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## If the Government Says So, It Must Be Right: An Analysis on the Impact of Government Issued Force Majeure Certificates

Verónica Orantes  
*University of Miami School of Law*

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# **If the Government Says So, It Must Be Right: An Analysis on the Impact of Government Issued Force Majeure Certificates**

Verónica Orantes<sup>†</sup>

*In March 2020, the world came to a halt with the beginning of the Covid-19 pandemic. The pandemic’s worldwide impact resulted in endless business transactions becoming impossible or impracticable to perform. The China Council for the Promotion of International Trade issued force majeure certificates for its national business parties to excuse their performance under cross-border transactions. This note explores how the excuses for the performance of a contract work under Common Law and Civil Law systems and how each system would react to the parties invoking force majeure under a force majeure certificate issued by a government agency.*

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<sup>†</sup> Verónica Orantes is a transactional attorney whose practice is focused on infrastructure and project finance in Latin America. She obtained her B.A. in Civil Law from Universidad Francisco Marroquin in Guatemala City (2012), and her Master of Laws at Duke University (2016). In 2021, she obtained her J.D. at the University of Miami. In 2022, Veronica will be joining Jones Day in Miami.

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On March 11, 2020, the World Health Organization (“WHO”) characterized the spread of Covid–19 as a pandemic.<sup>1</sup> The Covid–19 pandemic crisis has raised, and continues to raise, several issues. One of specific importance is whether the current events constitute a force majeure event that excuses the non–performance of a

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<sup>1</sup> *Rolling Updates on Coronavirus Disease (Covid–19)*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated July 31, 2020) (quoting World Health Organization (@WHO), TWITTER (Mar. 11, 2020)).

contract.<sup>2</sup> In response to these events, the China Council for the Promotion of International Trade (the “CCPIT”), a Chinese national foreign trade and investment promotion agency,<sup>3</sup> has issued thousands of certificates for parties to prove a force majeure event in connection with the Covid–19 pandemic (the “FM Certificates”) to Chinese companies as an excuse from performance under a contract.<sup>4</sup> By early March, the CCPIT had issued FM Certificates for contracts worth 373.7 billion Chinese yuan (US\$53.79 billion), which spanned across all industries and sectors from manufacturing to retail and construction.<sup>5</sup> This article will begin by discussing how an excuse for the performance of a contract traditionally works under the common law system and the standards of proof that are regularly required. Part I will discuss the excuse doctrines that exist under the civil law system, particularly in certain Latin America countries that follow the French Code system.

Part II will describe the Covid–19 events and how the pandemic has resulted in a tremendous unsettling in trade worldwide, including the struggle of commercial actors to avoid being held responsible for the non–performance of their contractual obligations. This section of the article will describe how China has reacted by attempting to protect Chinese companies issuing the FM Certificates and explore if any other country has used this same instrument. Part III will analyze what would happen if the defaulting party provided an FM Certificate in a claim before a common law court, specifically before U.S. courts. Part III will also analyze what would happen if a defaulting party provides a Certificate in a claim before a civil law

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<sup>2</sup> See David J. Marmins, *Is the Coronavirus a Force Majeure that Excuses Performance of A Contract?*, (Mar. 13, 2020), <https://www.agg.com/news-insights/publications/is-the-coronavirus-a-force-majeure-that-excuses-performance-of-a-contract/>.

\* <sup>3</sup> *The Impact of Covid–19 on Contract Performance and Force Majeure in China*, DENTONS (July 9, 2020), <https://www.dentons.com/en/insights/articles/2020/july/9/the-impact-of-covid19-on-contract-performance-and-force-majeure-in-china>.

<sup>4</sup> *Id.*

<sup>5</sup> Huileng Tan, *China Invokes ‘Force Majeure’ To Protect Businesses — But the Companies May Be in for a ‘Rude Awakening,’* CNBC (Mar. 6, 2020, 5:53 AM), <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html>.

court, taking some of China's strongest commercial partners in Latin America as examples, such as Mexico, Colombia, and Brazil.

Part IV will discuss the role of government findings to determine whether an excuse event has occurred. Specifically, the question is raised by what China is doing. Although, it may be the case that either currently or in the future, other governments will adopt a similar stance in order to protect the companies based in their country.

This note aims to explore the probabilities of success that Chinese commercial actors are likely to have using FM Certificates to excuse themselves from the performance of their contractual obligations in jurisdictions outside of China. Will the FM Certificates serve as a scapegoat in the face of Covid-19?

#### BACKGROUND

In December 2019, a new coronavirus was identified in Wuhan, China.<sup>6</sup> On February 11, 2020, the WHO announced the new coronavirus outbreak was identified as Covid-19 and could cause a wide range of effects from mild symptoms to severe illness or death.<sup>7</sup> Countries around the world adopted different responses to the outbreak, ranging from opening the economy while imposing virus control measures, to control responses with severe economic, political, and societal disruption.<sup>8</sup>

On January 21, 2020, the first case of Covid-19 in the United States was confirmed.<sup>9</sup> By mid-March, most local governments started implementing measures limiting mass gatherings and traveling.<sup>10</sup> The Covid-19 lockdowns resulted in a global shock

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<sup>6</sup> *Basics of COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-Covid-19.html> (last updated Nov. 4, 2021).

<sup>7</sup> *See id.*

<sup>8</sup> *See Covid -19: Briefing Materials Global Health and Crisis Response*, MCKINSEY & COMPANY (July 6, 2020), [https://www.mckinsey.com/~/\\_/media/McKinsey/Business%20Functions/Risk/Our%20Insights/COVID%2019%20Implications%20for%20business/COVID%2019%20July%209/COVID-19-Facts-and-Insights-July-6.pdf](https://www.mckinsey.com/~/_/media/McKinsey/Business%20Functions/Risk/Our%20Insights/COVID%2019%20Implications%20for%20business/COVID%2019%20July%209/COVID-19-Facts-and-Insights-July-6.pdf).

<sup>9</sup> Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic Covid-19 in the United States, February 24–April 21, 2020*, CDC (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm>.

<sup>10</sup> *Id.*

disrupting both the supply and demand chains.<sup>11</sup> The supply chain was disturbed by infections spreading in the workplace, business closures, and social distancing measures.<sup>12</sup> The demand chain suffered the consequences of layoffs, loss of income, and reduced investment.<sup>13</sup> In addition to the human cost, Covid-19 has had a devastating effect on the economy that has resulted in parties being unable to perform their contractual obligations.<sup>14</sup>

#### PART I: EXCUSE FOR PERFORMANCE

The world of contracts is centered on *pact sunt servanda*, a universally accepted principle by which contracts are binding for the parties, and if one of them fails to perform, that party will be liable to the other.<sup>15</sup> As a baseline, parties are not excused from performing their obligations under a contract for the sole fact that they are not able to perform.<sup>16</sup> However, there are certain types of events or circumstances that may constitute a valid cause to exonerate a party for non-performance; i.e., force majeure.<sup>17</sup>

Legal systems around the world have developed rules under which a valid excuse for the non-performance of a contract may be acceptable.<sup>18</sup> Although these excuses were originally intended to be narrow and limited to certain specific circumstances, they have inevitably grown into more relaxed and wider concepts lowering the threshold and resulting in the “liberalization” of excuses.<sup>19</sup>

Today, in Mexico, the concept of the unforeseeable as an excuse for non-performance includes practical and economic

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<sup>11</sup> Alexander Chudik et. al., *Economic Consequences of Covid-19: A Counterfactual Multi-Country Analysis*, VOXEU (Oct. 19, 2020), <https://voxeu.org/article/economic-consequences-Covid-19-multi-country-analysis>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Lauren Bauer et al., *Ten Facts About COVID-19 and the U.S. Economy*, BROOKINGS (Sept. 17, 2020), <https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/>.

<sup>15</sup> Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1413 (1963).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

impossibility.<sup>20</sup> Other jurisdictions, like New York, have kept a narrow definition of force majeure but created other excuses such as the frustration of purpose.<sup>21</sup> This section of the note will take us through the approach of different jurisdictions in both the common and civil law systems with respect to excuses for non-performance.

*A. Common Law Approach: United States*

*i. Impossibility*

A party may be excused of performing its obligations under a contractual relationship when the same is “objectively impossible” due to a supervening event.<sup>22</sup> The Restatement (Second) of Contracts defines impossibility as impracticability due to extreme and unreasonable difficulty, expense, injury, or loss involved.<sup>23</sup> For a party to succeed with a claim of impossibility, there must be no possible alternative for the party to fulfill its obligations.<sup>24</sup> As a result, if the obligation simply became more difficult to perform financially or in terms of time or efforts, the party may not claim impossibility.<sup>25</sup>

*ii. Impracticability*

Unlike impossibility, the excuse of impracticability does rest on the claim that performance of the obligation, although feasible, has become substantially more “difficult, complex or challenging” due to a supervening event.<sup>26</sup> The events render the performance impracticable because they result in an excessive increase in the cost such

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<sup>20</sup> *Id.* at 1414.

