

December 2021

Stagflation in American Jurisprudence

Chad G. Marzen

Florida State University, cmarzen@fsu.edu

Michael Conklin

Angelo State University, mconklin@angelo.edu

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Law and Economics Commons](#)

Recommended Citation

Chad G. Marzen and Michael Conklin, *Stagflation in American Jurisprudence*, 42 Pace L. Rev. 1 (2021)

DOI: <https://doi.org/10.58948/2331-3528.2046>

Available at: <https://digitalcommons.pace.edu/plr/vol42/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

STAGFLATION IN AMERICAN JURISPRUDENCE

Chad G. Marzen*
Michael Conklin**

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. THE HISTORY AND PERILS OF STAGFLATION	4
A. The Causes and Consequences of 1970s Stagflation.....	4
B. Stagflation in 2021	6
III. STAGFLATION IN AMERICAN JURISPRUDENCE	8
A. <i>Natural Resources Defense Council, Inc. v. Callaway</i>	8
B. <i>In re Dortch</i>	9
C. <i>Theofanis v. Theofanis</i>	10
D. Other Courts Referencing Stagflation.....	11
IV. STAGFLATION AS A FORCE MAJEURE EVENT.....	12
A. Background of Force Majeure Clauses	12
B. Force Majeure and Inflation	15
C. Stagflation, Commercial Impracticability, and Force Majeure Clauses.....	18
D. Stagflation and Commercial Impracticability.....	18
E. Stagflation and Force Majeure.....	19
V. CONCLUSION.....	22

I. INTRODUCTION

With a significant number of Americans now vaccinated against COVID-19,¹ the end of the COVID-19 pandemic is finally in sight.² The end of the pandemic has brought forth a sense of renewed optimism

* American General Insurance Associate Professor of Insurance Law, Florida State University. This author can be reached at cmarzen@fsu.edu.

** Powell Endowed Professor of Business Law, Angelo State University. This author can be reached at mconklin@angelo.edu.

1. See Sheryl Gay Stolberg & Noah Weiland, *With Vaccination Goal in Doubt, Biden Warns of Variant's Threat*, N.Y. TIMES (Sept. 2, 2021), <https://www.nytimes.com/2021/06/18/us/politics/biden-vaccine-variants.html>.

2. See Tomi Kilgore, *The COVID-19 Pandemic Isn't Over, but 'The Great End Point' Is in Site As More Than 120 Million Americans Are Fully Vaccinated*, MARKETWATCH (May 14, 2021, 3:10 PM), <https://www.marketwatch.com/story/the-covid-19-pandemic-isnt-over-but-the-great-end-point-is-in-site-as-nearly-120-million-americans-are-fully-vaccinated-11621009380>.

in the United States,³ with restrictions being lifted,⁴ schools reopening,⁵ baseball stadiums filled with spectators,⁶ and travel resuming.⁷

However, the consequences of the COVID-19 pandemic, and resulting rise in individuals leaving their homes, has led to shortages of some materials and items such as lumber,⁸ new cars,⁹ and bicycles.¹⁰ Furthermore, in a new era of massive stimulus,¹¹ a sharp rise in inflation has resulted in increasing prices and sticker shock for

3. See Tim O'Donnell, *Americans More Optimistic About the Future Than at Any Point Since 2006, Poll Finds*, YAHOO! NEWS (May 2, 2021), <https://news.yahoo.com/americans-more-optimistic-future-point-161600663.html>.

4. See Erin Schumaker, *US Sees Signs of 'New Normal' As States Lift COVID Restrictions*, ABC NEWS (June 1, 2021, 6:09 AM), <https://abcnews.go.com/US/us-sees-signs-normal-states-lift-covid-restrictions/story?id=77999357>.

5. See Dana Goldstein, *Schools Are Open, but Many Families Remain Hesitant to Return*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/05/09/us/covid-school-reopening-virtual-learning.html>.

6. See Jeff Tracy, *Normalcy Is Returning to America's Pastime*, AXIOS (June 10, 2021), <https://www.axios.com/baseball-stadiums-returning-capacity-coronavirus-9c3b9e10-b178-4473-88ae-3e0725042179.html>.

7. See Leslie Josephs, *Air Travel Jumps as Vaccinations Spur Vacation Bookings, Stocks Surge*, CNBC (Mar. 15, 2021, 6:06 PM), <https://www.cnbc.com/2021/03/15/air-travel-recovers-as-vaccinations-spur-bookings.html>.

8. *E.g.*, Joanna Schwartz, *A Lesson in Lumber Shortages, Buyer Preferences and Supply and Demand*, FORBES (June 15, 2021, 7:40 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2021/06/15/a-lesson-in-lumber-shortages-buyer-preferences-and-supply-and-demand/?sh=7e98e5985bda>.

9. *E.g.*, Keira Wingate, *New Car Shopping? Chip Shortage and Limited Supply Could Mean Traveling to a Dealership Out of State*, USA TODAY (June 17, 2021, 3:14 PM), <https://www.usatoday.com/story/money/cars/2021/06/17/auto-sales-car-prices-semiconductor-chip-shortage/5294532001/>.

10. *E.g.*, Andrew Keshner, *There's a COVID-Related Bicycle Shortage in the U.S.*, MARKETWATCH (June 5, 2021, 2:08 PM), <https://www.marketwatch.com/story/why-is-there-a-bicycle-shortage-its-got-a-lot-to-do-with-why-fireworks-are-scarce-11622751152>.

11. See Jacob Pramuk, *Biden Signs \$1.9 Trillion Covid Relief Bill, Clearing Way for Stimulus Checks, Vaccine Aid*, CNBC (Mar. 11, 2021, 3:03 PM), <https://www.cnbc.com/2021/03/11/biden-1point9-trillion-covid-relief-package-thursday-afternoon.html>.

consumers who are purchasing food,¹² gasoline,¹³ used cars,¹⁴ and airline tickets.¹⁵ This possible new era in inflation has led some commentators to remark that the United States may be entering a time during which an insidious economic problem may be emerging: stagflation, a period of stagnant job and economic growth and persistently high inflation.¹⁶

This Article endeavors to be the first law review article that analyzes stagflation in American jurisprudence. The first part of this Article discusses the history of stagflation and its prevalence, particularly during the Carter administration. The Article then analyzes how courts have historically considered stagflation in American jurisprudence and examines several cases that have cited stagflation in their analyses. The final part analyzes whether stagflation may be considered a force majeure event. A number of commentators have already started to address the question of whether the onset of the COVID-19 pandemic is a force majeure event.¹⁷ However, there is a glaring gap in the literature on the

12. See Millie Munshi, *Food Inflation Hits Everything from Mayonnaise to Tofu*, BLOOMBERG (June 11, 2021, 7:00 AM), <https://www.bloomberg.com/news/newsletters/2021-06-11/supply-chains-latest-food-inflation-means-higher-prices-for-tofu-and-mayonnaise>.

