared-over-coronavirus-in-contracts-with-smaller-firms-idUSKCN20M1R8.

100 Selden, *supra* note 11, at 225; Sharon Wajsbrot, *Nucléaire: Total gagne une manche judiciaire face à EDF*, LES ECHOS: ENERGIE - ENVIRONNEMENT (FR.) (May 20, 2020, 7:41 PM), https://www.lesechos.fr/industrie-services/energie-environnement/nucleaire-total-gagne-une-manche-judiciaire-face-a-edf-1204649.

101 United Nations Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/CONF.97/18, *reprinted in* S. TREATY DOC. NO. 98-9, 98th Cong., 1st Sess., and 19 I.L.M. 668 (1980) (pursuant to Article 6, the CISG supplants domestic law in appropriate cases involving international parties from different countries, at least one of which is a party to the treaty—assuming the party from a country who has signed the treaty has not taken an Article 95 reservation).

102 *Id.* art. 95 ("Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by . . . this Convention.").

countries, its language can be vague.[103] Generally, the conditions for an exemption under Article 79 of the CISG are narrowly construed and rarely granted.[104]

Under Article 79 of the CISG, a party may avoid liability due to an "impediment."[105] The term "*impediment*" describes an event beyond the contracting parties' control that excuses nonperformance of its obligations under the contract.[106] CISG Art. 79 (1) requires four (4) elements for the exemption to apply:

1. The failure to perform has to be caused by an impediment;
2. The impediment must be beyond the party's control;
3. The impediment and its consequences must be unforeseeable; and
4. Unavoidable.[107]

For a party to be exempted, the impediment must be the sole reason for the party's failure to perform.[108] The circumstances must fall outside the party's sphere of risk.[109] Financial capacity, personal circumstances and liability for one's own personnel are risks that are within a party's sphere of risk; and therefore, do not usually constitute an impediment.[110] Foreseeability is determined from an objective perspective as something that is somewhat likely to happen.[111]

Under Article 77 of the CISG, a party who relies on a breach has a duty to mitigate their damages.[112] To be unavoidable means that the nonperforming party could not have mitigated the circumstances. A party is obliged to perform under the contract if at all possible, including a duty to offer a commercially reasonable

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103 Jenni Miettinen, *Economic Impediment as Grounds for Exemption from Liability in the Scope of CISG Article 79*, 18 VINDOBONA J. INT'L COM. L. & ARB. 227 (2014).

104 *Id.* at 228.

105 *See* United Nations Convention on Contracts for the International Sale of Goods art. 79, *supra* note 19.

106 Brandon Nagy, *Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?*, 26 N.Y. INT'L L. REV. 61, 63 (2013) (explaining that examples of impediments include government actions, civil actions unrelated to the contract (like strikes), a seller's breach caused by supplier's default, and forces creating particularly onerous economic hardship may be ground for excuse).

107 Miettinen, *supra* note 103, at 229.

108 *Id.*

109 *Id.* (explaining that the sphere of risk is a concept used to describe the risks a party has to bear).

110 *Id.*

111 *Id.* at 230.

112 United Nations Convention on Contracts for the International Sale of Goods, *supra* note 101, art. 77 ("A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.").

substitute if the circumstances permit, and to bear costs of overcoming difficulties.[113]

Generally, hardship cases are not grounds for exemption under the CISG.[114] There is no mention of hardship in Article 79.[115] Additionally, the legislative history of the CISG suggests that under Article 79 a party cannot solely rely on the ground that performance has become unforeseeably more difficult or unprofitable to be excused.[116]

How would the CISG apply to COVID-19? If the parties allocated risk in the contract regarding government mandated shutdowns of businesses and epidemics, then the contract should be followed. If not then under the CISG, if the four elements can be satisfied a party may be exempt. If the pleaded circumstance resembles economic hardship, then a party will likely not be exempt. While epidemics and state interventions are essentially covered by Article 79 CISG, the specific circumstances of the contract could render COVID-19 inapplicable.[117] For example, precedent CISG case law regarding the SARS outbreak, held that SARS was not a force majeure event, but this was because SARS had happened a few months before the contract was signed.[118]

E. The Principles of European Union Contract Law

Using similar language to the CISG, the PECL provides an excuse to non-performance due to an "impediment" beyond a party's control.[119] The failure to perform due to frustration of purpose or impracticability is functionally equivalent to what the PECL refers to as excused non-performance.[120] In fact, under the PECL the circumstances of the impediment are like those traditionally required for force

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113 Miettinen, *supra* note 103, at 230.

114 Yasutoshi Ishida, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something*, 30 PACE INT'L L. REV. 331, 363 (2018).

115 *Id.* at 361; *cf.* David Kuster & Camilla Baasch Andersen, *Hardly Room for Hardship – A Functional Review of Article 79 of the CISG*, 35 J. L. & COM. 1, 4 (2016) (explaining a different idea that some scholars "rely on the wording of the article to reach a conclusion, surmising that the use of the words 'impediment' and 'could not reasonably be expected . . . to have avoided or overcome it or its consequences,' show that changes in circumstances short of impossibility can be unreasonable to enforce and thus hardship is included within the wording.").

116 PACE LAW SCHOOL INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, *GUIDE TO ARTICLE 79, COMPARISON WITH PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)* (2007).

117 Gizem Alper, *COVID-19: Force Majeure Under CISG*, JURIST: COMMENT. (May 27, 2020, 4:38 PM), https://www.jurist.org/commentary/2020/05/gizem-alper-force-majeure/; Peterson et al., *supra* note 83.

118 Alper, *supra* note 117.

119 *See* PRINCIPLES EUR. CONT. L. art. 8:108, *supra* note 24. *Cf.* United Nations Convention on Contracts for the International Sale of Goods art. 79, *supra* note 19.

120 Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT'L L. REV. 339, 361 (2001).

majeure events.[121] Nonperformance must not be the result of the party seeking the excuse.[122] Comment C to PECL Article 1:305 discusses how Articles 6:111(2), 8:107, and 8:108(3) use the criteria of foreseeability.[123] Comment C states that, "[a] party which should have known or foreseen a fact is usually treated as if it had the knowledge or foresight."[124] Aggrieved parties have a duty to mitigate loss.[125]

However, the PECL makes is a distinction between temporary and permanent excuses.[126] PECL Article 9:303(4) states that "if a party is excused under Article 8:108 through an impediment which is total and permanent, the contract is terminated automatically and without notice at the time the impediment arises."[127] However, if the impediment is temporary, a notice of termination by the aggrieved party is necessary, as the defaulting party may still tender performance.[128]

The PECL directly addresses economic hardship under PECL Article 6:111.[129] Unlike under the FCC, economic hardship is not grounds to plead an excuse under the PECL.[130] However, the idea of impracticability is accepted under the PECL.[131] Under PECL Article 6:111(2),[132] if performance of the contract has become excessively onerous because of changed circumstances, then Article 6:111(2) requires the party to enter into negotiations to modify or terminate the contract.[133] Case law and commentary suggest that the "excessively onerous"

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121 Mercédeh Azeredo da Silveira, *Termination of Contract Under the Principles of European Contract Law*, 10 VINDOBONA J. INT'L COM. L. & ARB. 123, 126 (2006).