<sup>21</sup> Berman, *supra* note 15 at 1414.

<sup>22</sup> *Excuses for Non-Performance: Conditions Following Contract Formation*, PRACTICAL LAW COM. TRANSACTIONS, <https://us.practicallaw.thomsonreuters.com/1-553-6307> (last visited Dec. 22, 2020).

<sup>23</sup> Lawrence P. Rochefort et al., *The Coronavirus and Force Majeure Clauses in Contracts*, AKERMAN (Apr. 6, 2020), <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html> (quoting Restatement (Second) of Contracts § 254 (1981)).

<sup>24</sup> *See Excuses for Non-Performance: Conditions Following Contract Formation, supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

that it would become commercially senseless.<sup>27</sup> Ultimately, meeting the threshold of impracticability requires the supervening event to make the performance materially more expensive, resulting in it being unduly burdensome for the excused party.<sup>28</sup>

### iii. Frustration of Purpose

When a party's purpose for entering into the agreement is destroyed or precluded as a result of a supervening event, that party may claim the purpose has been frustrated and performance is thus excused.<sup>29</sup> Frustration of purpose constitutes an excuse for performance when (i) the party invoking the excuse may no longer achieve its objective under the transaction, (ii) such objective was known to both parties, and (iii) the frustration of purpose was caused by a qualifying supervening event.<sup>30</sup>

For this doctrine to apply, the frustrated purpose must be the basis of the contract to the extent that, as both parties understood it, without the frustrated purpose the transaction makes no sense.<sup>31</sup> Although the party may still be able to perform its obligations under the contract, the excused party no longer has to fulfill its obligation because the transaction will no longer generate the expected result.<sup>32</sup> This doctrine excludes economic hardship and, as a result, the increase in the cost of performance does not constitute a frustration of purpose.<sup>33</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Excuses for Non-Performance: Conditions Following Contract Formation*, *supra* note 23.

<sup>31</sup> See generally Lawrence P. Rochefort et al., *The Coronavirus and Force Majeure Clauses in Contracts*, AKERMAN (Apr. 6, 2020), <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html> (quoting *Crown IT Servs. v. Olsen*, 11 A.D. 3d 263, 265 (1st Dep't. 2004)).

<sup>32</sup> *Excuses for Non-Performance: Conditions Following Contract Formation*, *supra* note 23.

<sup>33</sup> *A + E Television Networks, LLC v. Wish Factory Inc.*, 2016 WL 8136110, at \*13 (S.D.N.Y. Mar. 11, 2016) (quoting *Health-Chem Corp. v. Baker*, 737 F. Supp. 770, 776 (S.D.N.Y.)).



#### iv. Force Majeure

Under the common law, force majeure is generally a concept created by contract where the parties agree to include a force majeure clause.<sup>34</sup> In addition, even when the contract is silent on the matter, a court may still consider whether an event constitutes force majeure and excuses the performance of the impacted party.<sup>35</sup> Further, Force majeure events are typically extreme events that may prevent the performing party from complying with his or her obligations under an agreement.<sup>36</sup> The parties define what constitutes a force majeure event in a specific clause within the agreement.<sup>37</sup> A force majeure clause will usually include acts of God, war, government regulation, terrorism strikes, and other events that are considered to be outside the control of the parties and outside the parties' ability to protect themselves from such risk.<sup>38</sup>

The World Bank provides certain examples of force majeure clauses in the context of public–private partnership agreements.<sup>39</sup> In addition, it usually includes a catch–all provision as follows:

... other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts, which in each case directly causes either party to be unable to comply with

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<sup>34</sup> See generally Rochefort *supra*, note 24.

<sup>35</sup> *Force Majeure Clauses: Key Issues*, PRACTICAL LAW COMMERCIAL TRANSACTIONS, [https://us.practicallaw.thomsonreuters.com/5-524-2181?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://us.practicallaw.thomsonreuters.com/5-524-2181?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (last visited Dec. 22, 2020).

<sup>36</sup> *Id.*

<sup>37</sup> 30 Richard A. Lord, *Williston on Contracts* §77:31 (4th ed. 2020), <https://us.practicallaw.thomsonreuters.com/Document/1e3c49ad0d21111d9a974bad5e31cfc15/View/FullText.html>.

<sup>38</sup> *Id.*

<sup>39</sup> See *Sample Force Majeure Clauses*, WORLD BANK GROUP <https://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses> (last visited Feb. 3, 2021).

all or a material part of its obligations under this Agreement.<sup>40</sup>

The examples of force majeure clauses provided by the World Bank also include the consequences of a force majeure event and how they impact the performance under the agreement.<sup>41</sup> As a result of a force majeure event, neither party would be in breach of their respective obligations under the agreement.<sup>42</sup> An exception for payment obligations may sometimes be included.<sup>43</sup> Also, the parties would not be liable to the other party for any losses or damages of any nature under the following excerpt of the model clause:

Neither Party shall be in breach of its obligations under this Agreement (other than payment obligations) or incur any liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other (otherwise than under any express indemnity in this Agreement) if and to the extent that it is prevented from carrying out those obligations by, or such losses or damages are caused by, a Force Majeure Event except to the extent that the relevant breach of its obligations would have occurred, or the relevant losses or damages would have arisen, even if the Force Majeure Event had not occurred (in which case this Clause . . . shall not apply to that extent).<sup>44</sup>

The force majeure clause also requires the defaulting party invoking the force majeure event to provide, as soon as practicable from the day the force majeure event started and finished, proof that the force majeure event happened and the effects of same upon the performance of the defaulting party's obligations under the contract.<sup>45</sup> The force majeure sample clauses provide for a limited period during which a defaulting party may suspend its obligations due

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<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

to a force majeure event without necessarily terminating the agreement.<sup>46</sup> They usually provide for a period of 180 consecutive days.<sup>47</sup>

Similar to the concept of impossibility, an increase in expenses by itself is not enough for a party to claim force majeure.<sup>48</sup> Force majeure would require for there to also be an “extreme and unreasonable difficulty, expense, or injury.”<sup>49</sup> The defaulting party would also have to prove that such force majeure event was beyond its control and not the result of his or her own fault or negligence.<sup>50</sup> Subsequently, a force majeure event results in neither party being liable for any damages caused by the event.<sup>51</sup> Upon the occurrence of a force majeure event, either party may cancel the agreement by written notice to the other party or suspend the performance of its obligations.<sup>52</sup>

Generally, in a sales agreement, the seller will try to negotiate a broad force majeure clause that includes as many events as possible that could excuse the non-performance of its obligations.<sup>53</sup> On the contrary, the buyer, whose obligations will be limited mostly to payment, will fight to have a force majeure clause that is as narrow as possible including only those events that are genuinely outside of the seller’s control.<sup>54</sup> In addition, the buyer may require the right to cancel the agreement if the force majeure event is extended for a certain period of time.<sup>55</sup>

Under New York law, the court will first require the contract to include a force majeure clause with the force majeure event listed within the force majeure clause.<sup>56</sup> The defaulting party may argue there is a force majeure event where the WHO categorized the virus

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<sup>46</sup> See *Sample Force Majeure Clauses*, WORLD BANK GROUP <https://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses> (last visited Feb. 3, 2021).

<sup>47</sup> *Id.*

<sup>48</sup> Lord, *supra* note 38.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *Force Majeure Clauses: Key Issues*, *supra* note 23.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Phibro Energy, Inc. v. Empresa De Polimetros De Sines Sarl*, 720 F.Supp. 312, 318 (S.D.N.Y. 1989).

as a pandemic or where a government-imposed lockdown measure has prevented performance under the contract. In addition, the event must be unforeseen, and the party invoking the force majeure clause must have attempted to perform its obligations notwithstanding the event.<sup>57</sup>

Under Florida law, in addition to having a force majeure clause in the agreement, a defaulting party must show the event was unforeseeable.<sup>58</sup> In addition, the force majeure event has to have been outside the defaulting party's control.<sup>59</sup> As a result, the party invoking a force majeure clause as a defense for non-performance must show the event was unavoidable, and the defaulting party was not at fault or negligent.<sup>60</sup>

Finally, under California law, an event will constitute force majeure when there was insuperable interference happening without the interference of the defaulting party, and it could not have been prevented by prudence, diligence, and care.<sup>61</sup> In addition, even when a force majeure event has occurred, it will not constitute an excuse for performance unless it results in extreme and unreasonable difficulty, expense, injury, or loss.<sup>62</sup>

#### v. Rule 201 of the Federal Rules of Evidence

In order for the defaulting party to be able to prove the occurrence of a force majeure event and its effects on its ability to perform, the party must provide the corresponding evidence.<sup>63</sup> Under Rule 201 of the Federal Rules of Evidence; a court may judicially notice an adjudicative fact that is not subject to reasonable dispute because it is generally known in the territory or can be accurately and readily determined from sources whose accuracy cannot

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<sup>57</sup> See *Rochester Gas & Elec. Corp. v Delta Star, Inc.*, 2009 WL 368508, at \*7 (W.D.N.Y. Feb. 13, 2009).