13. See Jonathan Ponciano, *Bacon, Gas, Cars: Here's Everything Getting More Expensive As Inflation Spikes*, FORBES (May 12, 2021, 01:06 PM), <https://www.forbes.com/sites/jonathanponciano/2021/05/12/heres-everything-getting-more-expensive-as-inflation-spikes-prices-rise/?sh=37048f3a1967>.

14. See James Politi & Colby Smith, *'Kind of Crazy': How the Booming US Used-Car Market Is Driving Inflation*, FIN. TIMES (June 3, 2021), <https://www.ft.com/content/70491b2f-6b6c-4489-ae14-706ed835c423>.

15. See Leslie Josephs, *Say Goodbye to \$30 Plane Tickets. The Era of Dirt-Cheap Flights Is Ending*, CNBC (Mar. 23, 2021, 12:00 PM), <https://www.cnbc.com/2021/03/20/say-goodbye-to-30-plane-tickets-the-era-of-dirt-cheap-flights-is-ending.html>.

16. See, e.g., Bill Poulos, *Why Stagflation Is Coming for the US Economy*, UNSEEN OPPORTUNITY (May 28, 2021), <https://www.unseenopp.com/why-stagflation-is-coming-for-the-us-economy/>; Michele Schneider, *Is Stagflation Creeping Up?*, INVESTING.COM (June 20, 2021, 4:22 AM), <https://www.investing.com/analysis/is-stagflation-creeping-up-200587133>; see generally *Stagflation*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/stagflation/> (last visited Dec. 5, 2021).

17. See, e.g., George P. Bernhardt & Jack Fersko, *Feature the Covid-19 Issue the Impacts of the Coronavirus Pandemic on Real Estate Contracts Force Majeure, Frustration of Purpose, and Impossibility*, 35 PROB. & PROP. 34, 34 (2021); Cosmos Nike Nwedu, *The Rise of Force Majeure Amid Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts*, 61 NAT. RES. J. 1 (2021); James O'Reilly, *Force Majeure: How Much Have You Forgotten Since Law School, & Why Does That Matter During COVID-19 Today?*, 49 REAL EST. L.J. 220 (2021); Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020); King Fung Tsang, *From*

question of whether stagflation qualifies as such an event. Utilizing cases involving inflation and force majeure clauses as well as the COVID-19 pandemic as comparisons, this Article addresses the question of whether stagflation would qualify. With stagflation possibly on the horizon in the United States, analysis of this question will provide more clarity for contracting parties as well as the courts in the event a period of stagflation occurs. Furthermore, such analysis provides insight into the general principles of exceptions to performance in business contracts.

II. THE HISTORY AND PERILS OF STAGFLATION

A. The Causes and Consequences of 1970s Stagflation

The term “stagflation” was coined during the 1973–1975 recession.¹⁸ It occurs when high levels of inflation coincide with stagnant economic growth and high unemployment.¹⁹ The concept of stagflation came as somewhat of a surprise in the 1970s because conventional wisdom at the time held that high inflation and a stagnant economy would not occur concurrently.²⁰ Before its appearance in the 1970s, economists thought such an occurrence was impossible because inflation was a result of economic growth.²¹ From 1973–1975 there were five quarters with negative gross domestic product.²² Inflation more than doubled in 1973, from 3.6% to 8.7%.²³ The consumer price index measured double-digit annual inflation in 1974, 1979, and 1980.²⁴ Unemployment peaked in 1975 at 8.5%.²⁵

The cause of stagflation in the 1970s is debated. Some blame the

Coronation to Coronavirus: COVID-19, Force Majeure and Private International Law, 44 *FORDHAM INT'L L.J.* 187 (2020).

18. Kimberly Amadeo, *What Is Stagflation?*, *THE BALANCE* (July 1, 2021), <https://www.thebalance.com/what-is-stagflation-3305964>.

19. *See id.*

20. *See id.*

21. *See* Dave Roos, *What Is Stagflation and Why Is It So Dangerous?*, *HOWSTUFFWORKS*, <https://money.howstuffworks.com/stagflation.htm> (last visited Dec. 5, 2021).

22. *See* Amadeo, *supra* note 18.

23. *See id.*

24. *See id.*

25. *Databases, Tables & Calculators by Subject*, U.S. BUREAU OF LAB. STAT., https://data.bls.gov/timeseries/LNU04023554&series_id=LNU04000000&series_id=LNU03023554&series_id=LNU03000000&years_option=all_years&periods_option=specific_periods&periods=Annual+Data (last visited Dec. 6, 2021).

“Nixon Shock.”²⁶ This was a set of fiscal policies announced by President Nixon in 1971 which included price and wage freezes, a tariff on imports, and the abandonment of the gold standard for U.S. currency.²⁷ Some critics blame President Carter’s strategy of increased government spending.²⁸ Some point to the Organization of the Petroleum Exporting Countries (OPEC) oil embargo of 1973, which resulted in record oil prices and increased the costs of production and transportation of goods.²⁹ Some blame the Federal Reserve lowering interest rates in the 1960s.³⁰ Others point to the policies implemented by the Federal Reserve in the 1970s to fight stagflation as a contributing factor.³¹ By alternating between raising the federal funds rate to fight inflation and then lowering it to fight the recession, the Federal Reserve confused businesses, which responded by keeping prices high even when the federal funds rate was lowered.³² This confusion also resulted in consumers expecting high inflation rates, which resulted in less savings and more immediate purchases, which further drove up inflation.³³

The devastating effects of stagflation are made further problematic when one considers the lack of viable options to combat it, as evidenced by the events of the 1970s. Focusing on reducing inflation by reducing consumer purchasing power serves to make unemployment worse.³⁴ Conversely, focusing on unemployment by stimulating purchasing power and creating jobs makes inflation worse.³⁵ Some attribute the end of stagflation to policies enacted by Chair of the Federal Reserve, Paul Volcker.³⁶ In March of 1980, Volcker raised the federal funds rate to an all-time high of 20%.³⁷ By

26. Amadeo, *supra* note 18.

27. *See id.*

28. *See* Mike Moffatt, *Economic Stagflation in a Historical Context*, THOUGHTCO. (Jan. 27, 2020), <https://www.thoughtco.com/stagflation-in-a-historical-context-1148155>.