122 *Id.*

123 PRINCIPLES EUR. CONT. L. art 1:305, off. cmt. C (COMM'N ON EUR. CONT. L.).

124 *Id.*

125 *Id.* art. 9:504 ("The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects."); *id.* art. 9:505 ("(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.").

126 *Id.* arts. 8:108, 9:303.

127 *Id.* art. 9:303(4); Azeredo da Silveira, *supra* note 121, at 139.

128 Azeredo da Silveira, *supra* note 121, at 139.

129 *See supra* note 25 and accompanying text.

130 Lando, *supra* note 120, at 367 (explaining that under PECL Article 6:111(1) a party is bound even if performance has become more onerous due increase in cost of performance or decrease in value—acknowledging that this is a warning to those who believe they can get out of a contract merely because it has turned out to be unprofitable).

131 Lando, *supra* note 120, at 368 (explaining how hardship cases under the PECL would probably also be covered by the rule on impracticability in UCC section 2-615); *see also* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 757, 774 (2006) (explaining how "the PECL refers to 'change of circumstances' and 'onerousness,' which seems more like the U.C.C.'s notions of "impracticability" and unexpected contingencies").

132 *See supra* note 25 and accompanying text.

133 *See supra* note 25 and accompanying text; Lando, *supra* note 120, at 367.

requirement is a harsh standard, and requires performance that would result in the near ruin of the performing party.[134]

The PECL addresses what occurs when performance is entrusted to another party. Even under these circumstances, the party who entrusts performance of the contract to another person remains responsible for performance.[135] This is especially practicable in our modern world as most contracts are not made or performed by the contracting parties personally; but rather, contracted out through agencies who employ persons, including employees, agents, subcontractors, or other third parties.[136]

How would the PECL apply to COVID-19? As long as one of the parties have not assumed the risk associated with the circumstances surrounding COVID-19, then a party could potentially be excused from non-performance. A change in circumstance argument would be successful because it requires renegotiation, which will allow the parties to come to a new agreement that works better for both of them, otherwise the parties could terminate the agreement. Additionally, COVID-19 could satisfy a temporary excuse, but then the nonperforming party would have to perform after COVID-19 is considered over.

F. Summary

While sometimes disguised in different words, paradigms found under the common law—impossibility, frustration of purpose, impracticability, and change in law—persist across national and international codes and principles, as analyzed in Part 1 of this paper. The doctrines analyzed all show that if a party wants to be excused from performance under their contract, they really should include express language in a force majeure clause stating that. Even still, force majeure clauses are narrowly construed and typically excuse a party's nonperformance only when the event that caused the party's nonperformance is explicitly stated in the clause. If the specific event and its associated risk is not listed in the contract, excuses are applied even more narrowly.

Each doctrine has an element of foreseeability. The common law illustrates that if an event was foreseeable, the risk should have been allocated initially in the contract. If the event was not foreseeable then one of the contract doctrine's excuses may apply. Similarly, the CISG, the FCC, and the PECL in part require the event to be unforeseeable for the nonperforming party to be excused. The UCC, like the common law impossibility and frustration of purpose excuses, requires an implied condition—based on the basic assumption of the continued existence of a particular contingency.

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134 Spivack, *supra* note 131, at 774.

135 PRINCIPLES EUR. CONT. L. art. 1:305 (COMM'N ON EUR. CONT. L.).

136 *Id.* art. 1:305 off. cmt. B.

Under the common law, the UCC, the CISG, the FCC and the PECL parties are required to mitigate damages. The UCC requires both buyers and sellers to mitigate their damage. The CISG, requires that the nonperforming party could not have avoided the circumstances to qualify for the excuse. The PECL states that the nonperforming party is not responsible for loss contributed by the aggrieved party. While the FCC does not expressly require mitigation of damages, like the common law, it is common practice to enforce a duty on the nonperforming party to mitigate the effects of the triggering event.

There are subtle differences among the doctrines. The UCC, the PECL, and the CISG essentially codify the impracticability doctrine using different language. However, the FCC is unique from the other doctrines in that it recognizes economic hardship as an excuse and expressly recognizes force majeure as the default rule. The UCC prescribes an express change of law excuse.

In Part 2, I will analyze a recent case, *Victoria's Secret Stores, LLC*.[137] This case is a current example of a party trying to enforce the frustration of purpose, impossibility, and change in law excuses for non-performance.

PART 2: ANALYSIS OF ARGUMENTS FROM RECENT CASE INVOLVING CONTRACT EXCUSES: *VICTORIA'S SECRET STORES, LLC V. HERALD SQUARE OWNER, LLC*

This section analyzes how COVID-19 has affected Victoria's Secret and its lease with Herald Square. To get out of its lease, Victoria's Secret sued Herald Square using frustration of purpose, impossibility and change in law arguments due to COVID-19. The case involves a lease agreement between Victoria's Secret (VS), the tenant, and Herald Square (HS), the landlord.

A. Overview of Case

COVID-19 has affected the ability of retailers, restaurants, supply chains, farmers, and other industries across the globe to perform under their contracts. The ripple effect of COVID-19 on businesses ranges from disappearance of customers to employees getting sick with COVID-19 to government mandated shutdowns. VS is one of the businesses experiencing the repercussions of COVID-19–specifically from New York Governor Andrew Cuomo's stay at home order.[138] This stay-at-home order mandated the closing of all nonessential businesses,

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[137] Victoria's Secret Stores, LLC, v. Herald Square Owner, LLC, 136 N.Y.S.3d 697 (N.Y. Sup. Ct. 2021).

[138] Patricia Hurtado & Natalie Wong, *Victoria's Secret Sues NYC Landlord Over $938,000 in Rent*, BLOOMBERG: BUS. (June 9, 2020, 11:14 AM), https://www.bloomberg.com/news/articles/2020-06-09/victoria-s-secret-sues-landlord-over-938-000-in-n-y-city-rent#:~:text=Victoria's%20Secret%20and%20its%20parent%20company%20L%20Brands%20Inc.&text=In%20its%20lawsuit%20against%20landlord,up%20with%20the%20Evening%20Briefing.

including VS.[139] COVID-19 not only triggered the closing of its Herald Square location but also substantially decreased the anticipated foot traffic—more than 2 million after VS first entered into its nearly $1million/month lease with HS.[140]

