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Is There Force in Force Majeure After COVID-19 or in The Freedom to Negotiate Risk?

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Is There Force in Force Majeure After COVID–19 or in The Freedom to Negotiate Risk?

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This note explores the impact COVID–19 has had on contracting parties who have attempted to implicate force majeure provisions. An inquiry of recent cases reveals varying degrees of success and tension when parties turn towards force majeure text. This Note analyzes common law alternatives, discusses the implication of force majeure clauses as applied under Mexican and American law, highlights the implications that have played out in recent court decisions, and discusses post–pandemic implications that could affect how parties conduct cross–border transactions in the future.

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I. INTRODUCTION

In the midst of what may be the largest global trade disruptor,[1] contracting parties in Mexico and the United States are looking for a "get out jail free card" from their boilerplate provisions.[2] While

[1] *See COVID-19 and world trade*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (last visited Feb. 28, 2021).
[2] *See generally* Jacob Gershman, *Coronavirus Contract Disputes Start Hitting the Courts*, WALL ST. J. (Apr. 20, 2020), https://accounts.wsj.com/auth/sso/login?code=y4-awyFGjOfcpHRy&state=https%3A%2F%2Fwww.wsj.com%2Farticles%2Fcoronavirus-contract-disputes-start-hitting-the-courts-11587375001&savelogin=on.

COVID–19 began during a time of sluggish global trade, the Mexican government's refusal to provide fiscal aid for businesses fueled tension and parties turned to the courts for relief.[3] A recent court decision, *In re Cinemex*, demonstrates that force majeure clauses can provide a basis to avoid contract requirements, while also highlighting the importance of clear and concise contract language.[4]

The United States is Mexico's largest trading partner, due to the long–standing North American Free Trade Agreement (NAFTA) now succeeded by the United–States–Mexico–Canada Agreement (USMCA). Despite the trade agreement, the Mexican economy still contracted by 1.6% in 2019.[5] By the end of 2020, it diminished another 8.3% from the previous year—reflecting the largest drop in GDP since the Great Depression.[6] The response by the Mexican government was underwhelming.[7] By early 2020, both Mexico[8] and the United States[9] declared a national emergency that caused a rift in supply chain and disrupted a number of businesses.[10] These

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[3] Azam Ahmed, *Mexico's Leftist Leader Rejects Big Spending to Ease Virus's Sting*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/world/americas/mexico-AMLO-economy-coronavirus.html?.

[4] *See generally In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021).

[5] *See* United States-Mexico- Canada Agreement Fact Sheet, *Support America's Small and Medium-Sized Business*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 1, 2020) https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/supporting; *see* Daniel Zaga, Alessandra Ortiz, & Jesus Leal Trujillo, *Mexico: an exports-led recovery*, DELOITTE (June 17, 2021), https://www2.deloitte.com/us/en/insights/economy/americas/mexico-economic-outlook.html.

[6] *See* Zaga, *supra* note 5.

[7] Ahmed, *supra* note 3.

[8] John F. Walsh et al., *COVID-19: Federal Government of Mexico Declares State of Emergency and Suspends "Nonessential Activities*," WILMER HALE (Apr. 8, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200408-covid-19-federal-government-of-mexico-declares-state-of-emergency-and-suspends-nonessential-activities; *see also* Daniel Borunda, *Coronavirus: Mexico declares national public health emergency, bans nonessential activity*, EL PASO TIMES (Mar. 31, 2020), https://www.elpasotimes.com/story/news/health/2020/03/31/coronavirus-pandemic-mexico-declares-national-public-health-emergency/5093905002/.

[9] *See* Proclamation No. 9994, 85 Fed. Reg 15337 (Mar. 18, 2020).