29. *See* Roos, *supra* note 21.

30. *See id.*

31. *See* Amadeo, *supra* note 18.

32. *See id.*

33. *See id.*

34. *See* *Whipping Stagflation*, DIGIT. HIST., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3360 (last visited Oct. 6, 2021).

35. *See id.*

36. *See* Kimberly Amadeo, *Paul Volcker*, THE BALANCE (June 21, 2021), <https://www.thebalance.com/who-is-paul-volcker-3306157>.

37. *See id.*

consistently keeping the federal funds rate high, Volcker managed expectations regarding inflation, which reduced business and consumer behavior that had previously exacerbated inflation.³⁸ This solution came at a high cost, however, as it created the 1981 recession.³⁹

B. Stagflation in 2021

The rare nature of stagflation and the high number of variables in the U.S. economy make predicting it far from an exact science. However, there are some warning signs. In June of 2021, the Labor Department reported the steepest increase in inflation since August of 2008.⁴⁰ Excluding food and energy prices, inflation had the largest increase since June of 1992.⁴¹ Currently, certain commodity prices are increasing at a rate not experienced since the late 1970s.⁴² In July 2021, the Labor Department's report was even worse, nearly twice the predicted level on a monthly basis.⁴³

Some predict an upcoming stagflation crisis will be even worse than that of the 1970s due to higher national debt levels.⁴⁴ The national debt throughout the 1970s never reached \$1 trillion, while it is currently set to approach \$89 trillion by the end of 2029.⁴⁵ This would make addressing stagflation in 2021 far more challenging than in the 1970s. The higher national debt will make it more difficult for

38. *See id.*

39. *See id.*

40. *See* Gwynn Guilford, *U.S. Inflation Is Highest in 13 Years as Prices Surge 5%*, WALL ST. J. (June 10, 2021, 11:44 AM), <https://www.wsj.com/articles/us-inflation-consumer-price-index-may-2021-11623288303>.

41. *See id.*

42. *See* Jeffrey Kleintop, *Is Stagflation Back?*, CHARLES SCHWAB: MKT. COMMENT. (May 10, 2021), <https://www.schwab.com/resource-center/insights/content/is-stagflation-back>.

43. *See* Jeff Cox, *Inflation Climbs Higher than Expected in June As Price Index Rises 5.4%*, CNBC (July 13, 2021, 12:39 PM), <https://www.cnbc.com/2021/07/13/consumer-price-index-increases-5point4percent-in-june-vs-5percent-estimate.html> (inflation for the month of June alone was 0.9%, while estimates were only 0.5%).

44. *See* Nouriel Roubini, *The Looming Stagflationary Debt Crisis*, PROJECT SYNDICATE (June 30, 2021), <https://www.project-syndicate.org/commentary/stagflation-debt-crisis-2020s-by-nouriel-roubini-2021-06>.

45. *See* Mike Patton, *U.S. National Debt Expected to Approach \$89 Trillion by 2029*, FORBES (May 3, 2021, 12:27 PM), <https://www.forbes.com/sites/mikepatton/2021/05/03/us-national-debt-expected-to-approach-89-trillion-by-2029/?sh=1a69f3cd5f13>.

the government to bail out banks, companies, and households while servicing such high debts.⁴⁶ Additional evidence supporting the prediction of stagflation in 2021 are the trillions spent on stimulus checks during the COVID-19 pandemic, the maintaining of near-zero interest rates, and cryptocurrency investing hype.⁴⁷ Current Chinese fiscal policy could also exacerbate stagflation in the United States.⁴⁸

However, predicting stagflation is far from an exact science. For example, people warned of stagflation in 2011, which ultimately did not occur.⁴⁹ Additionally, some experts are not forecasting stagflation in the near future. Arguments presented against forthcoming stagflation are mainly focused on the temporary nature of present conditions. While shortages in lumber, semiconductors, boxes, and plastic lead to higher prices, some believe businesses are properly responding to these shortages and will meet market demand in the near future.⁵⁰ Likewise, the current shortage of employees drives up consumer prices.⁵¹ However, this may also be temporary, as the supplemental unemployment benefits incentivizing workers to stay out of the workforce were set to expire on September 6, 2021.⁵²

46. See Theron Mohamed, *'Dr. Doom' Economist Nouriel Roubini Warns the Global Economy Is Barreling Towards Stagflation – and Central Banks Face an Impossible Challenge*, MKTS. INSIDER (July 4, 2021, 8:00 AM), <https://markets.businessinsider.com/news/stocks/dr-doom-nouriel-roubini-economist-stimulus-debt-supply-chain-stagflation-2021-7>.

47. See *id.*

48. See Mark Gongloff, *China's Hot New Export Could Be Stagflation*, BLOOMBERG (June 2, 2021, 5:14 PM), <https://www.bloomberg.com/opinion/articles/2021-06-02/china-s-hot-new-export-could-be-stagflation>.

49. See Amadeo, *supra* note 18.

50. See Mark Sievers, *Wealth Matters: Inflation or Stagflation? That's Now the Question*, DAILY REPUBLIC (June 13, 2021), <https://www.dailyrepublic.com/all-dr-news/solano-news/solano-business/local-business-columnists/wealth-matters-inflation-or-stagflation-thats-now-the-question/>.

51. See *id.*

52. See Laura Michelle Davis & Oscar Gonzalez, *Pandemic Unemployment Benefits Expired on Labor Day. Could They Be Renewed?*, CNET (Sept. 18, 2021, 8:00 AM), <https://www.cnet.com/personal-finance/could-federal-unemployment-benefits-be-restored-in-your-state-what-to-know/> (noting that twenty-six state governors claimed pandemic-related unemployment benefits were producing limited incentives for workers to take jobs. However, while some states attempted to end the benefits before the federal expiration, successful lawsuits brought in various states, such as in Maryland, Arkansas, and Indiana, forced the state to preserve the federal coverage).