As a result, VS and its parent company L Brands Inc. sued its landlord of the Herald Square location in NY. VS declared that COVID-19 and the related government mandated shutdowns of nonessential business has caused a total standstill of business, commerce, and everyday life in New York City, which completely and unforeseeably frustrating the purpose of the lease, and rendering performance impossible.[141] VS also argued a change in law excuse since these government regulations outlawed the operation of its retail store.[142] Therefore, VS sought recission of the commercial property lease, and a declaration that the lease was unenforceable as a result of the COVID-19 pandemic and the related government mandated shutdowns.[143] In response, HS threatened termination and eviction and demanded payment of the remaining amount due under the lease—claiming tenant liability of a minimum of $25 million.[144]

In its answer to VS's complaint, HS referred to VS as a sophisticated party, implying that the officers of VS were knowledgeable enough to contemplate and negotiate potential liability regarding a situation like COVID-19 into the lease.[145] In fact, according to HS, the parties actually allocated the business/economic risks of circumstances that might lead to a closure of the Retail Premises to VS in the lease, and VS agreed that it would in all such circumstances — other than where closure was brought about by Landlord's failure to provide essential services — remain liable to pay rent.[146] HS pointed to three (3) provisions of the agreement in its Answer to support this argument:[147]

(a) in Lease § 1(A), as the starting point, Tenant agreed that it was liable to pay its rent "without set-off, offset, abatement or deduction whatsoever";
(b) in Lease § 26(ii)[148] Tenant specifically anticipated that it might need to close its Retail Premises for an extended period of time in the event of,

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139 *Id.*
140 Complaint at 2, Victoria's Secret Stores, LLC v. Herald Square Owner LLC, 136 N.Y.S.3d 697 (N.Y. Sup. Ct. 2021) (No. 651833/2020).
141 *Id.* at 1.
142 *Id.* at 9, 17.
143 *Id.*
144 Edmund Pittman, *Knives Out: The Landlord's Response to Victoria's Secret*, JD SUPRA (Oct. 12, 2020), https://www.jdsupra.com/legalnews/knives-out-the-landlord-s-response-to-64317/.
145 *Id.*
146 Answer at 16-17, Victoria's Secret Stores, LLC, 136 N.Y.S.3d 697 (No. 651833/2020).
147 *Id.* at 17.
148 *Id.* at 17, n.1 (citing section 26 of the lease, which provides:

inter alia, "unavoidable delay," but agreed that Tenant would only be entitled to a rent abatement if the closure was due to some failure by Owner that was not excused by "unavoidable delay"; and

(c) in Lease § 2(C)(vi),[149] Tenant further recognized that circumstances might prevent it from honoring its commitment to continuously operate

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> INABILITY TO PERFORM. (i) Except as expressly set forth in subparagraph (ii) below, this Lease and the obligation of Tenant to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord or because Landlord is unable to make, or is delayed in making any repairs, additions, alterations, improvements or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of strikes or labor troubles or by accident or by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency (herein sometimes referred to as "unavoidable delay").
>
> (ii) If Landlord fails to provide any service or perform any obligation that Landlord is obligated to provide or perform under this Lease and solely as a result thereof, Tenant shall be not able to operate its store at the Premises, shall be closed for business and have discontinued its operation of the store for a period of six (6) consecutive days or more after written notice by Tenant to Landlord advising Landlord of such failure to provide any such service or perform any such obligation, that such failure has rendered the Premises unusable and that Tenant has closed for business and discontinued its operation of the store, then, Tenant shall be entitled to an abatement of Minimum Rent and additional rent for each day after said six (6) consecutive day period through the earlier to occur of the day preceding (i) the day on which the service is substantially restored and (ii) the day Tenant reopens for business and recommences its operation of the store at the Premises. Tenant shall not be entitled to an abatement of rent in the event that such failure results from (i) any installation, alteration or improvement which is not performed by Tenant in a good workmanlike manner; (ii) Tenant's failure to perform any obligation hereunder; (iii) the negligence or tortious conduct of Tenant; (iv) casualty; or (vi) unavoidable delay.

Victoria's Secret and Herald Square August 22, 2001 Lease attached as Exhibit in Answer [hereinafter, "Lease"].

[149] *Id.* at 18, n.2 (citing section 2(C)(vi) of the lease, which provides:

> (vi) Because of the difficulty or impossibility of determining Landlord's damages due to diminished saleability or mortgageability or adverse publicity or appearance by Tenant's actions, should Tenant (a) fail to open for business in the

> its store, but Tenant agreed that Tenant would be excused from its obligation to continuously operate its Retail Premises only in the event of "fire or casualty."

Therefore, Herald Square moved for summary judgment.[150]

I do not find that these provisions of the lease lack a force majeure clause expressly relieving or allocating liability to either party as a result of a global pandemic. What the lease does say is that, under § 26(i) of the lease, the Tenant still has to pay rent if the landlord fails to perform one of its obligations, if the landlord's failure was due to an "unavoidable delay"—which is a defined term under Lease § 26(i).[151] However, under § 26(ii) of the lease, the tenant is entitled to minimum rent abatement and additional rent if the landlord fails to provide services or obligations that causes the store to close.[152] Further, under § 26(ii) the tenant is not entitled to rent abatement in the event of a failure to operate the premises due to the various actions by the tenant, casualty, or unavoidable delay.[153]

HS argued that under Lease § 2(C)(vi) if the tenant ceases operations, then the landlord has the right to certain remedies;[154] but there is an exception if VS ceases operations due to "fire or casualty."[155] HS argued that these circumstances are not relevant to COVID-19 and the government mandated shutdowns; therefore, VS is obligated to pay its rent.[156]

> Premises, fully fixtured, stocked and staffed by June 1, 2003, (b) vacate, abandon or desert the Premises, or (c) cease operating or conducting its business therein as required by this Lease (except during any period the Premises are rendered untenantable by reason of fire or casualty or as expressly permitted by Subsection C(i) of this Article 2), in the case of (b) or (c) for a period of five (5) days following written notice from Landlord, then and in any of such events (hereinafter collectively referred to as "failure to do business"), Landlord shall have the right in addition to all other remedies provided in this Lease, at its option, to treat such failure to do business as an Event of Default and shall further have the right to collect the Minimum Rent and items of additional rent and also a further item of additional rent at a rate equal to the amount of Percentage Rent payable by Tenant in respect of the immediately prior fiscal year divided by 365 for each day or portion of a day that may have elapsed during such period. . . .

Lease § 2(C)(vi)).

150 Motion for Summary Judgement, Victoria's Secret Stores, LLC, 136 N.Y.S.3d 697 (No. 651833/2020).

151 *See* Answer at 17, n.1, *supra* note 146, and accompanying text.

152 *Id.*

153 *Id.*

154 *See* Answer at 18 n.2, *supra* note 149, and accompanying text.

155 *Id.*

156 Answer at 16-17, *supra* note 146.

VS filed a motion in opposition to HS motion for summary judgment.[157] VS raised questions of law and fact, arguing that the lease did not address this situation and that the situation was not foreseeable—demanding its day in court.[158] In the following two sections, I will analyze the parties' arguments, starting with VS.