<sup>58</sup> See *Bloom v. Home Devco/Tivoli Isles, LLC*, 2009 WL 36594, at \*4 (S.D. Fla. Jan. 6, 2009).

<sup>59</sup> See *id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477 (1953).

<sup>62</sup> *Butler v. Nepple*, 54 Cal. 2d 589, 599 (1960).

<sup>63</sup> See *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012); see also *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

reasonably be questioned.<sup>64</sup> Further, the court instructs the jury to accept the noticed fact as conclusive.<sup>65</sup>

In addition, the occurrence of a pandemic is a fact that, as dictated by the WHO, may not be subject to reasonable dispute.<sup>66</sup> A party may request the court to take note of the adjudicative fact of the occurrence of the pandemic.<sup>67</sup> Further, the party must provide the court with the necessary information to authorize such request.<sup>68</sup>

## B. *A Civil Law Approach: Mexico, Colombia, and Brazil*

### i. Mexico

#### 1. Force Majeure (Fuerza Mayor) and Fortuitous Event (Caso Fortuito)

A force majeure or fortuitous event is an act of God, or an act of men that is “insurmountable, irresistible, or inevitable.”<sup>69</sup> A force majeure event is an act of nature that was not foreseeable, while a fortuitous event is a man-made event that is inevitable.<sup>70</sup> A force majeure or fortuitous event constitutes an excuse for non-performance provided the defaulting party did not contribute to the event, did not take on the risk, nor is responsible for taking on the risk by law.<sup>71</sup>

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<sup>64</sup> FED. R. EVID. 201.

<sup>65</sup> *Id.*

<sup>66</sup> See *United States v. Gamboa*, 467 F. Supp. 3d 1092, 1099 (2020); see also *Watson v. NYCHA-Brevoort Houses*, 2020 WL 7347904, at\*2 (N.Y. Civ. Ct. Dec. 14, 2020).

<sup>67</sup> *United States v. Gamboa*, 467 F. Supp. 3d 1092, 1099 (2020).

<sup>68</sup> *Id.*

<sup>69</sup> Hogan Lovells, *COVID-19 México – El problema de la Fuerza Mayor y el COVID-19 (Covid-19 Mexico – The issue with Force Majeure and Covid-19)*, HOGAN LOVELLS (Mar. 30, 2020), <https://www.hoganlovells.com/es/publicaciones/el-problema-de-la-fuerza-mayor-y-el-covid19>.

<sup>70</sup> *¿Qué es caso fortuito? ¿Qué es fuerza mayor? ¿Cuáles son sus diferencias?* [What is a fortituous case? What is Force Majeure? What are the Differences?], INSTITUTO DE INVESTIGACIONES JURÍDICAS, <https://asesoria.juridicas.unam.mx/preguntas/pregunta/29-Que-es-caso-fortuito-Que-es-fuerza-mayor-Cuales-son-sus-diferencias> (last visited Dec. 29, 2020).

<sup>71</sup> Lovells, *supra* note 69.

Under Mexican law, force majeure and fortuitous events have the same elements and consequences.<sup>72</sup> Article 1847 of the Federal Civil Code provides that no penalty shall be imposed on the obligor when non-performance is due to a fortuitous event or force majeure.<sup>73</sup> In addition, article 2111 of the Civil Code of the Federal District (i.e., Mexico City) provides that a party shall not be liable upon the occurrence of a force majeure event if that party did not contribute to the occurrence of the event, nor took on the risk of such event, unless the law attributes the risk to that party.<sup>74</sup> As a consequence of an act of nature or man-made act, not caused by the obligor, such party is impeded from performing all or part of its obligations on a temporary or permanent basis.<sup>75</sup> The defaulting party will not be held liable when a force majeure or fortuitous event renders that party's obligations physically or legally impossible.<sup>76</sup>

In connection with Covid-19, unless the obligor is sick with the virus and cannot perform due to the illness, the mere existence of Covid-19 is not enough for a valid force majeure or fortuitous event claim because it does not inevitably impede the party from performing.<sup>77</sup> Also, having the WHO characterizing Covid-19 as a pandemic or any other international organization is not enough because a resolution of that nature only provides guidelines for each country

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<sup>72</sup> EY Mexico, *Aplicación de los conceptos de caso fortuito y fuerza mayor, como consecuencia de COVID-19, en el marco contractual. Breves consideraciones sobre contratos petroleros [The Application of the Concepts of Fortuitous Case and Force Majeure As the Consequence of Covid-19 In the Contracts Context. Brief Considerations On Oil Agreements]*, EY MEXICO (Mar. 20, 2020), [https://www.ey.com/es\\_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19](https://www.ey.com/es_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19).

<sup>73</sup> Código Civil Federal [CC], art. 1847, Diario Oficial de la Federación [DOF] 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.), <https://mexico.justia.com/federales/leyes/codigo-civil-federal/libro-cuarto/primera-parte/titulo-primero/#:~:text=Art%C3%ADculo%201847.,caso%20fortuito%20o%20fuerza%20insuperable> (consultada el 3 de febrero de 2022) (Mex.).

<sup>74</sup> Código Civil Federal [CC], art. 2111, Diario Oficial de la Federación [DOF] 26-05-1928, últimas reformas DOF 05-02-2015 (Mex.), formato PDF, <http://aldf.gob.mx/archivo-c9dc6843e50163a0d2628615e069b140.pdf> (consultada el 3 de febrero de 2022) (Mex.).

<sup>75</sup> EY Mexico, *supra* note 72.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

to address the health emergency, but they are not mandatory for the countries or to the parties of the agreement.<sup>78</sup>

Under Mexican law, for Covid-19 to constitute a force majeure or fortuitous event, it is necessary for a government entity to impose certain legally binding restrictions that would result in the obligor being inevitably impeded from performing its obligations.<sup>79</sup>

## 2. Rebus Sic Stantibus

The theory of the unforeseeable, or *rebus sic stantibus*, allows the parties to amend their obligations under an agreement in order to even out or balance the parties when an unforeseeable event results in the obligations of one or both of the parties being too burdensome.<sup>80</sup> This theory is applicable when under certain events provided by law, the parties have a right to amend or terminate the agreement as a result of the impact such extraordinary circumstances have on the initial considerations that gave rise to the agreement in the first place.<sup>81</sup>

The defaulting party shall comply with certain formalities required by law for a claim under the theory of the unforeseeable, and, in some cases, it may be necessary for a court to authorize the amendment or termination.<sup>82</sup> The party requesting the amendment or termination must provide evidence that there was a change in the circumstances or economic conditions material enough to justify the amendment of the obligations or the termination of the contract.<sup>83</sup> Finally, the theory of the unforeseeable will only apply to those obligations that are pending performance and will not apply to obligations that were defaulted or performed before the event occurred.<sup>84</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Lovells, *supra* note 70.

<sup>81</sup> *Coronavirus "Covid-19:" Contractual Aspects*, CHEVEZ RUIZ ZAMARRIPA (Mar. 2020), [https://www.chevez.com/ingles/upload/files/TaxFlashTR\\_2020-1.pdf](https://www.chevez.com/ingles/upload/files/TaxFlashTR_2020-1.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

## ii. Colombia

Under the Civil Code of Colombia, a force majeure event or fortuitous event is unforeseeable or inevitable.<sup>85</sup> An event of this nature shall be construed as a “supervening impossibility” of performing the obligations under the agreement due to an event that was unforeseeable, irresistible, and external.<sup>86</sup> Specifically, unforeseeable shall mean the event was a surprise and exceptional, and as a result could not be reasonably avoided.<sup>87</sup> Irresistible shall mean the event could not have been avoided by the obligor and was not provoked by the same.<sup>88</sup>

The Covid-19 pandemic by itself does not necessarily constitute a force majeure event under Colombian law.<sup>89</sup> A party may argue Covid-19 is a force majeure event when the pandemic has made it impossible to perform the obligations or if there is a government order that includes certain prohibitions and restrictions that result in the party being incapable of performing its obligations.<sup>90</sup>

On March 22, 2020, the Government of Colombia issued Decree 457, which provides for certain restrictions and orders mandatory to all inhabitants of the country, including a stay home order and restrictions on transportation.<sup>91</sup> Decree 457 also included certain restrictions for industrial and commercial activities.<sup>92</sup> As a result, those parties that were impacted by Decree 457, to the extent such restriction made it impossible for the obligor to perform its

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<sup>85</sup> Código Civil [C.C.], art. 64 (Colom.), [https://leyes.co/codigo\\_civil/64.htm](https://leyes.co/codigo_civil/64.htm).