III. STAGFLATION IN AMERICAN JURISPRUDENCE

A. *Natural Resources Defense Council, Inc. v. Callaway*

An environmentalist group attempted to stop the U.S. Navy from dredging a deeper and wider channel in the Thames River to accommodate a new class of submarine.⁵³ The dredging itself was not being challenged.⁵⁴ Rather, it was the relocation of 2.8 million cubic yards of the polluted, dredged spoil to a site in New London, Connecticut.⁵⁵ The plaintiffs complained this would pollute the New London dump site, that the decision to choose this site was “arbitrary and capricious,” and the agencies involved did not comply with procedural requirements in the decision-making requirements.⁵⁶ The plaintiffs asked for permanent injunctive relief against dumping the spoil at the New London dump site.⁵⁷

The district court held that the Army Corps of Engineers was provided adequate information to inform its decision and that the Corps considered the full impact of its decision, its available alternatives, and it acted in good faith in considering where to relocate the spoil.⁵⁸ The district court made explicit reference to stagflation in explaining why the Navy was allowed to use an outside consultant.⁵⁹ It reasoned that if outside consultants were not allowed, federal agencies without enough projects to justify a full-time employee to draft impact statements might turn to utilizing existing employees who are ill-equipped to do so.⁶⁰ Alternatively, small agencies might be forced to hire full-time experts for whom there is only part-time work.⁶¹ Either way, the district court reasoned, “[w]ith the economy already in a tailspin due to ‘stagflation,’ this court will not compel such a wasteful result.”⁶²

The environmental groups appealed the district court opinion to

53. *See Nat. Res. Def. Council, Inc. v. Callaway*, 389 F. Supp. 1263, 1267 (D. Conn. 1974).

54. *See id.*

55. *See id.*

56. *Id.* at 1268.

57. *See id.* at 1270.

58. *See id.* at 1276–89.

59. *See id.* at 1274.

60. *See id.*

61. *See id.*

62. *Id.*

the United States Court of Appeals for the Second Circuit.⁶³ There, the court reversed in part and remanded in part, holding that the Navy did not meet certain procedural requirements.⁶⁴ The Second Circuit made no reference to stagflation, either express or implied.

B. *In re Dortch*

Stagflation has even made an appearance in a court decision relating to an application for admission to the Maryland bar. *In re Dortch* involved an individual who served fifteen years in prison but later graduated from law school.⁶⁵ In *Dortch*, the applicant to the Maryland bar had an accomplished career prior to a criminal conviction.⁶⁶ During high school, the applicant was president of the student council as well as captain of the varsity football team and varsity basketball team.⁶⁷ Following high school, he earned a bachelor's degree from Howard University and served in the U.S. Army during the Vietnam War, where he was wounded trying to save another soldier.⁶⁸ After his military service, he worked as a life insurance agent for five years.⁶⁹

In 1974, the applicant started an operational holding company.⁷⁰ However, this company of ten to fifteen employees encountered financial difficulties because sales did not live up to projections.⁷¹ Specifically, the Maryland Court of Appeals noted that stagflation was a factor in the difficulties with the applicant's business.⁷²

In the wake of the failure of the business, the applicant led a conspiracy to commit armed robbery.⁷³ He was convicted of second degree murder, conspiracy to commit a felony, and attempted armed robbery.⁷⁴ He was sentenced to fifteen years to life imprisonment.⁷⁵

63. See *Nat. Res. Def. Council, Inc., v. Callaway*, 524 F.2d 79 (2d Cir. 1975).

64. See *id.* at 82–83.

65. See 687 A.2d 245, 246–47 (Md. 1997).

66. See *id.* at 246.

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.* at 246–47.

72. See *id.* at 247 (“In addition, the United States, at the time, was experiencing ‘stagflation,’ rampant inflation combined with high unemployment, which was caused, in part, by the Organization of Petroleum Exporting Countries’ oil embargo.”).

73. See *id.*

74. See *id.* at 246.

75. See *id.*

The applicant was a model prisoner while incarcerated and was released on parole after fifteen years.⁷⁶ One year after his release from prison, he started his legal studies at the University of the District of Columbia School of Law, where he served as the president of the student bar association and was praised by faculty members for his “leadership skills, honesty, conscientiousness, maturity, compassion, tirelessness, responsibility, accessibility, trustworthiness, energy, intellect and oral communication skills.”⁷⁷

The Maryland Court of Appeals held that the applicant’s admission to the bar was premature.⁷⁸ A key factor in this decision was the fact that the applicant was still on parole.⁷⁹ The Maryland Court of Appeals also cited⁸⁰ a decision of the United States District Court for the Eastern District of Michigan which reasoned that an attorney on parole could represent criminal defendants and potentially encounter a conflict of interest due to the attorney’s adversarial relationship with the Federal Probation Office.⁸¹ Overall, the Maryland Court of Appeals ruled that it would not entertain a petition for admission to the bar in the circumstance when a person was still on parole “for a crime so severe that disbarment would be clearly necessitated if the crime were committed by an attorney.”⁸²

C. *Theofanis v. Theofanis*

Finally, the New Jersey Superior Court Appellate Division discussed stagflation in the decision of the family law case *Theofanis v. Theofanis*.⁸³ *Theofanis* involved a high net-worth divorce, with multiple homes, multiple vehicles, a boat, and a successful floral business.⁸⁴ The parties negotiated a resolution of all collateral issues incident to the request for divorce, and placed the settlement terms on the record in late 2007; the court entered an amended joint order of divorce on January 8, 2008.⁸⁵ Pursuant to the agreement, the

76. *See id.* at 247.

77. *Id.* at 248.

78. *See id.* at 251.

79. *See id.* at 250.

80. *See id.* at 249–50.

81. *See In re Culpepper*, 770 F. Supp. 366, 374 (E.D. Mich. 1991).

82. *In re Dortch*, 687 A.2d at 251.

83. *See* No. A-5943-08T3, 2011 WL 611869, at *1 (N.J. Super. Ct. App. Div. Feb. 23, 2011).

84. *See id.* at *1.