B. Victoria's Secret's Argument as Tenant

VS's argument is twofold—impossibility and frustration of purpose as well as a separate excuse based on change in law. VS seeks:

> [R]escission of a commercial property lease, and a declaration that the lease is unenforceable as a result of the COVID-19 Pandemic and the related government-mandated shutdowns. In sum, the total standstill of business, commerce, and everyday life in New York City has completely and unforeseeably frustrated the purpose of the lease and has rendered performance impossible.[159]

In its complaint, VS claimed that due to the COVID-19 Pandemic and Executive Orders, its lease and guaranty with HS should be rescinded by the legal doctrines of frustration of purpose and impossibility of performance.[160] A contract may be rescinded due to impossibility of performance and frustration of purpose, but not where the frustration of the purpose is insubstantial.[161] When an unforeseeable event occurs and one party cannot give the other what induced him to make the bargain in the first place, the purpose is frustrated, and the contract can be rescinded.[162] The rescission of a contract contemplates full restoration of parties to their practicable precontract position.[163] Rescinding a contract means annulling the contract completely.[164] Typically, a party's obligations in the wake of a force majeure event will be suspended on a temporary basis for the duration of the supervening event—and the force majeure clauses will provide for a suspension

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157 Motion in Opposition to Summary Judgement, Victoria's Secret Stores, LLC, 136 N.Y.S.3d (No. 651833/2020).

158 *Id.*

159 Complaint, *supra* note 140, at 1.

160 *Id.* at 14.

161 17B C.J.S. Contr. Frustration of Purpose as Ground for Recession § 629 (updated 2021); 8 Fla. Pl. & Pr. Forms § 56:29 (updated 2020); 25 Wash. Prac., Contr. Law & Pract. Rescission § 11:6 (updated 2020).

162 United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974) (reiterating the narrowly tailored framework by explaining that discharge under this doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party).

163 25 Wash. Prac., Contr. Law & Prac. Rescission § 11:6 (updated 2020).

164 *Id.*

expressly.[165] It seems VS claimed recission as a legal strategy because it wanted to completely abandon the contract and avoid liability for any rent. In contrast, a suspension would permit delay in payment but still require payment after the event has subsided.

In its complaint and opposition to summary judgement, VS postulated the basic assumption of both parties when entering the lease agreement. VS explained that the purpose of the lease was to permit VS to operate a retail store for the entire term of the lease with the expectation from both parties when entering the lease that the Herald Square storefront was a first-class retail location with high foot traffic.[166] VS bargained for a prime position in one of the heaviest traffic urban avenues in the world, which was a material factor in VS decision to pay nearly $1 million per month in rent.[167] HS, under the lease, required VS to operate under certain conditions given the prime location, including being open Monday through Friday and having enough employees to successfully operate given the location; and HS even negotiated a higher monthly rental price through arbitration.[168] VS might have included these facts so it could later show an underlying assumption of the deal or basis of the bargain, just like the existence of the opera house in *Caldwell* or the parade in *Krell*. As explained in Part 1 of this paper, the frustration of purpose excuse requires that both parties understood the purpose of the lease at the time of signing—and both relied on an underlying assumption—which is why VS makes the effort to show HS understanding of the purpose.

Furthermore, VS explained that when retail activities resumed, the government would restrict re-openings to marginal capacity for the foreseeable future.[169] VS concluded that it would be years before consumer retail behavior and Herald Square's business district activity levels recover to pre-COVID-19 levels.[170] To show that both parties understood the purpose of the lease, VS argued that the purpose of having an open retail location in a prime location with high foot traffic was frustrated by COVID- 19 and the government mandated shutdowns of retail businesses. Therefore, the purpose of the lease agreement was frustrated.[171] Unlike *Lloyd*, where the court found the mere business downturn an inexcusable reason to perform under the contract, here something much more significant happened. The way the world will carry on will be changed for years to come.

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165 Fred R. Pletcher & Anthony A. Zoobkoff, *supra* note 12.

166 Opposition to Summary Judgement*, supra* note 157, at 1; Complaint, *supra* note 140, at 6 (using the language "plaintiffs and defendants entered the Lease and Guaranty with the basic expectation that VS could operate the premises as a first-class retail location," rather than just saying "plaintiffs" to show that both parties contemplated the basic assumption).

167 Complaint, *supra* note 140, at 2.

168 *Id.* at 7, 11.

169 *Id.* at 15.

170 *Id.*

171 *Id.* at 2.

VS made clear that the lease's purpose is frustrated by no fault of its own. VS explained its inability to operate based on frustration of purpose and change in law:

> 1. Because of the COVID-19 Pandemic, VS cannot operate its retail store at the Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the lease was entered.[172]
> 2. Because of Executive Order 202.8,[173] VS cannot operate its retail store at the Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the lease was entered.[174]

Further, VS argued that it could not have possibly foreseen COVID-19, the government mandated shutdown, and limited capacity phased re-opening. The impacts of COVID-19 have been unprecedented. In its complaint, VS wrote that the COVID shutdown is a novel situation never before experienced in the United States in terms of severity and duration and could not have been foreseen. Therefore, VS could not have possibly contemplated it before entering the lease.[175] Such circumstances could not have been contemplated, thus there is no way it could have included anything in the contract allocating the associated risks.

On the basis of foreseeability VS rebutted HS argument (which is discussed in the next section) that the lease addressed this situation. VS argued that the clause in Lease § 26 is with regards to a temporary store closure.[176] Lease § 26 could not possibly apply to the present circumstances because the lease addresses a simple store closure and what is being dealt with today is a massive government-ordered shutdown of all non-essential commercial activity.[177] VS stated that even the most sophisticated party could not have foreseen and contractually protected themselves from this happening.[178]

Additionally, VS argued that if it had not ceased operations at its Herald Square retail location it would have been in violation of the law—specifically the numerous executive orders limiting gatherings and retail operations, which VS cited in its complaint.[179]

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[172] *Id.* at 13.

[173] N.Y. Governor Andrew Cuomo, Exec. Order 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf. [hereinafter, Executive Order 202.8.]

[174] Complaint, *supra* note 140, at 13.

[175] *Id.* at 2-3 (explaining that while the parties may have contemplated certain gradual ups and downs of tourism, the economy, seasonal habits, and the like, the COVID-19 shutdown is unprecedented).

[176] Lease § 26 (*See supra* note 148 and accompanying text).

[177] Opposition to Summary Judgement*, supra* note 157, at 4.

[178] *Id.* at 8.