[10] Adam Uzialko, *How a Government Shutdown Hurts Small Businesses*, BUS. DAILY NEWS (June. 29, 2022), https://www.businessnewsdaily.com/5235-government-shutdown-hurting-small-businesses.html.

disruptions led to parties disputing whether COVID–19 triggered a force majeure event.[11]

A scrutiny of cases reveals tension.[12] The text of the force majeure provision may implicate whether, and to what extent, courts will grant parties abatement of their duties when force–majeure events arise.[13] These cases also confirm that common–law alternatives, such as frustration of purpose, generally will not apply when parties have contractually allocated risks through a force–majeure clause, or where performance has not been prevented but merely impaired.[14] Part II of this Note will begin by discussing the background implication of force majeure clauses as applied under Mexican and American jurisprudence. Part III will highlight *Cinemex*, a recent court decision that analyzed the potential limitations, and will also discuss the prospect of a successful force majeure implication, along with other common law defenses. Part IV of this Note will discuss the implication of common law contract defenses as well as force majeure clauses as applied under Mexican law and will examine the equitable powers U.S. courts have over parties. Part V will look at the cross–border implications of USMCA, and how courts have excluded responsibilities to contractual obligation on the principles of force majeure. Part VI will analyze the specific language of contract provisions and analyze them through the different approach's courts have taken when interpreting contract defenses and force majeure clauses. Lastly, Part VII will discuss the post–pandemic implications that could affect how parties conduct cross–border business in the future.

II. BACKGROUND

The doctrine of force majeure has a longstanding history.[15] It has been recognized as a general principle of international law, as

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[11] Farshad Ghodoosi, *Contracting Risk*, UNI. OF ILL. L. REV. 805, 809-10 (2022).
[12] *See id.*
[13] *See id.*
[14] *Id. See generally* Andrew C. Smith et al., *Tour de Force: Evolving Force Majeure Considerations One Year into the Pandemic*, PILLSBURY (Mar. 24, 2021), https://www.pillsburylaw.com/en/news-and-insights/tour-de-force-evolving-force-majeure-considerations-one-year-into-the-pandemic.html.
[15] Simon Hentrei & Ximena Soley, *Force Majeure*, MAX PLANK ENCYCLOPEDIAS OF INT. LAW, https://opil-ouplaw-com.daytona.law.miami.edu/

well as customary practice in American jurisprudence.[16] Mexican law indicates that "force majeure events include acts by humans, acts of nature, or acts by governmental authorities, provided such acts were not caused by the contracting party claiming force majeure."[17] In accordance with the Mexican Law and criteria provided by the Mexican Supreme Court of Justice ("SCJN"), a force majeure event has to meet the following characteristics: *first,* "it must render fulfillment of the obligation impossible; *second*, it must be out of the party's control; *third*, it must be unpredictable; and *fourth*, even if the event was anticipated, it must be unavoidable."[18] The inclusion of a force majeure clause in commercial contracts is common in Mexico, particularly in long–term commercial contracts.[19] When invoking COVID–19 as a force majeure event, the most difficult element to satisfy is establishing that such an event "is impossible to overcome."[20] The legal effect of COVID–19 and the application of any force majeure clause is a question of contractual interpretation, which Mexican and U.S. courts resolve on a case–by–case basis.[21] As such, it is up to each respective court to decide the parties' rights and obligations in the event an impacted party elects to invoke a force majeure clause.[22] A proper assessment of the impact of the COVID–19 outbreak, thus, requires a fact–specific analysis of a company's business and contractual relationships.[23]

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view/10.1093/law:epil/9780199231690/law-9780199231690-e1042?rskey=wCE7QL&result=1&prd=MPIL (last visited Oct. 20, 2021).

[16] *Id.*

[17] *See* Ceasar Armando Lechuga Perezanta & Cabriel Salinas Ruiz, *CMS Expert Guide to the law and regulation of force majeure: Law and regulation of force majeure in Mexico*, CMS 1, 4 (2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/mexico?format=pdf&v=4.

[18] *Id*.

[19] *See* Francisco B. Garduno et al., *The Impact of NAFTA on Labor Legislation in Mexico*, 1 U.S.-MEX. L.J. 219, 233 (1993).

[20] *Id.*

[21] *Id.*

[22] *See generally* Ghodoosi, *supra* note 11, at 40-44.