85. *See id.*

husband retained the business, and in exchange for a waiver with respect to the business as well as alimony, the wife received a \$1 million lump sum distribution.⁸⁶

However, in 2008 the U.S. economy entered a financial crisis,⁸⁷ and the resulting recession was the worst in the country since the Great Depression.⁸⁸ The husband moved to modify the personal settlement agreement, alleging that the downturn in the economy with increased rental costs caused the floral business's valuation to be much less than that was utilized in the agreement.⁸⁹ The trial court denied the husband's motion to vacate the personal settlement agreement.⁹⁰

On appeal, the New Jersey Superior Court Appellate Division affirmed the trial court's ruling.⁹¹ In New Jersey, relief from a final judgment of divorce—and personal settlement agreement—is available only if a situation meets the standard of “exceptional circumstances.”⁹² The husband argued on appeal that the economic downturn of the 2008 financial crisis would result in a windfall to his wife and a detriment to him.⁹³ In affirming the trial court's ruling, the appellate court noted that although the 2008 financial crisis was not a foreseeable event, “the possibility of financial constraints were known.”⁹⁴ Importantly, the court cited stagflation in its analysis that the possibility of financial constraints were known, noting that the husband's floral business had survived “inflation, stagflation and lower consumer spending.”⁹⁵

D. Other Courts Referencing Stagflation

At least two other courts have briefly mentioned stagflation. The United States Court of Appeals for the District of Columbia Circuit

86. *See id.* at *2.

87. *See* Mark Landler, *Global Fears of a Recession Grow*, N.Y. TIMES (Oct. 6, 2008), <https://www.nytimes.com/2008/10/07/business/worldbusiness/07global.html>.

88. *See* Floyd Norris, *In Great Recession, Other Nations Have Suffered More*, N.Y. TIMES (Sept. 17, 2010), <https://www.nytimes.com/2010/09/18/business/18charts.html>.

89. *See Theofanis*, 2011 WL 611869, at *3.

90. *See id.*

91. *See id.* at *6.

92. *Id.* at *5.

93. *See id.* at *6.

94. *Id.*

95. *Id.*

briefly referenced stagflation parenthetically in *Union Electric Co. v. Federal Energy Regulatory Commission*, which involved a dispute between a utility and the Federal Energy Regulatory Commission regarding a rate approval order.⁹⁶ Additionally, the Ohio Court of Appeals mentioned stagflation briefly in a footnote in a case involving the interpretation of a rent escalation clause in a commercial lease contract.⁹⁷

IV. STAGFLATION AS A FORCE MAJEURE EVENT

With the threat of stagflation on the horizon in the United States, an arrival may potentially become a significant factor as courts make decisions in the contract law area. There remains an open question—would stagflation constitute an adequate force majeure event or provide grounds for the invocation of commercial impracticability? Judicial precedent from cases involving inflation, force majeure, and commercial impracticability provide an indication of how courts may rule in the event a party invokes stagflation as a force majeure event to excuse contractual nonperformance.

A. Background of Force Majeure Clauses

When a party to a contract does not perform its obligations, there are statutory and common law defenses that permit the party in breach to be excused from performance. Examples of particular importance to this Article include impossibility of performance,⁹⁸

96. See 890 F.2d 1193, 1202 (D.C. Cir. 1989).

97. See *Cap. Equity, Ltd. v. Metromedia Steakhouses, Inc.*, No. 92AP-1498, 1993 WL 104904, at *4 n.4 (Ohio Ct. App. Mar. 30, 1993).

98. See generally 17A AM. JUR. 2D *Contracts* § 642 (2021) (“For the purposes of extinguishing a promisor’s liability because a contractual promise becomes objectively impossible to perform, there are two kinds of impossibility: original and supervening. Original impossibility is impossibility of performance existing when the contract was made, so that the contract was to do something that was impossible from the outset, while supervening impossibility develops after the contract in question is formed, and exists when the subject matter of the contract for which the parties bargained is no longer in existence or is no longer capable of being performed due to an unforeseen, supervening act for which the promisor is not responsible.” (footnotes omitted)).

destruction of subject matter,⁹⁹ commercial impracticability,¹⁰⁰ and frustration of performance.¹⁰¹ Parties to a contract that prefer to have more protection in the event they are unable to perform their obligations may include a force majeure clause.¹⁰² Such a clause excuses a party from performance under certain events or circumstances. The force majeure clause therefore affects the balance in a contract between the dueling notions of “legal certainty” and “reasonableness and equity.”¹⁰³ Namely, it increases reasonableness and equity—by excusing nonperformance in situations outside the control of the nonperforming party—at the cost of legal certainty.¹⁰⁴

Force majeure clauses generally protect against extreme events that are “commonly considered to be caused by overpowering, superior, or irresistible force, such as an act of God, which is beyond the reasonable control of the parties and cannot be avoided by the exercise of due care.”¹⁰⁵ However, parties to a contract are free to set the terms for an event that triggers the clause more broadly if desired,¹⁰⁶ as long as such terms are not “manifestly unreasonable.”¹⁰⁷ The “manifestly unreasonable” standard is inherently subjective and will vary depending on the parties involved and the subject matter of

99. See generally RESTATEMENT (SECOND) OF CONTRACTS § 263 (AM. L. INST. 1981) (“If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.”).

100. See generally P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 216 (1995) (“In a case of commercial impracticability, performance is still possible and the purpose of the contract can still be fulfilled. However, due to a change in circumstances, the performance of the promisor’s obligations has become economically senseless.”).

101. See generally *id.* at 217 (“In ‘frustration of purpose’ cases, performance is still possible, but an unanticipated circumstance, the risk of which cannot fairly be thrown on the promisor, makes performance vitally different from what was originally to be expected.”).

102. See *id.* at 224 (explaining that the doctrine of commercial impracticability under Section 2-615 of the U.C.C. “provides a minimum standard for excuse beyond which an agreement may not go,” while force majeure clauses “enlarge upon or supplant the provisions of U.C.C. Section 2-615”).

103. *Id.* at 214.

104. It is at the cost of legal certainty because it is not always clear whether an event that allows for nonperformance under a force majeure clause has occurred.

105. *Kentucky Utilities Co. v. S. E. Coal Co.*, 836 S.W.2d 392, 400 (Ky. 1992).