[179] Victoria's Secret cites the following executive orders relating to COVID-19:

Executive order 202.8 completely prohibited VS operations because it stated:

All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m.[180]

VS had to shutter indefinitely since the government's restrictions classified it as a non-essential business.[181] Any retail activity at the location would have violated the State's orders and could potentially subject VS to criminal violations and penalties.[182]

In summary, VS asserts that the contract does not expressly address a global pandemic. Therefore, VS argued frustration of purpose, impossibility, and change in law excuses due to COVID-19 and the government shutdowns. Due to

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> 60. In the ensuing days and weeks, the Governor, in a series of executive orders, aimed to "flatten the curve" and slow the spread of COVID-19 by limiting gatherings of people (see, e.g., Executive Order 202.1 [ordering the 30-day postponement or cancelation of "[a]ny large gathering or event for which attendance is anticipated to be in excess of five hundred people"]; Executive Order 202.3 [modifying the large gathering order in Executive Order 202.1 to gatherings where "more than fifty persons are expected in attendance"]; Executive Order 202.10 [cancelling or postponing all "(n)on-essential gatherings of individuals of any size for any reason"]).
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> 61. On March 16, 2020, as the crisis worsened, New York City Mayor Bill de Blasio issued Emergency Executive Order No. 100, imposing restrictions on various types of retail locations. As such, at the close of business on March 16, 2020, VS suspended all retail operations at the Premises to comply with applicable governmental orders and guidelines and to protect the health and safety of its employees, customers, and the surrounding community.
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> 62. On March 18, 2020, Governor Cuomo issued Executive Order 202.6, requiring non- essential businesses to reduce their in-person work force by 50%. VS's operations at the Premises was deemed "non-essential." By this time, business and commerce in New York City was already at a virtual standstill.
>
> 63. These efforts culminated in the issuance of Executive Order 202.8, on March 20, 2020, which ordered all nonessential businesses and nonprofit organizations to *"reduce [their] in- person workforce at any work locations by 100% no later than March 22[, 2020] at 8 p.m."* (Executive Order 202.8) (emphasis added).
>
> 64. Pursuant to these extraordinary and unforeseeable executive acts and decrees, VS was *required* to close all of its operations at the Premises (despite having paid full rent for the month of March 2020). The VS store at the Retail Premises remains shuttered to this day by government order.

Complaint at 12-13.

180 Executive Order 202.8, *supra* note 173.

181 Complaint, *supra* note 140, at 9.

182 *Id.*

the change in law from the government shutdowns of the VS Harold Square location, VS was forced closed. Because of the government mandated shutdowns and phased reopening plans, VS will have substantially less shoppers than the 2 million plus pre-COVID annual visitors for years to come. A fully open store and high foot traffic were basic assumptions of the lease.[183] VS inability to operate because of COVID-19 and the government shutdown orders was beyond VS control and was neither foreseen nor foreseeable at the time the Lease and Guaranty were entered.[184] However, HS saw things differently.

C. Herald Square's Argument as Landlord

Herald Square asserts that the parties allocated the business and economic risks of potential closures of the retail premises to the tenant in the lease—and that VS agreed it would be liable to pay rent in all such circumstances.[185] In its motion for summary judgement, HS states that:

> The Lease unambiguously shows the parties contemplated the possibility of a store closure, and explicitly agreed that, absent Landlord having brought about such closure by reason of its own unexcused failure to provide required service, Tenant would remain obligated to pay rent.[186]

HS argued that the circumstances at issue were foreseeable, and in fact the parties allocated the risk in the lease. Under the common law, if something is foreseeable, the idea is that the parties would have allocated the risk by an express condition.[187] Where the risk was "foreseeable," claims of frustration of purpose and impossibility fail.[188] Therefore, HS asserted that the tenant's frustration and impossibility claims fail because the express terms of the lease negate the essential element common to both doctrines—that being that the parties have not allocated the risk in question.[189] HS argued that because the lease addresses this particular issue, the parties should turn to the lease for the remedy—which it claims makes VS obligated to pay rent.

Herald Square explained that the tenant would only be excused under the lease in certain circumstances. For example, if the landlord fails to perform essential services, the tenant is entitled to rent abatement under Lease § 26(ii).[190]

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183 *Id.* at 2.
184 *Id.* at 15.
185 Answer, *supra* notes 148-149 and accompanying text.
186 Motion for Summary Judgment, *supra* note 150, at 7.
187 *See supra* note 60 and accompanying text.
188 Gander Mountain Co. v. Islip U-Slip LLC, 923 F. Supp. 2d 351, 360 (N.D.N.Y. 2013).
189 Motion for Summary Judgment, *supra* note 150, at 2.
190 *See supra* note 145 and accompanying text.

But the tenant is entitled to rent abatement only if the closure was due to some failure by Landlord to provide a required service, or to perform another required obligation, where the performance/provision thereof would not itself be excused by "unavoidable delay."[191] More specifically, the Landlord's failure has to not be caused by "government preemption" or "order" including one issued in the case of an "emergency," which are examples used in § 26(i) defining unavoidable delay.[192]

Yes, Lease § 26(i) mentions government acts, but with regards to affecting the landlord's performance. The problem in *Victoria's Secret Stores, LLC* is that the government acts prevent the tenant from using the property as the parties had expected it to be used—that being the implied condition of the first-class retail location. The outcome turns on whether the global pandemic and government mandated orders are an "unavoidable delay" that prevents the landlord from performing and simultaneously puts the liability on VS **or** whether this is now the way society must operate and simultaneously frustrates the purpose of the contract. If it's the latter, then VS has a stronger argument to get out of the lease because the circumstances do not fall under the terms of the lease. However, if a court finds that these circumstances fall under "unavoidable delay," then VS would be liable.

Under the lease, the landlord is not liable due to unavoidable delay, while the tenant is. HS argues that under § 26(ii) the tenant is not excused or entitled to rent abatement due to "casualty" or "unavoidable delay."[193] However, interpreted narrowly, as precedent case law shows us courts will do, the "casualty" and "unavoidable delay" circumstances would likely be interpreted in connection to the other circumstances regarding the tenant's actions. Further, VS argued that it could not have possibly foreseen COVID-19, the government mandated shutdown, and limited capacity phased re-opening. Therefore, § 26 is silent as to what happens when there is a global pandemic as it relates to the tenant's obligation to perform.

HS also argues that under Lease § 2(C)(vi), VS is obligated to pay rent in the current circumstances. Under lease § 2(C)(vi), VS could be excused from its obligation to continuously operate its Retail Premises only in the event of "fire or casualty," among a few other circumstances.[194] But, even in such circumstances HS argues that under the language of the lease Tenant would remain obligated to pay rent.[195] The question then becomes, does COVID-19 and the government shutdown qualify as a "casualty"? HS claims that the pandemic and subsequent

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191 *Id.* (defining unavoidable delay).

192 *See supra* note 145 and accompanying text.

193 *Id.*

194 *See supra* note 146 and accompanying text.

195 Motion for Summary Judgment, *supra* note 150, at 6.

government shutdowns do not fall under "fire or casualty."[196] Therefore, HS argues VS is not excused under this provision and is still obligated to pay the rent.