<sup>86</sup> See Gabriela Manchero-Bucheli, *COLOMBIA: The effects of the Covid19 Pandemic on distribution and commercial agency contracts in Colombia*, INT'L DISTRIBUTION INST. (June 15, 2020), <https://www.idiproject.com/news/colombia-effects-covid19-pandemic-distribution-and-commercial-agency-contracts-colombia>

<sup>87</sup> *See id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Decreto 457, mediante el cual se imparten instrucciones para el cumplimiento del Aislamiento Preventivo Obligatorio [Decree 457, by which instructions are given for the Mandatory Preventive Isolation]*, MINISTRY OF COMMERCE, INDUSTRY AND TOURISM OF COLOMBIA (Mar. 23, 2020) <https://www.mincit.gov.co/prensa/noticias/general/decreto-457-mediante-el-cual-se-imparten-instrucci#:~:text=El%20Gobierno%20Nacional%20expidi%C3%B3%20el,del%20lunes%2013%20de%20abril%20C>.

<sup>92</sup> See Manchero-Bucheli, *supra* note 86.



obligations under the agreement, could have a viable claim under force majeure.<sup>93</sup>

A force majeure claim may result in the termination of the contractual obligations or in the exoneration of liability to the defaulting party.<sup>94</sup> In the event of the termination of the obligations, it is necessary to determine which party will bear the economic loss of the termination.<sup>95</sup> Both civil and commercial laws determine which party will bear the loss.

For example, under article 930 of the Code of Commerce, in a commercial sales agreement if there is a loss for cause not attributable to the seller, the agreement must be terminated, and the seller will not be liable for such loss.<sup>96</sup> Here, force majeure is more than an excuse for non-performance—it is a complete waiver.<sup>97</sup>

Article 992 of the Code of Commerce provides another example in connection with transportation agreements.<sup>98</sup> The law provides that if the carrier has adopted the necessary measures to mitigate the damage, the carrier shall be completely or partially waived of any liability for any damages caused by the non-performance or partial performance of the obligations due to force majeure.<sup>99</sup> In addition, article 1609 of the Code of Commerce provides that under a maritime transportation agreement, the carrier shall be free of liability for any loss caused as a consequence of a force majeure event or quarantines.<sup>100</sup>

### iii. Brazil

In Brazil, an obligor may claim force majeure to be exonerated of its contractual obligations.<sup>101</sup> The defaulting party may be

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<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> Código de Comercio [C. Com.], art. 930 (Colom.), [https://leyes.co/codigo\\_de\\_comercio/930.htm#:~:text=Art%C3%ADculo%20930.,vendedor%20libre%20de%20toda%20responsabilidad](https://leyes.co/codigo_de_comercio/930.htm#:~:text=Art%C3%ADculo%20930.,vendedor%20libre%20de%20toda%20responsabilidad) (Colom.).

<sup>97</sup> *See* Manchero-Bucheli, *supra* note 86

<sup>98</sup> Código de Comercio [C. Com.], art. 992 (Colom.), [https://leyes.co/codigo\\_de\\_comercio/992.htm](https://leyes.co/codigo_de_comercio/992.htm) (Colom.)

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Force Majeure in Brazil*, PINHEIRO NETO, <https://www.pinheironeto.com.br/Documents/Artigos/the-legal-500-force-majeure-brazil.pdf>.

excused from performing because the force majeure event renders the obligations impossible to fulfill.<sup>102</sup>

Under Article 393 of the Brazilian Civil Code, a debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless such party has expressly taken on the risk.<sup>103</sup> In addition, the same article defines a fortuitous event or force majeure event as an inevitable fact whose effects were impossible to avoid or prevent.<sup>104</sup> A force majeure event in the Brazilian law context is in essence “inevitable.”<sup>105</sup>

As a result, even when the parties may foresee the event, the defaulting party may still be exonerated if the effects of such event were inevitable.<sup>106</sup> In addition, the event could not have been caused by the defaulting party’s actions or lack thereof.<sup>107</sup> Article 393 also allows the parties to agree to their own terms and conditions for purposes of determining when there is a force majeure event.<sup>108</sup> A force majeure clause may determine the consequence of the occurrence of the event: termination or extinction of obligation.<sup>109</sup> A force majeure clause may also impose additional duties on the obligor, including the duty to mitigate damages.<sup>110</sup> In any case, in order to qualify for the exoneration of liability, the obligor must prove the force majeure event was inevitable, and the performance of the obligation as originally agreed is impossible or excessively burdensome.<sup>111</sup>

In Brazil, the Covid-19 pandemic could be considered a force majeure event.<sup>112</sup> However, this requires a case-by-case analysis of the effects of the pandemic on the specific relationship and

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<sup>102</sup> *Id.*

<sup>103</sup> CÓDIGO CIVIL [C.C.][CIVIL CODE] art. 393 (Braz.).

<sup>104</sup> *Id.*

<sup>105</sup> *Force Majeure in Brazil, supra* note 101.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Force Majeure in Brazil, supra* note 101.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

obligations pending performance.<sup>113</sup> A court will review whether the defaulting party could have avoided the non-performance.<sup>114</sup>

#### iv. People's Republic of China

The chapter on contracts is based mainly on the PRC Contract Law effective as of October 1, 1999, and it also includes certain new or modified provisions.<sup>115</sup> Previously the PRC Contract Law regulated the excuses for performance of contracts, now the Civil Code does.<sup>116</sup> Enacting its first Civil Code last year, China follows a civil law system.<sup>117</sup> The Civil Code was published on May 28, 2020, and has been in force since January 1, 2021.<sup>118</sup> The Civil Code, among other provisions in connection to personal and private property rights, includes a set of provisions on contracts.<sup>119</sup>

##### 1. Change in Circumstances

Although the Civil Code includes a compilation of many existing laws in the country, there are still plenty of novelties included in the same such as an amendment to the rule on change of circumstances.<sup>120</sup> Article 533 of the Civil Code provides the following:

Article 533 – Where the basic conditions of a contract undergo significant changes, which are not

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Ulrike Glueck, Michael Munzinger & Lei Shi, *Overview on Key Issues of the Contract Part of China's First Civil Code*, CMS (June 24, 2020), [https://www.cmschina.info/insight/2020\\_China/06\\_Civil\\_Code\\_2/Overview\\_on\\_Key\\_Issues\\_of\\_the\\_Contract\\_Part\\_of\\_China's\\_First\\_Civil\\_Code\\_200624.pdf](https://www.cmschina.info/insight/2020_China/06_Civil_Code_2/Overview_on_Key_Issues_of_the_Contract_Part_of_China's_First_Civil_Code_200624.pdf) (on a thorough analysis on the differences between the PRC Contract Law and the new PRC Civil Code).

<sup>116</sup> See generally *id.*

<sup>117</sup> Keith Zhai, Gabriel Crossely, & Yew L. Tian, *China set to implement its first civil code, as private investment slows*, THOMSON REUTERS (May 21, 2020, 4:08 AM), <https://www.reuters.com/article/us-china-parliament-civil-code/china-set-to-implement-its-first-civil-code-as-private-investment-slows-idUSKBN22X0TC>.

<sup>118</sup> *PRC Civil Code Amends the Rule on Change of Circumstances*, CLYDE & CO (Aug. 5, 2020), <https://www.clydeco.com/en/insights/2020/08/prc-civil-code-amends-the-rule-on-change-of-circum>.

<sup>119</sup> Zhai et al, *supra* note 117.

<sup>120</sup> Clyde & Co, *supra* note 118.

commercial risks and were unforeseeable when the parties signed the contract, if the continued performance of the contract is obviously unfair to one party, the party adversely affected may renegotiate with the other party; if the negotiation fails within a reasonable period, the party/parties may apply to the Court or arbitration institution for modification or termination of the contract.