106. See *id.*

107. U.C.C. § 1-102(3) (AM. L. INST. & UNIF. L. COMM’N 1977).

the contract.¹⁰⁸ Courts do not interpret force majeure clauses in isolation; they are interpreted against the backdrop of the entire contract.¹⁰⁹

Force majeure clauses generally contain enumerated circumstances in which nonperformance is allowed, followed by a generic, catch-all phrase, such as “other events beyond the reasonable control of the parties.”¹¹⁰ However, courts are more likely to allow nonperformance when the intervening event was explicitly mentioned in the force majeure clause rather than when it was only implied based on a generic, catch-all provision.¹¹¹ The doctrine of *ejusdem generis* is particularly relevant to force majeure clauses. The doctrine states that when a court is interpreting a contractual clause that contains specific provisions and a generic provision, the generic clause will only be interpreted to include events similar to the events explicitly listed in the generic clause.¹¹² This issue can be minimized by explicitly stating in the generic, catch-all phrase that it applies “whether of the kind described herein or otherwise.”¹¹³

If a nonperforming party to a contract attempts to use the generic, catch-all provision of a force majeure clause, courts will generally require the intervening event to be unforeseeable at the time the contract was entered into—specifically enumerated events listed in a force majeure clause do not require unforeseeability.¹¹⁴ If this interpretation is undesirable to the parties, they may expressly eliminate such a foreseeability requirement when drafting the force majeure clause.¹¹⁵

108. See Declercq, *supra* note 100, at 231.

109. See *id.* at 228.

110. Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 98 (2007).

111. See, e.g., *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (“Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance will that party be excused.”).

112. See, e.g., *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003) (the case involved an oil and gas lease with a force majeure clause that provided the lease would not terminate in the event production was “prevented by an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the control of the Lessee.” The court held that the generic catch-all of “or other cause beyond the control of the Lessee” was limited to external factors because all of the specifically enumerated examples were external events).

113. Kelley, *supra* note 110, at 114 (furthermore, prefacing the explicitly listed events in the force majeure clause with “including, without limitation . . .” will also help) (citations omitted).

114. See *id.* at 101.

115. See Declercq, *supra* note 100, at 237.

In order to be freed from a contractual obligation, a force majeure clause may require the nonperforming party to comply with provisions, such as giving notice to the other party.¹¹⁶ After a contract is terminated by a force majeure act, contractual obligations are terminated even if the force majeure event resolves itself and the contract becomes possible again.¹¹⁷

B. Force Majeure and Inflation

With so few reported court cases citing stagflation specifically, it is unclear how courts might analyze stagflation as a force majeure event. Given that inflation is a key component of stagflation, examining cases involving inflation, force majeure clauses, and commercial impracticability provides a comparison to predict the likely outcome of using stagflation to excuse nonperformance.

Commercial impracticability has been a defense to contract performance in some cases in which inflation has arguably made contract performance impracticable for one party. With contracts for the sale of goods, Uniform Commercial Code (UCC) § 2-615(a) provides an excuse for delay in delivery or non-delivery of goods “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[.]”¹¹⁸

One of the first cases that involved inflation and commercial impracticability was *Maple Farms, Inc. v. City School District*.¹¹⁹ In *Maple Farms*, a milk supplier sought to terminate its contract for selling milk to a school district during the 1973–1974 school year due to a steep increase in the price of raw milk.¹²⁰ The contract was entered into by the dairy farm and the school district on June 15, 1973, at which time the price of raw milk was \$8.03 cwt.¹²¹ However, by December 1973, the price of raw milk increased approximately 23%

116. See, e.g., *L & A Jackson Enters. v. United States*, 38 Fed. Cl. 22 (1997), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (holding that a contractor was not allowed to excuse nonperformance because he did not request an extension nor provide weather data demonstrating the alleged cause of nonperformance as required by the contract).

117. See Suzen M. Grieshop Corrada, *The Best Laid Plans: Force Majeure Clauses in Travel and Event Contracts*, 31 NOVA L. REV. 409, 418 (2007).

118. U.C.C. § 2-615(a) (AM. L. INST. & UNIF. L. COMM'N 1977).

119. See 352 N.Y.S.2d 784 (N.Y. Sup. Ct. Chemung Cnty. 1974).

120. See *id.* at 786.

121. See *id.*

to \$9.89 cwt.¹²²

The dairy farm asserted common law claims of impossibility of performance and frustration of performance as well as a claim under UCC § 2-615 (commercial impracticability) in seeking to terminate the contract.¹²³ In rejecting the dairy farm's arguments to terminate the contract, the New York Supreme Court noted that the increase in the price of milk was not a "totally unexpected" occurrence.¹²⁴ The court specifically remarked that a nearly 10% increase in the price of raw milk had occurred from early 1972 until when the contract was entered on June 15, 1973.¹²⁵ In addition, the court also stated that the dairy farm would have been aware of the inflationary conditions in the United States at the time the contract was entered into.¹²⁶ Thus, both parties, including the dairy farm, entered the contract with knowledge of increasing raw milk prices.¹²⁷ Finally, the court noted that the dairy farm could have included an exculpatory clause in the contract to offer relief from performance if the cost of raw milk increased—but it failed to do so.¹²⁸ Despite taking a loss under the contract,¹²⁹ the dairy farm assumed the risk of loss by entering into the agreement under the circumstances.¹³⁰

Significant inflation in price also was found not to constitute commercial impracticability in *Iowa Electric Light & Power Co. v. Atlas Corp.*¹³¹ In this case, the seller of uranium yellowcake sought reformation of a contract for the sale of the product due to alleged significant cost increases.¹³² The seller cited several reasons that allegedly made it commercially impracticable to perform its obligations under the contract: an OPEC oil embargo; unforeseen environmental and safety regulations enacted at the federal government level; inflation of wages, chemical costs, and equipment costs; and general conditions in the uranium market.¹³³

122. *See id.*

123. *See id.* at 787.

124. *Id.* at 789.

125. *See id.*

126. *See id.* at 790.

127. *See id.*

128. *See id.*

129. *See id.* at 787.

130. *See id.* at 790.

131. *See* 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

132. *See id.* at 131.

133. *See id.* at 134.