The fact that only "casualty" is mentioned in Lease § 26(ii) but "fire or casualty" is stated in Section2(c)(vi) is an interesting distinction. However, I do not think it makes a difference to this particular lease. Because the standalone "casualty" in Lease § 26(ii) is used in a series of circumstances regarding the tenant's actions it should be interpreted in way correlated to the tenant's actions. Typically, "fire or casualty" clauses refer to destruction of leased property.[197] This includes anything from a complete destruction of the property to a minor casualty causing a restorable condition.[198] The destruction must render the premises permanently untenantable or such that restoration would be practically the equivalent of a new building, or so extensive that the demised building has, as a practical matter, lost its character as a building.[199] It is not likely that a government shutdown would qualify as a "fire or casualty." Therefore, I do not think that "casualty" as used in Lease § 2(C)(vi), could include an event like COVID-19 and the subsequent government shutdowns. Evidence of the party's intent behind the choice of this language of course could change the outcome.

HS repeatedly refers to VS as a sophisticated party to support the argument that if VS wanted different terms it should have negotiated different terms. In its motion for summary judgement, it explains that the question should be:

> [W]hether it is reasonable to conclude that a sophisticated party like VS — a publicly traded multi-billion dollar company with over a thousand stores — could have worded the Lease in a manner that could have broadly "protected" it, including a rent abatement, without expressly mentioning the pandemic. If it is reasonable to conclude the Lease could have been so-worded by such a sophisticated party, then if VS signed the Lease without insisting upon "such protection," it should not now be heard to ask this Court to re-write the allocation of risk that it did agree to.[200]

But VS didn't do this; so, HS argues VS should be bound by the terms of the lease.

There is an argument that could have been made about the percentage rent feature of the lease; however, HS did not raise this argument. The percentage rent feature of the lease could be understood as part of how the parties allocated the economic risk under the lease. The total monthly rental payment is based on a

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196 *Id.* at 18 (explaining that that tenant agreed that it would nevertheless be obligated to pay its rent except in circumstances not relevant here).

197 STUART M. SAFT, COMMERCIAL REAL ESTATE LEASING § 8:1 (2d ed. 2013).

198 *Id.*

199 *Standard Indus., Inc. v. Alexander Smith, Inc.*, 214 Md. 214, 225, 133 A.2d 460, 466 (1957).

200 Motion for Summary Judgment, *supra* note 150, at 8.

minimum rent plus a percentage rent. The percentage portion of the rent is based on the total sales made that month. So, if there is reduced foot traffic or a store closure, the percentage rent portion would be adjusted to fairly reflect that, meaning that the lease is "self-correcting" for a situation like COVID-19 because there is an automatic downward adjustment in rent. The tenant would just continue with the minimum rent portion of its payment.

Therefore, because Herald Square finds COVID-19 and the government shutdowns to be circumstances foreseeable and identified in the lease, it claims that VS's frustration of purpose, impossibility, and change in law arguments do not apply. HS argues that the lease allocates the economic risk to the tenant and VS is, thus, obligated to pay the rent.

D. Summary

Victoria's Secret and Herald Square disagree about whether the lease addresses an event like COVID-19 and its repercussions, like the complete government mandated shutdowns. VS argues that the lease does not address this situation—that, in fact, this situation is so unprecedented that it could not possibly have been foreseen. Therefore, VS brings frustration of purpose, change in law, and impossibility excuses to rescind the contract. From VS's perspective, COVID-19 and the complete government mandated shutdown rendered the contract impossible to perform since the store could not remain open as mandated by law. Additionally, there were no longer 2 million people passing through the location frustrating the purpose of the first class location-rent-price of $1 million. In contrast, HS argues that these circumstances are remedied by the terms of the lease and that the risk and liability fall on VS. Herald Square points to the fact that VS is a sophisticated party that could have foreseen such an event and contracted the lease accordingly. So, who should prevail? I will discuss this in the next section.

PART 3: THE COURT'S HOLDING AND ITS POTENTIAL IMPACTS

Recently the Supreme Court of the State of New York County ordered in favor of HS. However, based on precedent, I think the just outcome should have been in favor of VS. Nonetheless, based on this outcome future parties to lease agreements should be cautious to negotiate their contracts around global pandemics and entire government mandated shutdowns of retail premises.

A. Decision and Order by the Court

To determine whether the excuses of frustration of purpose, impossibility, or change in law would apply to a party like Victoria's Secret, a court would follow

several steps. A court would first determine the intent of the parties at the time the contract was made by examining the language used in the contract.[201] If the language expressly states what will happen under a particular change in circumstances and states who is responsible for the risk of that change, then a court will abide by the contract. Impossibility, impracticability, and frustration of purpose, may be viewed as the default defenses to performance when contracts are silent on an issue.[202] In cases involving scenarios where the contract is silent regarding an excuse and neither party is at fault, courts have used fairness principles like loss sharing to fill the contractual gap.[203] As for the change of law excuse, unless the clause specifically lists a change in law as a force majeure event, it is unlikely that a change in law, unless it makes the contract illegal to perform, will be considered excusable.[204]

The analysis for The Supreme Court of the State of New York County stopped at the express language of the contract. The court ruled in favor of HS.[205] In the court's decision and order on motion, it stated that VS and HS allocated the risk expressly in the contract with regard to a state law that temporarily caused a closure of the tenant's business[206] in paragraph 26 of the Lease. The court said that the parties agreed that this would not relieve the tenant's obligation to pay rent.[207] Therefore, HS motion for summary judgment was granted, and VS's complaint was dismissed.[208]

B. Analysis of Decision and Order

Deciding a fair result for *Victoria's Secret Stores, LLC* is no doubt a difficult decision. Both parties are innocent, and the risks are enormous. However, I think precedent cases and contract principles lead to an outcome in favor of VS. Following the steps that a court would take to determine liability, I purport that the case should have been decided in favor of VS. The analysis should not have stopped at the express language of the agreement because I don't find the lease to allocate

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201 102 Am. Jur. 3d *Proof of Facts* § 401 (Originally published in 2008) (citing *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23 (Ind. Ct. App. 2013)); *see also* Meister Seelig & Fein LLP, *Considerations for Invoking the Defenses of Frustration of Purpose & Impossibility of Performance* (May 5, 2020), https://www.meisterseelig.com/wp-content/uploads/2020/05/MSF-Client-Alert-Considerations-for-Invoking-the-Defenses-of-Frustration-May-5-2020.pdf [hereinafter, Meister Seelig & Fein LLP].

202 John W. Hinchey & Erin M. Queen, *Anticipating and Managing Projects: Changes in Law*, 26 CONSTRUCTION L. 26, 28 (2006).

203 Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 372 (1996).

204 Hinchey & Queen, *supra* note 202, at 29.

205 *Victoria's Secret Stores, LLC,* 136 N.Y.S.3d at 697.

206 *Id.*

207 *Id.*

208 *Id.*

responsibility for a global pandemic and government shutdown of nonessential businesses to VS.