The Court or arbitration institution shall decide whether to modify or terminate the contract subject to the principle of justice and the actual facts of the case.<sup>121</sup>

Although similar to the PRC Contract Law, the new provision in the Civil Code does not require for the circumstance to be caused by force majeure.<sup>122</sup> Under article 533, the parties shall negotiate and try to find a solution by mutual consent before moving on to litigation.<sup>123</sup> Once before a court or arbitral tribunal, the contract may be modified or terminated by the court or arbitral order.<sup>124</sup>

## 2. Force Majeure

Force majeure under Chinese law used to be regulated under the PRC Contract Law adopted and promulgated in 1999.<sup>125</sup> Article 117 provides that if a contract cannot be fulfilled due to force majeure, the obligations within it may be exempted in whole or in part.<sup>126</sup> The extent of the exemption to fulfill the obligations will depend on force majeure's impact on the ability to do so, unless the law provides otherwise.<sup>127</sup> If the force majeure occurs once there was already a delay in fulfillment, the party may not be exempt from such

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<sup>121</sup> *Id.*

<sup>122</sup> Glueck, *supra* note 115.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 20.

<sup>125</sup> See Contract Law of the People's Republic of China (合同法), (promulgated by the Ninth National People's Congress, Mar. 15, 1999, effective Mar. 15, 1999) art. 117, (China), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/52923/108022/F1916937257/CHN52923%20Eng.pdf>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

obligations.<sup>128</sup> The PRC Contract Law defines force majeure as objective situations which cannot be foreseen, avoided or overcome.<sup>129</sup>

Under Chinese contract law, a force majeure event may constitute a partial or full exemption to performance of the obligation in proportion to the circumstances of the force majeure event.<sup>130</sup> In addition, article 118 of the same law requires the defaulting party to give notice to the other party in order to avoid greater damage and include evidence of the force majeure event within a reasonable time.<sup>131</sup>

In 2003, the Supreme Court of China issued a judicial interpretation on the SARS outbreak.<sup>132</sup> In the judicial opinion; the court stated that if the party was not able to perform its obligations under the contract as a result of any of the administrative measures adopted due to SARS, it should be considered a force majeure event.<sup>133</sup> Although the Chinese courts have yet to declare whether the Covid-19 pandemic constitutes force majeure, certain Chinese courts have issued opinions to guide parties in the use of force majeure provisions in light of the Covid-19 events.<sup>134</sup>

For example, the Supreme Court of China issued a guiding opinion on issues concerning civil litigation cases involving the Covid-19 pandemic.<sup>135</sup> The opinion recommends for the courts to require

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Contract Law of the People's Republic of China*, *supra* note 125.

<sup>132</sup> Yuanyou (Sunny) Yang, *China's Supreme People's Court Provides Guidance On Application of Force Majeure Doctrine for Covid-19-Related Civil Disputes*, PORTER WRIGHT (June 1, 2020), <https://www.porterwright.com/media/chinas-supreme-peoples-court-provides-guidance-on-application-of-force-majeure-doctrine-for-covid-19-related-civil-disputes/>.

<sup>133</sup> *Id.*

<sup>134</sup> Zunarelli Studio Legale Associato, Covid-19, "*Force Majeure*" and *Performance of Contractual Duties – Insights from Chinese High Courts*, INT'L COMPARATIVE LEGAL GUIDES (June 1, 2020), <https://iclg.com/briefing/12928-Covid-19-force-majeure-and-performance-of-contractual-duties-insights-from-chinese-high-courts>.

<sup>135</sup> Fafa (2020) No. 12 (最高人民法院 印发《关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 的通知》[Regarding the Proper Trial of Civil Cases Involving the New Coronary Pneumonia Epidemic Guiding Opinions on Certain Issues (1)], <https://www.chinacourt.org/law/detail/2020/04/id/150152.shtml> (Sup. People's Ct. Apr. 20, 2020) (China).

the party seeking to be discharged in whole or in part of its liability for breach of contract, to demonstrate causation between the pandemic events or administrative measures and the party's failure to perform.<sup>136</sup> In addition, the party shall provide timely notice to the other party in compliance with article 117 and 118 of the PRC Contract Law.<sup>137</sup> However, if the pandemic and the control measures only cause difficulties in the performance of the contract, the parties shall renegotiate.<sup>138</sup>

Similarly, the Beijing First Intermediate Court issued an opinion on lease agreements affecting the real estate sector.<sup>139</sup> The opinion calls for a case-by-case analysis on whether the cessation of activities and the use of the premises as a result of the virus outbreak is insurmountable.<sup>140</sup> When the business is able to resume activities after a short period of time, but its business suffers, that should be considered an "ordinary commercial risk" not subject to the protection of a force majeure clause.<sup>141</sup> On the other hand, when the business has endured long-term or permanent closure, it is necessary to consider the tenant exempt because of the impact of the force majeure event.<sup>142</sup>

## PART II: COVID-19 EVENTS AND EFFECTS

### A. *The Beginning of the End*

On December 31, 2019, the WHO learned about certain cases of an unknown type of pneumonia diagnosed in Wuhan City, Hubei Province of the Republic of China.<sup>143</sup> On January 13, 2020, Thailand reported the first case outside of China.<sup>144</sup> At the time, the

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Zunarelli Studio Legale Associato, *supra* note 134.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Novel Coronavirus (2019-nCoV) Situation Report – 1*, WORLD HEALTH ORG. (Jan. 21, 2020) [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4).

<sup>144</sup> *Id.*

United States implemented traveling restrictions and screening measures to travelers coming from Wuhan City.<sup>145</sup>

On January 23, 2020, China started implementing strict lockdowns in certain regions, including Wuhan City and Huanggang.<sup>146</sup> On March 11, 2020, the World Health Organization declared Covid-19 a pandemic.<sup>147</sup> Two days later, on March 13, 2020, the Trump administration declared the coronavirus a national emergency and issued travel bans on non-Americans who visited one of 26 European countries within 14 days prior to coming to the United States.<sup>148</sup>

On March 17, 2020, the United States reported its 100th death from Covid-19.<sup>149</sup> On March 19, the State of California was the first to issue a statewide stay-at-home order which allowed only essential workers and shops of essential needs to continue operations.<sup>150</sup> And as of April 2, 2020, 90 countries around the world had ordered their citizens to stay at home.<sup>151</sup> Half of the world's population was in lockdown by government orders in order to prevent the spread of the virus.<sup>152</sup>

By April 20, 2020, 40 U.S. states and the District of Columbia had issued shelter in place orders.<sup>153</sup> In the United States, the governor of each state has the power to issue stay-at-home orders under

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<sup>145</sup> *Id.*

<sup>146</sup> *A Timeline of Covid-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Dhaval M. Dave et al., *When Do Shelter-in-Place Orders Fight Covid-19 Best? Policy Heterogeneity Across States and Adoption Time 3*, (NAT'L BUREAU OF ECON. RSCH., Working Paper No. 27091, 2020), [https://www.nber.org/system/files/working\\_papers/w27091/w27091.pdf](https://www.nber.org/system/files/working_papers/w27091/w27091.pdf).

<sup>152</sup> Alasdair Sandford, *Coronavirus: Half of humanity now on lockdown as 90 countries call for confinement*, EURONEWS (Apr. 3, 2020), <https://www.euronews.com/2020/04/02/coronavirus-in-europe-spain-s-death-toll-hits-10-000-after-record-950-new-deaths-in-24-hou>.

<sup>153</sup> Dhaval M. Dave et al., *When Do Shelter-in-Place Orders Fight Covid-19 Best? Policy Heterogeneity Across States and Adoption Time 3*, (NAT'L BUREAU OF ECON. RSCH., Working Paper No. 27091, 2020), [https://www.nber.org/system/files/working\\_papers/w27091/w27091.pdf](https://www.nber.org/system/files/working_papers/w27091/w27091.pdf).

the state's police constitutional powers.<sup>154</sup> An order of such nature has the weight of law and violating the same is considered a misdemeanor.<sup>155</sup> Violations of the orders vary from state to state, including fines or even prison for repeated offenses.<sup>156</sup>

Mexico, on the other hand, has never gone into complete lockdown and has limited Covid-19 preventive measures to shutdowns of certain businesses such as indoor dining and cultural events.<sup>157</sup> Mexico's president, Andrés Manuel López Obrador, has labeled lockdown and compulsory face-mask measures as authoritarian, labeling it akin to a "dictatorship."<sup>158</sup> López Obrador believes that these measures should be voluntary and people should be free to take the precautions they consider makes them feel safe.<sup>159</sup> So far, Mexico has the fourth-highest death toll in the world with an official reported total of 153,639.<sup>160</sup> However, Mexico's limited testing makes officials estimate the real death toll in Mexico to be much higher.<sup>161</sup>

In Colombia, the first Covid-19 case was confirmed on March 6, 2020.<sup>162</sup> On March 12, 2020, one day after the WHO declared Covid-19 a pandemic, Iván Duque Márquez, the president of Colombia, issued the first measures to battle the virus.<sup>163</sup> First, all

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<sup>154</sup> U.S. CONST. amend. X (by which States have the rights and powers not delegated to the United States, granting the states the power to establish and enforce laws protecting the welfare, safety, and health of the public).