The seller even cited a 58.4% increase in the price of uranium yellowcake above the contract price in their claim of commercial impracticability.¹³⁴ However, the United States District Court for the Northern District of Iowa noted that the seller had good reason to anticipate rising costs and expenditures due to new regulations, despite other unforeseen phenomena.¹³⁵ In addition, the court mentioned that the seller entered into a longer term contract to strengthen its ability to obtain future corporate financing, so it had knowledge that it might lose money with the contract.¹³⁶ Finally, the court stated that the seller was in a good position to allocate its risk among other buyers of uranium such that it could have an advantage on other contracts with greater profit margins and increased prices.¹³⁷

In declining to adopt the seller's position regarding commercial impracticability, the court specifically observed that price increases of 50% to 58% are not enough to excuse contractual obligations.¹³⁸ In the end, the court held that the seller failed to prove the extent to which the price increases were due to unforeseen reasons and that the situation it found itself in was not due to its own actions.¹³⁹

However, not all courts have rejected commercial impracticability in cases of severe inflation. In *Aluminum Co. of America v. Essex Group, Inc.*, the parties entered into a toll conversion service contract in which the seller company converted alumina supplied by the buyer company into aluminum for that company.¹⁴⁰ The contract entered into by the parties was to last from 1967 until 1983.¹⁴¹ However, in 1973 an increase in pollution control costs as well as the cost of oil increased the electricity costs of the seller.¹⁴² This caused an unexpected and massive increase in the production costs of the seller, well beyond an indexed increase within the contract price.¹⁴³ The seller presented evidence that it would potentially lose over \$60 million throughout the course of the contract

134. *See id.* at 139–40.

135. *See id.* at 134–35.

136. *See id.* at 135.

137. *See id.* at 140.

138. *See id.*

139. *See id.* at 132–33.

140. *See* 499 F. Supp. 53, 57 (W.D. Pa. 1980).

141. *See id.*

142. *See id.* at 58.

143. *See id.*

due to the increased costs.¹⁴⁴

The United States District Court for the Western District of Pennsylvania remarked that the emphasis of the doctrine of commercial impracticability was on hardship.¹⁴⁵ Considering the fact that the seller would potentially lose approximately \$60 million under the contract, the court found that the “strict standard of severe disappointment” was met in the case and that the performance cost increase was “severe enough” to justify relief.¹⁴⁶ The court thus ordered reformation of the contract.¹⁴⁷

C. Stagflation, Commercial Impracticability, and Force Majeure Clauses

With the threat of stagflation hovering over the U.S. economy today, courts may be faced with a party to a contract seeking termination and/or reformation of the contract due to stagflation. However, any parties seeking to invoke stagflation as an event that constitutes commercial impracticability will likely run into the dilemma that such a condition is more foreseeable.

D. Stagflation and Commercial Impracticability

The decisions of the New York Supreme Court in *Maple Farms* and the Northern District of Iowa in *Iowa Electric Light & Power* illustrate that even inflation exceeding 50% in the price of goods or materials is insufficient to establish commercial impracticability.¹⁴⁸ *Aluminum Co. of America*, the exception to the rule on inflation, exemplifies that a party seeking contract relief due to stagflation would have to demonstrate severe hardship, a substantial bar.¹⁴⁹

A key question as to whether stagflation could excuse a party from performance through the doctrine of commercial impracticability is whether stagflation is foreseeable. An era of stagflation that could arise today would emerge in the wake of the COVID-19 pandemic. As one federal bankruptcy judge in Florida

144. See *id.* at 73.

145. See *id.* at 72.

146. *Id.* at 73.

147. See *id.* at 80.

148. See 52 N.Y.S.2d 784 (Sup. Ct. Chemung Cnty. 1974); see also 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

149. See 499 F. Supp. 53, 57 (W.D. Pa. 1980).

noted, “[t]here is no question that the COVID-19 pandemic was completely unforeseeable.”¹⁵⁰ However, by contrast, a period of stagflation is arguably foreseeable—consider the opinion of the appellate court in New Jersey with the *Theofanis* case.¹⁵¹ The fact that the husband was experiencing difficulties with the floral business in the wake of the 2008 financial crisis was not grounds to invalidate a personal settlement agreement, especially where that husband’s business had survived the stagflation of the 1970s.¹⁵²

Individuals in their sixties, seventies, and eighties likely have memories and personal experiences of living through an era of stagflation. There is a saying that “history repeats itself.”¹⁵³ Contracting parties should be aware of the very real threat of stagflation today, and the warning signs from the elevated prices of lumber, used cars, and other consumer goods today may very well be the harbingers of a period of stagflation. Furthermore, stagflation is more a creation of human hands, whereas other situations (e.g., a pandemic) are more of a natural occurrence.¹⁵⁴ Future courts are likely to deny relief on the basis of commercial impracticability when only stagflation is present.

E. Stagflation and Force Majeure

Would stagflation constitute a force majeure event? Parties in a contract may certainly utilize strategic contracting to protect their interests in an era of high unemployment and high inflation.¹⁵⁵ Several recent cases involving the COVID-19 pandemic and force majeure provisions provide guidance on the drafting of force majeure clauses to encompass a stagflation event.

Courts across the country are now facing claims by commercial tenants seeking relief from commercial leases due to financial

150. *In re Cinemex USA Real Est. Holdings, Inc.*, 627 B.R. 693, 700 (Bankr. S.D. Fla. 2021).

151. *See* No. A-5943-08T3, 2011 WL 611869, at *6 n.6 (N.J. Super. Ct. App. Div. Feb. 23, 2011).

152. *See id.* at 16-18.

153. David Baker, *History Repeats Itself. That’s Bad News for the 2020s*, THE CONVERSATION (Jan. 2, 2020, 4:56 PM), <https://theconversation.com/history-repeats-itself-thats-bad-news-for-the-2020s-127116>.

154. *See* Civil Action No. CV 20-4223, 2021 WL 1193100, at *3 (E.D. Pa. Mar. 30, 2021) (citation omitted).