[23] *Id.*

III. *IN RE CINEMEX* – LANGUAGE MATTERS IN FORCE MAJEURE CLAUSES

The success of force majeure arguments largely hinges on the language of the clause.[24] *Cinemex* highlights the different approaches courts have taken when interpreting force majeure clauses and alternative contract defenses, which underscored the importance of clear, concise, and accurate contract drafting.[25]

In *Cinemex*, a high–end movie theater that operated both in the United States and Mexico, filed for Bankruptcy in April 2020.[26] As local governments responded through regulations, companies, including *Cinemex*, suffered the consequences because they backed out of many of their contractual duties— including paying rent.[27] The issue before the court was to what extent, if any, was *Cinemex* excused from its payment obligations under its lease, and for how long.[28] *Cinemex* argued that because the Governor mandated the theater to close, that the mandate triggered several provisions under the lease, including frustration of purpose and impossibility of performance, which they argued excused *Cinemex* from paying rent.[29] The landlord countered, arguing that the force majeure provision did not excuse Cinemex's obligation to pay rent at all.[30] In essence, the landlord claimed the provision functioned like an "anti–force majeure" clause, which would require payment regardless of the force majeure event. The provision contained the following language:

> If either party to this Lease, as the result of any . . . (iv) acts of God, governmental action,

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[24] *See generally Force Majeure State Case Law Summary Chart: Overview*, WESTLAW PRAC. L. COM. TRANSACTIONS (Mar. 1, 2022), https://us.practicallaw.thomsonreuters.com/w-024-8671.

[25] *See* Timothy Murray, *The Courts Have Spoken: Lessons of the Covid-19 Force Majeure Cases*, LEXISNEXIS PRAC. GUIDE J. (Mar. 20, 2021), https://plus.lexis.com/api/permalink/9bc7a2e2-faaf-4305-b9ec-2e09999255b7/?context=1530671.

[26] *In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693, 695 (Bankr. S.D. Fla. 2021).

[27] *See id.* at 697.

[28] *Id*. at 698.

[29] *Id.*

[30] *Id.*

> condemnation, civil commotion, fire or other casualty, **or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform** (other than failure to timely pay monies required to be paid under this Lease), fails punctually to perform any obligation on its part to be performed under this Lease, then such failure shall be excused and not be a breach of this Lease by the party in question, but only to the extent occasioned by such event.[31]

The court reasoned that due to the placement of "other than failure to timely pay monies required to be paid under this lease" that immediately followed the fifth subsection rather than before or after the entire section list, the creditors carve–out only applied to the fifth subsection and not to the fourth force majeure subsection.[32] As the court explained, *Cinemex* was excused from paying rent while the theater was closed because the contractual provision was directly on point and the terms clearly contemplated that the parties might not be able to perform their obligations under the terms of the lease due to acts of God or governmental action.[33] But once the theater was allowed to open, even at a limited capacity, their rent obligation resumed.[34] By looking at the specific language of the provision, the court determined that the clause was an excuse from the breach and was not a force majeure clause, underscoring the importance of the placement and language in contracts provisions.[35] However, the contract also highlights an important distinction— if the case was litigated in Mexico, the court may have come to an alternative conclusion.[36]

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[31] *Id.* at 699.
[32] *In re Cinemex*, 627 B.R. at 700.
[33] *Id.* at 702.
[34] *Id.*
[35] *Id.* at 700.
[36] *See* Juan A. Martin et al., *Force Majeure of COVID-19 under Mexican Law?*, WHITE & CASE (Mar. 26, 2920), https://www.whitecase.com/publications/alert/force-majeure-covid-19-under-mexican-law.