<sup>155</sup> Dave et. al, *supra* note 153, at 3.

<sup>156</sup> *Id.*

<sup>157</sup> *Mexico City, Suburbs Return to Partial Coronavirus Lockdown*, AP NEWS (Dec. 18, 2020), <https://apnews.com/article/suburbs-coronavirus-pandemic-mexico-city-mexico-12d94be9131725387c230181037354e2>.

<sup>158</sup> *Id.*

<sup>159</sup> Associated Press in Mexico City, *Mexico: López Obrador says pandemic lockdowns are the tactic of dictators*, THE GUARDIAN (Dec. 2, 2020, 4:34 PM), <https://www.theguardian.com/world/2020/dec/02/mexico-lopez-obrador-pandemic-lockdowns-dictatorship>.

<sup>160</sup> COVID-19 Coronavirus Pandemic, WORLDOMETER, <https://www.worldometers.info/coronavirus/> (last visited Jan. 28, 2020).

<sup>161</sup> Associated Press in Mexico City, *supra* note 159.

<sup>162</sup> *Colombia Confirms Its First Case of Covid-19*, MINISTRY OF HEALTH AND SOC. PROTECTION (Mar. 6, 2020), <https://www.minsalud.gov.co/Paginas/Colombia-confirma-su-primer-caso-de-Covid-19.aspx>.

<sup>163</sup> *President Duque Declares Health Emergency Due to Covid-19*, MINISTRY OF HEALTH AND SOC. PROTECTION (Mar. 12, 2020), <https://www.minsalud.gov.co>



public events with over 500 people were immediately canceled including soccer games that had been scheduled for that week.<sup>164</sup> In addition, cruise ships were not allowed to come to the country, and arrangements were made with local hotels for foreigners to do mandatory quarantine.<sup>165</sup> Colombia went into complete lockdown on March 25, 2020.<sup>166</sup>

Finally, Brazil's president, similar to Mexico's president, has consistently opposed protective measures to help contain the virus despite having experienced the virus himself.<sup>167</sup> At the beginning of March 2020, Brazil declared the pandemic a public health emergency, and the Ministry of Health urged state public officials to adopt measures such as social distancing and canceling public events.<sup>168</sup> In response, most state governors adopted quarantine policies to combat the virus.<sup>169</sup> However, such initiatives were quickly undermined by the president's pressure on public health officials to ignore the recommendations.<sup>170</sup>

#### B. *Economic Impact of the Pandemic and the Lockdowns*

The rapid spread of Covid-19 around the world forced governments to implement stay-at-home or shelter-in-place orders.<sup>171</sup> Stay-at-home orders require people to stay home except for any

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/Paginas/Presidente-Duque-declara-Emergencia-Sanitaria-frente-a-Covid-19.aspx.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Measures to Face Covid-19 After One Month of Arrival to the Country*, MINISTRY OF HEALTH AND SOC. PROT. (Apr. 6, 2020), <https://www.minsalud.gov.co/Paginas/Medidas-para-afrontar-la-Covid-19-tras-un-mes-de-su-llegada-al-pais.aspx>.

<sup>167</sup> Manuela Andreoni, *Coronavirus in Brazil: What You Need to Know*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/article/brazil-coronavirus-cases.html>.

<sup>168</sup> *Id.*

<sup>169</sup> *Coronavirus: Brazil Reports Over 1,000 Deaths*, BBC NEWS (Apr. 1, 2020), <https://www.bbc.com/news/world-latin-america-52251342>

<sup>170</sup> Andreoni, *supra* note 167.

<sup>171</sup> Austan Goolsbee & Chad Syverson, *Fear, Lockdown, and Diversion: Comparing Drivers of Pandemic Economic Decline 2020* 1 (University of Chicago Booth School of Business and NBER, Working Paper No. 2020-80), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3631180](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631180).

essential activity like buying food or medicine.<sup>172</sup> As hospitals battled the virus and its devastating health effects, merchants also struggled to keep their business afloat while suffering overwhelming economic damage.<sup>173</sup> It is to say, confinement orders directly affected merchants' ability to continue operations and performance of their contractual obligations.<sup>174</sup>

Determining the economic impact of Covid-19 lockdown measures is an ongoing process as we continue to experience the volatility of the situation.<sup>175</sup> However, with a big percentage of economic transactions now occurring online, some may question the extent to which lockdowns actually impaired economic activity.<sup>176</sup> A study by the University of Chicago Booth School of Business concluded that although overall consumer traffic fell by 60 percentage points during the pandemic, only seven percent could be attributed to legal restrictions; the rest was credited mainly to consumer behavior.<sup>177</sup> But an analysis on the economic cost of the lockdown in California concluded that 400 jobs were lost per life saved.<sup>178</sup>

The same study from the University of Chicago determined economic traffic started declining even before the lockdown measures were in place.<sup>179</sup> Consumers started reacting to the news of the virus, shifting their focus from their regular consumer activity towards more essential goods such as groceries.<sup>180</sup> The study concludes that whether the activity was allowed or not by the policy in place was not a determining factor in the recovery of the economy.<sup>181</sup> The most decisive reason why individuals decided to engage in some economic activities and avoid others was fear of the virus—not the lockdowns themselves.<sup>182</sup> Specifically, data showed consumers' activity

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<sup>172</sup> Dave et al., *supra* note 153 at 3.

<sup>173</sup> Syverson, *supra* note 171.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Dave et al., *supra* note 153 at 5.

<sup>179</sup> Syverson, *supra* note 171 at 1.

<sup>180</sup> *Id.* at 2.

<sup>181</sup> *Id.* at 12.

<sup>182</sup> *Id.*

was based on whether the activity would require interacting with other people.<sup>183</sup>

Additionally, the study showed that stay-at-home orders had a limited negative impact on economic activity, which fell eight percent due to the policy and only rose five percent after the policy was lifted.<sup>184</sup> As mentioned before, lockdown measures were more influential in consumer activity in terms of inducing more consumption of essential goods, like groceries, and staying away from non-essential services such as restaurants.<sup>185</sup> The virus also had an influence on which type of store the consumer would prefer to shop at, choosing smaller establishments with less traffic over bigger stores with more traffic.<sup>186</sup> The study ultimately concludes that the changes and reactions in consumers' activity were mostly the result of voluntary decisions rather than government-imposed restrictions on activity.<sup>187</sup> Restrictions on certain activities had only a modest impact on business resulting in reallocations from non-permitted activities to permitted ones.<sup>188</sup>

*C. The China Council for the Promotion of International Trade and the FM Certificates*

The CCPIT issues commercial certificates to certify documents and facts related to commercial activities under Chinese laws, relevant regulations, and international trade practices.<sup>189</sup> In order to obtain a commercial certificate, a party is required to file an application through the CCPIT website.<sup>190</sup> The CCPIT issues commercial certificates based on the factual proof provided by the applicant.<sup>191</sup>

At the beginning of 2020, the CCPIT declared they would be issuing commercial certificates to help local businesses in connection with contractual defaults as a result of measures put in place by the Chinese government as a consequence of the initial outbreaks of

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 8.

<sup>185</sup> Syverson, *supra* note 171 at 8.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 12.

<sup>189</sup> CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE, <https://www.rzccpit.com/> (last visited Feb. 2, 2021).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

Covid-19.<sup>192</sup> The defaulting parties under a contract filing for commercial certificates were seeking to provide evidence to rely on in a force majeure claim.<sup>193</sup> These certificates are commonly known as force majeure certificates.<sup>194</sup> In order to assess the chances of success of such, it is necessary to understand the scope of the FM Certificates and the evidentiary weight they carry.