I respectfully disagree with the court's interpretation of Lease § 26. Lease § 26 allocates risk to VS, but only with regard to the landlord's inability to make repairs, additions, alterations, improvements or decorations due to unavoidable delay.[209] This provision of the lease does not allocate the risk to VS with regard to a state law that caused the Tenant's store to close by law and affects the Tenant's duty to perform. Based on the language of Lease § 26 and the analysis of the arguments in Part 2, I do not think the parties allocated the risk to VS. So, the next step would be to determine if an impossibility, impracticability, frustration of purpose, or change in law excuse could apply.

Under an impossibility and frustration of purpose excuse analysis, I think VS should have prevailed. Impossibility excuses a party's performance when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.[210] For frustration of purpose to excuse performance, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[211] The implied condition and basic assumption of the lease was the first-class retail location with high foot traffic. A retailer would not choose to rent at this location only to have a mail order or curbside pickup business. Businesses choose to have a store front at Harold Square because of the millions of customers that come through yearly, which VS says is why it entered the lease.[212] HS also recognized the significance of the prime location by the fact that it had special requirements for the stores operations and negotiated a higher price through arbitration.[213]

Furthermore, the cases cited by HS regarding foreseeability are distinguishable from *Victoria's Secret Stores, LLC*. In *A + E Television Networks, LLC v. Wish Factory Inc.*, the party pleading the excuse argued that the relevant issue with regards to frustration of purpose was not whether the specific reason the show declined in popularity was foreseeable.[214] The U.S. District Court for the Southern District of New York said that this interpretation was too narrow, that the standard is whether generally the decline in popularity was foreseeable.[215] Similarly, in *Noble Ams. Corp. v. CIT Grp./Equip. Fin* the Supreme Court of New

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209 *See supra* note 145 and accompanying text.

210 *Kel Kim Corp.*, 70 N.Y.2d at 902.

211 A + E Television Networks, LLC v. Wish Factory Inc., 15-CV-1189 (DAB), 2016 WL 8136110, at *12 (S.D.N.Y. Mar. 11, 2016) (citing *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 924 N.Y.S.2d 391, 394 (App. Div. 2011)).

212 Complaint, *supra* note 140, at 11.

213 *Id.* at 7, 11.

214 *A & E Television Networks*, *LLC,* 2016 WL 8136110, at *14.

215 *Id.*

York held that the general possibility of bankruptcy was foreseeable.[216] Unlike these cases, a complete government mandated shutdown was not foreseeable. In *Victoria's Secret Stores, LLC* the parties contemplated a simple store closure. I agree with VS that a complete government shutdown of retail businesses was not foreseeable or contemplated at all.[217]

New York courts have consistently accepted impossibility and frustration of purpose arguments when the bargained-for premises could not be operated for the contractual purpose.[218] In its opposition to summary judgment, VS cites several persuasive cases supporting this. In *Benderson Dev. Co. v. Commenco Corp.*, the Supreme Court, Appellate Division, Fourth Department of New York held that the lease was frustrated when the tenant was unable to use the premises it had leased as a restaurant until a public sewer was completed.[219] In *Jack Kelly Partners LLC v. Zegelstein*, the Supreme Court, Appellate Division, First Department of New York held that the lease was frustrated where the certificate of occupancy allowed only residential use, and the tenant was an office space tenant.[220] In *Doherty v. Eckstein Brewing Co*, the Supreme Court, Appellate Term, First Department held that a brewery's lease was frustrated when a constitutional amendment barred the sale of alcohol.[221] VS is like all of these cases because the purpose of its lease was frustrated when Governor Cuomo mandated a stay-at-home-order preventing VS from remaining open at its Herald Square location.

As for the change in law argument, New York courts have sometimes excused parties from their contracts under the doctrine of impossibility of performance based on the impact of new laws.[222] New York Governor Cuomo's stay at home order closing nonessential businesses is an example of a change in law rendering performance impossible. The stay-at-home order made it impossible for VS to continue operations of its store at Herald Square without criminal liability. Comparing *Victoria's Secret Stores, LLC* to *Lloyd* regarding the facts about the changes in law also would lead to VS prevailing. Unlike the law in *Lloyd*,

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216 *Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.*, 2009 WL 9087853 (Sup. Ct. N.Y. Co. Dec. 4, 2009).

217 Opposition to Summary Judgement*, supra* note 157, at 4.

218 *Noble Americas Corp., supra* note 216 (explaining that the "modern version of this doctrine, recognized by New York courts, has evolved as narrower than its application in Krell… and is limited to instances where a virtually cataclysmic, unforeseeable event renders the contract valueless to one party").

219 *Benderson Dev. Co. v. Commenco Corp*., 44 A.D.2d 889 (4th Dept. 1974), aff'd 37 N.Y.2d 728 (1975).

220 Jack Kelly Partners LLC v. Zegelstein, 140 A.D.3d 79, 85 (1st Dept. 2016).

221 Doherty v. Eckstein Brewing Co., 115 Misc. 175, 179 (1st Dept. 1921).

222 22A N.Y. Jur. 2d *Contracts* § 404 (explaining that a "party not absolutely unable to perform may be excused from further performance under the doctrine of impossibility as a result of unforeseeable government action where the action creates a substantially unjust situation which reasonable contract draftsmen could not have anticipated and the increase in the contractor's cost is excessive as matter of law"); *See also* Meister Seelig & Fein LLP, *supra* note 201.

Governor Cuomo's stay at home order was enacted after VS entered into the lease agreement, completely prohibiting its operations and destroying the purpose of the lease. Furthermore, *Victoria's Secret Stores, LLC* differs from *Lloyd* because in *Lloyd* the purpose was restricted, but in *Victoria's Secret Stores, LLC,* the purpose has been destroyed. Therefore, due to the impact of new laws, I respectfully think that the court should have found in favor of VS under the change of law excuse.

When relying on a law as the basis for being excused, a party must still prove that the law was unforeseeable at the time the contract was made.[223] Looking to other epidemics for guidance would not have helped here. While there have been other epidemics in the past, such as SARS, H1N1 influenza, and Ebola, a complete government mandated shut down of businesses did not occur. Therefore, VS—nor even the most sophisticated party—could not have anticipated that COVID-19 would get so out of control that there would need to be a government mandated shutdown of businesses.

There is evidence that perhaps VS is experiencing economic hardship; but, combined with the other facts of the case I, respectfully, still think VS should have prevailed. Under the terms of the lease, the monthly amount of rent is determined in part by a percentage of VS total monthly sales. Its arguable that if VS had to pay the full $1 million every month this might suffice for the impracticability excuse like the cost of mining in Mineral Park. However, if the rent automatically goes down when fewer customers show up, VS's argument might look more like economic hardship, which the common law does not recognize hardship as an excuse.[224] New York courts have reasoned that financial difficulty or economic hardship—no matter how extensive or devastating—does not excuse performance under the doctrines of frustration of purpose or impossibility of performance.[225] If this case was in France, economic hardship would be a persuasive argument, but this case is not in France so you can *baguette* about it.