155. *See* Larry A. DiMatteo, *Strategic Contracting: Contract Law As a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 762–63 (2010).

difficulties faced while the businesses were closed at the onset of the COVID-19 pandemic. For example, in *1600 Walnut Corp. v. Cole Haan Co. Store*, a footwear and accessories company sought a discharge of its contractual obligations under an eleven-year lease due to impracticability of performance, impossibility, and frustration of purpose following closure due to restrictions imposed by the Governor of Pennsylvania in response to the COVID-19 pandemic.¹⁵⁶ However, the force majeure clause of the lease specifically defined “another reason not the fault of or beyond the reasonable control of the party delayed” to be a force majeure event.¹⁵⁷ Despite restrictive governmental laws or regulations constituting a force majeure event, the clause also stated that a force majeure event “shall not . . . relieve Tenant from the obligation to pay Rent.”¹⁵⁸ Interpreting this clause, the United States District Court for the Eastern District of Pennsylvania found that the COVID-19 pandemic constituted “another reason not the fault of or beyond the reasonable control of the party delayed[.]” and denied relief to the footwear and accessories company.¹⁵⁹

A state appellate court in New York also examined the frustration of purpose defense in *A/R Retail LLC v. Hugo Boss Retail, Inc.*¹⁶⁰ This case involved a thirteen-year lease between a commercial landlord and retail tenant.¹⁶¹ The contract at issue included in the force majeure provision that “order or regulations of or by any governmental authority” would constitute a force majeure event.¹⁶² In addition, the lease agreement noted that a force majeure event would not excuse “Tenant’s obligations to pay any sums of money due under the terms of this Agreement[.]”¹⁶³ The retail tenant sought relief from the lease through rescission or reformation due to frustration of purpose as a result of the COVID-19 pandemic.¹⁶⁴

In rejecting the application of the frustration of purpose defense, the New York Supreme Court remarked that “[t]he pandemic triggered several months of ‘shutdown’ followed by an evolving set of

156. See 2021 WL 1193100 at *1.

157. *Id.* (citation omitted).

158. *Id.*

159. *Id.* at *3.

160. See 149 N.Y.S.3d 808 (N.Y. Sup. Ct. N.Y. Cnty. 2021).

161. See *id.* at 814.

162. *Id.* at 816.

163. *Id.* at 817.

164. See *id.* at 813.

capacity restrictions that have reduced (but not eliminated) Tenant's ability to generate revenue from its retail operation."¹⁶⁵ Furthermore, the court made the observation that the risk of government restrictions on the utilization of the premises were also foreseen, as such a contingency was provided for in the force majeure clause.¹⁶⁶

However, not all courts have denied relief to tenants seeking release from their leases as a result of the COVID-19 pandemic. For instance, the United States Bankruptcy Court for the Southern District of Florida, in *In Re Cinemex USA Real Estate Holdings, Inc.*, relieved a movie theater business from the obligation to pay rent to a commercial landlord during the time period when movie theaters were shut down during the pandemic.¹⁶⁷ The force majeure clause included "governmental action" and "other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform" within its scope.¹⁶⁸ The court also noted that the COVID-19 pandemic was a "completely unforeseeable" event "and certainly not the fault of either contract party."¹⁶⁹

The lessons of the foregoing cases illustrate the importance of defining stagflation as a force majeure event within a contractual clause. As the Eastern District of Pennsylvania in *1600 Walnut Corp.* observed, common law theories for contractual relief should only determine allocation of risk between the parties in the event there is an absence of a contractual allocation of risk.¹⁷⁰ As the Florida District Court of Appeals also noted, common law defenses to contract enforcement are not available "if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express contractual agreement."¹⁷¹ Stagflation is positioned as a very real risk in 2021, and now prominent voices such as economist Nouriel Roubini are issuing warnings about approaching stagflation.¹⁷² Stagflation is arguably a foreseeable event,

165. *Id.* at 823.

166. *See id.* at 825.

167. *See* 627 B.R. 693 (Bankr. S.D. Fla. 2021).

168. *Id.* at 699.

169. *Id.* at 700.

170. *See* Civil Action No. CV 20-4223, 2021 WL 1193100, at *3 (E.D. Pa. Mar. 30, 2021).

171. *Home Design Ctr.—Joint Venture v. Cnty. Appliances of Naples, Inc.*, 563 So.2d 767, 769 (Fla. Dist. Ct. App. 1990).

172. *See* Paula Froelich, *Economist Nouriel Roubini Warns of 'Train Wreck' Stock Market Crash and 'Stagflation'*, N.Y. POST (July 3, 2021, 4:53 PM), <https://nypost.com/2021/07/03/economist-roubini-warns-of-stock-market-crash->

and its inclusion as a force majeure event within a force majeure clause should be a subject of negotiation with parties to commercial contracts.

So, if stagflation is included within a force majeure clause between two parties in a commercial contract, how should it be defined? As prior cases indicated, even price inflation exceeding 50% may not be enough to justify commercial impracticability. Parties wishing to draft a force majeure clause that protects against stagflation should consider explicitly defining the term. This is because the standard definition of stagflation as “[p]ersistent high inflation combined with high unemployment and stagnant demand in a country’s economy”¹⁷³ is inherently subjective. Thresholds for exactly what constitutes “high” inflation, “high” unemployment, and stagnant economic growth should be expressly defined. Likewise, an explicit time period for which these events need to occur to be considered “persistent” should be defined. Finally, parties may decide to allow force majeure protections even when two of the three prongs of stagflation are present.¹⁷⁴

V. CONCLUSION

The COVID-19 pandemic brought about numerous issues regarding contractual obligations—most notably, the ability of a party to excuse nonperformance through commercial impracticability or a force majeure clause. This first-of-its-kind Article provides valuable insight into how post-COVID-19 stagflation would likely be viewed by courts as an excuse for nonperformance. The very real threat of stagflation in the near future is problematic for businesses, not only because of the likely harm from reduced sales but also because the media coverage of the threat means that it is foreseeable; therefore, it would likely not be covered under a theory of commercial impracticability or in a generic force majeure clause. A further problem for business owners is that attempting to include stagflation

and-stagflation/.

173. *Stagflation*, LEXICO, <https://www.lexico.com/en/definition/stagflation> (last visited Dec. 6, 2021).

174. To make matters even more complex, parties may wish to implement a totality-of-the-circumstances type sliding scale. For example, one could hypothetically posit that “stagflation is defined as when the average percentage change in unemployment increases, inflation increases, and U.S. GDP decreases exceed 6%.” This way, force majeure protections may be enacted if two of the factors are exceptionally high despite one factor remaining low.

language in a force majeure clause will not be a simple task, as multiple interrelated terms must be defined. In the wake of the COVID-19 pandemic, stagflation and the law may become highly relevant to parties, policymakers, and the courts.