The CCPIT issued FM certificates to businesses that have provided evidence that they have not been able to meet their obligations as a consequence of the effects of the pandemic.<sup>195</sup> The CCPIT may issue certificates stating the time, location and extension of an administrative action and overall proclamation of the virus spread as a pandemic.<sup>196</sup>

For example, the CCPIT may issue a certificate for a party to prove the existence of a ban on the production of a certain product for a period of time in a specific area.<sup>197</sup> Typically, the FM Certificates are issued based on certain specific regulations enacted by governments and competent authorities.<sup>198</sup> The Certificates are mere evidence that the party was involved in a Covid-19 related event.<sup>199</sup> However, the FM Certificates are not direct evidence that such specific event constitutes objective, unpredictable, unavoidable and insurmountable circumstances that directly impacted the performance of the party under the contract.<sup>200</sup>

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<sup>192</sup> Rochefort, *supra* note 23.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Rochefort, *supra* note 23.

<sup>196</sup> Evan Chuck & Yao Mou, *Coronavirus Outbreak: Time to Review Force Majeure Provisions in International Commercial Contracts*, CROWELL & MORNING LLP (Feb. 13, 2020) <https://www.cmtradelaw.com/2020/02/coronavirus-outbreak-time-to-review-force-majeure-provisions-in-international-commercial-contracts/>.

<sup>197</sup> Zunarelli Studio Legale Associato, *supra* note 134.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

## PART III: ANALYSIS

A. *Certificates in Common Law: United States*

Under the common law, a non-performing party may be excused of performance and, as a result, not liable for a breach of contract if the party qualifies under an excuse for non-performance.<sup>201</sup> Excuses for non-performance may be impossibility, impracticability, frustration of purpose, economic hardship, a contractual excuse provided for under the agreement (which may include a change in law or a material adverse effect), or force majeure.<sup>202</sup>

A claim for impossibility may be successful when the defaulting party is able to prove it had no possible alternative to perform its obligations.<sup>203</sup> The party will need to provide evidence of a supervening event that renders the obligation objectively impossible.<sup>204</sup> An FM Certificate may be used by the defaulting party to have the court take note of the pandemic or a lockdown policy as an adjudicative fact.<sup>205</sup> However, the party will still need to provide evidence that as a consequence of such an event there was no possible alternative to perform.<sup>206</sup>

Similarly, impracticability is where the party may perform the obligation but doing so is difficult, complex or challenging to the point that it would result in an excessive increase in cost and is commercially senseless.<sup>207</sup> An FM Certificate would have a limited effect in an impracticability claim—the Certificate would provide evidence of the occurrence of the event but fall short in proving the effects of same on the party's ability to perform its obligations under

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<sup>201</sup> *Excuses for Non-Performance: Conditions Following Contract Formation*, PRACTICAL LAW COMMERCIAL TRANSACTIONS, <https://us.practicallaw.thomsonreuters.com/1-553-6307> (last visited Dec. 22, 2020).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> FED. R. EVID. 201. *See also* *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012); *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

<sup>206</sup> *Excuses for Non-Performance: Conditions Following Contract Formation*, PRAC. L. COM. TRANSACTIONS, <https://us.practicallaw.thomsonreuters.com/1-553-6307> (last visited Dec. 22, 2020).

<sup>207</sup> *Id.*

the contract.<sup>208</sup> Comparably, under a frustration of purpose claim, an FM Certificate would have little impact on the success rate of the claim, and the party would still need to prove the purpose of the agreement was destroyed or precluded by the event, and without such purpose, it makes no sense for the party to continue to perform under the contract.<sup>209</sup>

As a result, we are left with force majeure as an excuse for performance and the use of FM Certificates in a claim before United States courts. Below we will go through an analysis under three different jurisdictions within the United States: New York, Florida, and California.

i. New York

Under New York law, the coronavirus pandemic may successfully constitute a force majeure event that excuses a non-performing party of its contractual obligations.<sup>210</sup> The first requirement for a valid force majeure claim is for the contract in question to provide for a force majeure clause.<sup>211</sup> The force majeure clause shall include either an epidemic or pandemic as a force majeure event and/or a governmental act.<sup>212</sup>

The party must also be able to determine if the event was unforeseeable at the time when the parties entered into the agreement.<sup>213</sup> For example, if the agreement was executed after the WHO pronounced the occurrence of the pandemic, the party would likely not succeed in its claim. Moreover, New York law requires the party to attempt to perform.<sup>214</sup> The party shall provide evidence that, notwithstanding the force majeure event, the party tried to perform its

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Force Majeure Clauses: Key Issues*, PRAC. L. COM. TRANSACTIONS, [https://us.practicallaw.thomsonreuters.com/5-524-2181?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://us.practicallaw.thomsonreuters.com/5-524-2181?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (last visited Dec. 22, 2020).

<sup>211</sup> *Phibro Energy, Inc. v. Empresa De Polimetros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

<sup>212</sup> Richard A. Lord, *Williston on Contracts*, §77:31 (Sweet & Maxwell eds., 4th ed. 2020), <https://us.practicallaw.thomsonreuters.com/Document/Ie3c49ad0d21111d9a974bad5e31cfc15/View/FullText.html>.

<sup>213</sup> *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 (W.D.N.Y. Feb. 13, 2009).

<sup>214</sup> *Id.*

obligation but failed due to the restrictions imposed by the force majeure event.<sup>215</sup>

However, the utility of an FM Certificate is more uncertain. Here, an FM Certificate may help the defaulting party in establishing the occurrence of the force majeure event without a dispute.<sup>216</sup> The party may request for the court to take note of the occurrence of the pandemic or a government act such as a lockdown or other measures imposed by an authority in order to slow the spread of the virus.<sup>217</sup> The FM Certificate may provide the court with enough information to prove such.<sup>218</sup> However, the FM Certificate will fall short in satisfying all the elements to be proved in order to have a successful force majeure event, like whether the event was foreseeable and if it was outside of the control of the defaulting party.<sup>219</sup>

#### ii. Florida

Under Florida law, the coronavirus pandemic will likely constitute a force majeure event.<sup>220</sup> Similar to New York, the first step is to determine if the contract in question has a force majeure clause and, if so, if it includes a pandemic or government act as a force majeure event.<sup>221</sup> The force majeure event must also have been unforeseeable to the parties at the time they entered into the agreement.<sup>222</sup> Thus, if the parties entered into the agreement once the pandemic was already happening or after the government had already put in place stay-at-home policies, the party will likely fail in its claim.

In addition, the party must prove the force majeure event was outside of the party's control.<sup>223</sup> That means that the party claiming

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<sup>215</sup> *Id.*

<sup>216</sup> FED. R. EVID. 201.

<sup>217</sup> *See* United States v. Gamboa, 467 F.Supp. 3d, ¶19, Cr. No. 09-1741 JAP; *see also* Watson v. NYCHA-Brevoort Houses, 11660/2020, 2020 WL 7347904, at\*2 (N.Y. Civ. Ct. Dec. 14, 2020).

<sup>218</sup> Watson, 2020 WL 7347904, at\*2.

<sup>219</sup> Phibro Energy, Inc. v. Empresa De Polimetros De Sines Sarl, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

<sup>220</sup> Bloom v. Home Devco/Tivoli Isles, LLC, 2009 WL 36594, at \*4 (S.D. Fla. Jan. 6, 2009).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

the exemption could not have prevented or overcome the force majeure event.<sup>224</sup> For example, certain governments provided a period of time before the policy was effective in order to allow businesses to mitigate the damage caused by the lockdowns.<sup>225</sup> In that case, the party would have to prove that despite having a short period to react before the policy was in place, it was still not possible to perform its obligations.<sup>226</sup> Finally, the party must prove it was not at fault or negligent.<sup>227</sup> If the party could have performed its obligations, but due to its negligence in ordering supplies on time it was not able to react and perform, then such party will likely fail on its claim.<sup>228</sup>

Here, as under New York law, the FM Certificate would have a limited impact on claims' chances of success. The party making a force majeure claim and providing the court with an FM Certificate will only be able to prove one of four elements required for a successful force majeure claim. The FM Certificate is not enough to prove all of the elements needed to support a FM claim.

### iii. California

Under California law, a force majeure event has a broader meaning. Force majeure is subject to a test on whether under a particular set of circumstances an insuperable interference was occurring without the party's intervention that it could not have been prevented by the exercise of prudence, diligence, and care.<sup>229</sup> In addition, even where the agreement includes a force majeure clause and the party is able to establish the occurrence of a force majeure event, a mere increase in expense will not be enough to establish a valid force majeure excuse.<sup>230</sup> The party must also prove that performing the

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<sup>224</sup> *Id.*

<sup>225</sup> See Emergency Order 23-20, MIAMI-DADE COUNTY (May 27, 2020) <https://www.miamidade.gov/global/initiatives/coronavirus/emergency-orders/emergency-order-23-20.page>; see also Emergency Order 16-20, MIAMI-DADE COUNTY (March 31, 2020) <https://www.miamidade.gov/global/initiatives/coronavirus/emergency-orders/emergency-order-16-20.page>

<sup>226</sup> *Bloom*, 2009 WL 36594, at \*4.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953).