Furthermore, the cases cited in HS's motion for summary judgment regarding economic hardship are simply not relevant here.[226] In *Urban Archaeology*, the court found the tenants liable despite the hardship from the Great Recession of 2008 and 2009 because an economic downturn could have been

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223 Hinchey & Queen, *supra* note 202, at 31 (summarizing that the contract principles of foreseeability and causation are both considered in determining whether a change in law will excuse performance). *See also* Meister Seelig & Fein LLP, *supra* note 201.

224 *See supra* note 62 and accompanying text.

225 *A + E Television Networks, LLC*, 2016 WL 8136110, at *13 (asserting that in New York, a party is not excused from a contract simply because it becomes more economically difficult to perform); Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990) (reasoning that just because a subsequent decline in the price of its stock made a company's performance of the contract more onerous does not establish a basis for a defense of frustration of purpose or commercial impracticability); *See also* Meister Seelig & Fein LLP.

226 Motion for Summary Judgment, *supra* note 150, at 9-10.

guarded against in the lease.[227] Here, VS did account for economic hardship in the lease through the provision about the rent being a portion of its profits; the issue is the complete government mandated shutdown and the first class retail location. In *Trinity Centre, LLC v. Wall St. Correspondents, Inc.,* the court held that although the 9/11 terrorist acts caught the whole city by surprise, the lease between the parties in fact anticipated a potential casualty and therefore the tenant was still liable.[228] A provision in the lease of that case stated that if Wall St. Correspondents' space was damaged by fire or other casualty, Wall St. Correspondents was not allowed to terminate the lease but was merely relieved of the obligation to pay rent until the space was restored.[229] The court further explained that a downturn in the economy partially resulting from the 9/11 tragedy is not a valid reason for relieving a party from its responsibilities under a lease.[230] Unlike *Trinity Centre*, where the casualty was actual damage (its need for telephone and internet service, air quality, and damage to the space made disrupted the occupancy), there was no physical damage to VS's space. I don't interpret the lease to include a provision regarding allocation of risk to a complete government mandated shut down. Additionally, VS argument goes beyond economic hardship.

The cases cited by HS involved an economic downturn or a financial difficulty that simply rendered the deal less profitable or less desirable for one of the parties,[231] which is not the case for VS. VS is arguing that both parties literally cannot meet the obligations of the lease because of the government shutdowns of retail businesses and phased re-openings of minimal capacity; VS is not making an economic hardship argument. This is not a temporary situation that will be resolved quickly—it will be years before things go back to pre-COVID times. Therefore, I believe VS should have prevailed.

Because the lease did not account for COVID-19 and a government shutdown of retail business, the analysis should have continued. The facts support that VS is going beyond an economic hardship claim. The basic assumption of the first-class location was frustrated and then the subsequent changes in law rendered the lease impossible to perform. I respectfully disagree with the outcome of the case and think VS should have prevailed under these excuses.

C. Effect on Future Contracts

The policy considerations highlight how difficult getting to a fair outcome is. It is not fair for a court to allocate an enormous risk to one party, if that party clearly didn't accept that risk before signing the contract. With the case decided in

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227 Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562, 891 N.Y.S.2d 63 (2009).
228 Trinity Ctr., LLC v. Wall St. Cor Inc., 798 N.Y.S.2d 348 (Sup. Ct. 2004).
229 *Id.*
230 *Id.*
231 Opposition to Summary Judgement*, supra* note 157, at 10.

favor of the landowner the implications are twofold. One implication is that future retailers and tenants could be discouraged from entering into lease agreements for their businesses if courts find that they could be liable for unprecedented change in circumstances when their leases remain silent on such an issue. Another implication is that future landlords and tenants will now be sure to negotiate specifically about global pandemics and government mandated shutdowns before entering into leases.

Commercial landlords are not necessarily in a better position to sustain losses. If the property is financed, the landlord may be relying on the rental stream to pay the debt it owes on the property. Without the funds to pay the debt, the landlord could foreclose on the property. If the outcome of the case is in favor of tenants, it could deter landownership as the risk of leasing out property would be too high. Similarly, the effect on future agreements would be that landlords would want to negotiate specific risk allocation provisions before entering into contracts.

If a court would put the burden on the tenant in a situation like COVID-19, what would they do in future novel situations? Additionally, to keep the economy going and businesses from shutting down, there are other solutions, as opposed to the Dr. Jekyll and Mr. Hyde reasoning of demanding full payment or complete rescission—rent reduction, buyout, transfer, government assistance, insurance, and loan modification are all loss sharing solutions.[232]

D. Summary

The Supreme Court of the State of New York County did not include loss sharing remedies when it held VS obligated to pay rent under the lease agreement. The court concluded point blank that the lease attributed the risk to VS under its express terms. I considerately think the case should have been found in favor of VS for several reasons. First, I don't think the pandemic and complete government was foreseeable, and in turn the lease didn't address these circumstances. Second, the implied condition precedent of having a first-class retail location was completely frustrated due to COVID-19 and the government mandated shutdowns. Third, the change in law mandating the closing of retail locations rendered the lease impossible to carry out. Additionally, the case law in New York and contract principles further support the outcome of this case in favor of VS. Regardless, future parties will be sure to negotiate on the points of pandemics and government mandated shutdowns because the unthinkable is now thinkable.

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[232] Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L. J. 343, 372 (1996); Capital Rivers Commercial, *A Commercial Landlord Reaction Plan to COVID-19* (Apr 9, 2020), https://www.bizjournals.com/sacramento/news/2020/04/09/a-commercial-landlord-reaction-plan-to-covid-19.html.

CONCLUSION

The history of contracts and excuses shows us that what the parties agree on in their contract is held with high regard. The court will follow the intent of the parties. However, sometimes unforeseeable circumstances happen that could not have been contracted for and a party can plead certain excuses. As Part One of this paper examines, the common law, UCC, FCC, CISG, and PECL all encompass parts of the impossibility, frustration of purpose, impracticability, and change in law excuses. While these doctrines differ in how the excuses are precisely prescribed, they are all applied very narrowly.

Victoria's Secret Stores, LLC reveals how complicated and difficult seeking enforcement of these contract excuses can be. Through no fault of either party, unforeseeable circumstances occurred that drastically changed the state of the world in unprecedented ways. The analysis of VS's and HS's arguments from Part Two of this paper show how contract excuses can be used and the nuances in their application to COVID-19 and potential future global pandemics. After analyzing the court's order in Part Three, I respectfully disagree with the courts holding because I do not find that the specific terms of VS's and HS's lease contemplate today's state of the world. Even the most sophisticated parties could not have contemplated or contracted the impossible circumstances that businesses face today. Based on the doctrine, precedent, and policy considerations, I think the case should have been decided in favor of VS. Moving forward, future tenants and landlords will be sure to include risk allocation regarding global pandemics and government mandated shutdowns.