<sup>230</sup> *Butler v. Nepple*, 54 Cal. 2d 589, 598, 354 P.2d 239 (1960).



obligations under the agreement would result in extreme and unreasonable difficulty, expense, injury, or loss.<sup>231</sup>

Therefore, under California law, a party providing an FM Certificate would be far from establishing a valid force majeure claim. The effectiveness of the FM Certificate would be limited to establishing the fact that the pandemic happened, or a government act was in place.<sup>232</sup> However, the defaulting party would need to prove the additional elements required under the laws of California.<sup>233</sup> An FM Certificate will likely not prove the effects of the event on the defaulting party's ability to perform, such as if it could have been prevented, if the increased cost was so extreme and unreasonable, or if the interference caused by the event was insuperable.<sup>234</sup>

### B. *Certificates in Civil Law*

Countries under the Civil law system, such as Mexico, Colombia, Brazil, and China, generally have a statute that provides for a force majeure provision applicable to all contracts governed under the law of that jurisdiction.<sup>235</sup> As a result, parties are free to include a force majeure clause in their contracts defining what constitutes a force majeure event and the consequences of the same. However, the statute will provide for certain fall back language, which shall be considered in an analysis of a force majeure claim provided the parties have not expressly agreed otherwise.

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<sup>231</sup> *Id.*

<sup>232</sup> *See* United States v. Gamboa, 467 F. Supp. 3d, ¶19, Cr. No. 09-1741 JAP; *see also* Watson v. NYCHA-Brevoort Houses, 11660/2020, 2020 WL 7347904, at\*2 (N.Y. Civ. Ct. Dec. 14, 2020).

<sup>233</sup> *See* Mathes v. City of Long Beach, 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953); *see also* Butler v. Nepple, 54 Cal. 2d 589, 598, 354 P.2d 239 (1960).

<sup>234</sup> *Id.*

<sup>235</sup> *See* CC, art. 1847, <https://mexico.justia.com/federales/leyes/codigo-civil-federal/libro-cuarto/primera-parte/titulo-primero/#:~:text=Art%C3%ADculo%201847.,caso%20fortuito%20o%20fuerza%20insuperable>; *see also* Civil Code of Colombia, Art. 64, [https://leyes.co/codigo\\_civil/64.htm](https://leyes.co/codigo_civil/64.htm); *see also* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 393 (Braz.); *see also* Contract Law of the People's Republic of China, *supra* note 125.

i. Mexico

Under Mexican law, the defaulting party claiming a defense for non-performance under force majeure must provide evidence of the occurrence of the force majeure event and that such makes it incapable for the party to default in the performance of the contractual obligations.<sup>236</sup> An FM Certificate would provide evidence that the WHO has characterized Covid-19 as a pandemic.<sup>237</sup> However, the facts certified would not be not enough to succeed in a force majeure claim because a resolution of that nature only provides guidelines for each country to address the health emergency, but they are not mandatory to the countries or to the parties of the agreement.<sup>238</sup>

A defaulting party *would* likely succeed in a force majeure claim under Mexican law if a Covid-19 related event, such as governmental legally binding restrictions, results in the obligor being inevitably impeded from performing its obligations.<sup>239</sup> In that case, an FM Certificate would provide the defaulting party the evidence that the governmental policy was in fact put in place.<sup>240</sup> However, the party would also need to provide additional evidence on how that specific policy impeded the performance of the obligations under the agreement.<sup>241</sup>

In addition, a defaulting party may claim that the pandemic constitutes an unforeseeable extraordinary event rendering the outstanding obligations under the agreement significantly more expensive.<sup>242</sup> Under the contractual unforeseeability theory, the party

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<sup>236</sup> EY Mexico, *The Application of the Concepts of Fortuitous Case and Force Majeure As the Consequence of Covid-19 In the Contracts Context. Brief Considerations On Oil Agreements*, EY MEXICO, [https://www.ey.com/es\\_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19](https://www.ey.com/es_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19) (Mar. 20, 2020).

<sup>237</sup> *The Impact of Covid-19 on Contract Performance and Force Majeure in China*, DENTONS (July 9, 2020), <https://www.dentons.com/en/insights/articles/2020/july/9/the-impact-of-covid19-on-contract-performance-and-force-majeure-in-china>.

<sup>238</sup> *The Application of the Concepts of Fortuitous Case and Force Majeure As the Consequence of Covid-19 In the Contracts Context. Brief Considerations On Oil Agreements*, EY MEXICO, [https://www.ey.com/es\\_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19](https://www.ey.com/es_mx/energy-reimagined/energy-alert/caso-fortuito-y-fuerza-mayor-Covid-19) (Mar. 20, 2020).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Lovells, *supra* note 69.

<sup>242</sup> *The Application of the Concepts of Fortuitous Case and Force Majeure As the Consequence of Covid-19 In the Contracts Context*, *supra* note 236.

looks to find the equilibrium between the parties by amending the obligations under the contract.<sup>243</sup> In this context, an FM Certificate would be of extremely limited importance since it would provide no impact in proving the elements of an unforeseeable event under this theory.<sup>244</sup>

ii. Colombia

Under Colombian law, the Covid-19 pandemic may constitute a force majeure event when the pandemic makes it impossible to perform the obligations under the contract, or a government act or policy, including a set of restrictions or prohibitions on economic and industrial activities, precludes the party from performing.<sup>245</sup> However, the court would need to apply a case-by-case analysis where under a specific set of facts it will determine whether at the moment of the execution of the agreement the pandemic was an unforeseeable or inevitable event.<sup>246</sup>

In addition, the court would analyze whether the effects of the pandemic or lockdown measures make it impossible for the party to perform.<sup>247</sup> An FM Certificate would be limited to providing evidence on the existence of the pandemic or lockdown measure.<sup>248</sup> However, the party would still have the burden of proof for the other elements of the claim.<sup>249</sup>

iii. Brazil

Under Brazilian law, a party may claim a force majeure event exemption based on any administrative decision by the Brazilian government imposing restrictions on mobility, commercial activities, and similar acts.<sup>250</sup> However, the courts are unlikely to be influenced by an FM Certificate because a force majeure claim needs

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<sup>243</sup> *The issue with Force Majeure and Covid-19, supra* note 70.

<sup>244</sup> *Coronavirus "Covid-19:" Contractual Aspects, supra* note 81.

<sup>245</sup> C.C., art. 64.

<sup>246</sup> *See* Manchero-Bucheli, *supra* note 87.

<sup>247</sup> *Id.*

<sup>248</sup> *The Impact of Covid-19 on Contract Performance and Force Majeure in China, supra* note 237.

<sup>249</sup> C.C., art. 64.

<sup>250</sup> C.C., art. 393.

to be proven on a case-by-case basis.<sup>251</sup> A party is likely to succeed in a force majeure claim if there is evidence that such government action directly or indirectly delayed or prohibited timely access to resources or services or impacted the availability of labor or materials.<sup>252</sup>

#### PART IV CONCLUSION

The Covid-19 pandemic shook the entire globe, driving businesses worldwide to review their contracts and try to mitigate their exposure to contractual liability. As a result, some businesses tried to re-negotiate terms, while others inevitably breached their contractual obligations. This has led to an intense discussion on the application of force majeure clauses under different legal systems.

Under the common law system, a force majeure excuse is created by the parties by mutual agreement. Under the civil law system, a force majeure excuse is based on statute, and parties may agree otherwise. As a general rule, in the contracts sphere, under both the common law and civil law systems, a claim for an excuse of performance is a factual dispute. The defaulting party has the burden of proving how the pandemic or lockdown measures had an effect on the specific set of facts.

A governmental agency has a limited role in a proceeding on the excuse for performance of a contract between two private parties. The issuance of FM Certificates by governmental agencies would not hurt but falls short of giving any material advantage to the defaulting party. In addition, in the case of the CCPIT, there is little explanation as to how the evidence provided by the party is analyzed and considered before issuing the FM Certificate.

Although the utility of the force majeure excuse for performance varies across the spectrum within the different legal systems, it is without exception a factual analysis that needs to be done on a case-by-case basis. A party may benefit from an FM Certificate by avoiding the contractual debate over whether the pandemic or the lockdown happened to warrant the excuse of force majeure. Given the

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<sup>251</sup> Pinheiro, *supra* note 101.

<sup>252</sup> *Id.*

ongoing nature of the pandemic, an explicit answer to these contractual issues may not exist, but *will* exist in the near future.