IV. GENERAL CONTRACTING PROVISIONS THAT CAN BE INVOKED

A. An Overview of Mexican Law

Traditional doctrine in both common law and civil law has regularly supported the doctrine of *pacta sunt servanda* "agreements must be kept" though the heavens fall.[37] The major exceptions in civil and common law systems are the doctrines of impossibility and frustration of the purpose.[38] These traditional doctrines continue to receive support across jurisdictions, and relief for hardship is limited to these two doctrines or in exceptional circumstances, though force majeure provisions.[39] "Either performance is made impossible by force majeure and the contract disappears or the performance is impossible, and the contract has to be performed, at whatever cost."[40] In other words, hardship provides a ground for the discharge or the contracting parties must adapt to the changed circumstances.[41]

1. Emergency Laws as Invoked in Mexico

In Mexico, the government's decision to declare a state of emergency due to a triggering force majeure event precludes the application of any alternative provision that would have enabled the parties to postponement of the contract.[42] In the United States, emergency laws are legislation, referring to a state of emergency, which empowers governments to take actions or impose policies that governments ordinarily would not be authorized to take.[43] This means that exigent circumstances must be present for governments to declare a state of emergency.[44] Upon declaration, governments can invoke

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[37] Joseph Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT'L. & COMP. 5, 7 (1997).
[38] *See id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Laura Becking & Chanani Sandler, *Latin America, Business Closures, Coronavirus/COVID-19, Public Health Emergency, Shelter-In-Place*, ORRICK (Apr. 9, 2020), https://justis-vlex-com.daytona.law.miami.edu/#search/jurisdiction:MX/Emergency+Law/p2/WW/vid/842738711.
[43] Xuan-Thao Nguyen, *Contract As Emergency Law*, 30 WASH. INT'L L.J. 420, 423 (2021).
[44] *Id.*

specific powers in response to the multiple crises steaming from an emergency.[45]

2. Force Majeure Overview as Applied In Mexican Jurisprudence

Mexican law allows parties to avoid liability from nonperformance if they are under "the aforementioned circumstances."[46] Such events require performance of contractual obligations to be impossible for nonperformance to be a proper defense.[47] Similarly, contracts may include price adjustments for when performance is not reached the level of impossible, but it would make performance extremely onerous, given the unforeseen circumstances.[48] Generally, under Mexican Law, contracts should be performed as contracted by the parties.[49] In evaluating the impact of the COVID–19 on party obligations, along with any potential relief, the express contractual provisions agreed by the parties is what dictates and courts generally have not upheld explicit carved–outs.[50] Where contractual provisions are unclear, insufficient, or non–existent, Mexican law arguably protect parties from liability that results from their inability to perform by virtue of force majeure events that are categorized as Acts of God.[51]

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[45] *Id.*

[46] Martin et al., *supra* note 36 (citing Amparo directo 295/2006. Patricia Ponce Meléndez. 24 de agosto de 2006. Unanimidad de votos. Ponente: Neófito López Ramos.Secretaria: Lizette Arroyo Delgadillo ("En los contratos civiles cada una de las partes se obliga en la forma y términos que aparezcaque quiso obligarse, con plena libertad para hacerlo, siempre y cuando no se contravengan disposiciones legales ni se afecte elinterés público.").

[47] *Id.*

[48] *Id.*

[49] *See generally id.*; *see also* Monica Hwang & Silvia Martin, *Preparing for Investments in Mexico's Upcoming Energy Infrastructure Plan,* JD SUPRA MEXICO (May 19, 2020), https://www.jdsupra.com/legalnews/preparing-for-investments-in-mexico-s-95431/.

[50] Hwang, *supra* note 49.

[51] *See generally id.*; *see also* ACT OF GOD, Black's Law Dictionary (11th ed. 2019). *Cf.* FORCE MAJEURE, Black's Law Dictionary (11th ed. 2019).

3. Mexican Federal Code Weighs in on Government Actions

While Mexican courts do not provide a precise definition of "force majeure," they generally refer to force majeure events as those events which result from human conduct and Acts of God as those events which result from nature.[52] Although each triggering event that results in force majeure may be different in nature, the legal consequence under the applicable Mexican statute is the same.[53] Article 2111, which provides: "no one is obligated under fortuitous events (i.e. acts of God), unless it has contributed to its cause, has expressly agreed to such obligation or when applicable law requires it."[54] Similarly, Article 1847, provides: "the penalty shall not be given effect when the obligor has not been able to comply with the contract as result of the creditor's actions, fortuitous event (i.e. acts of God) or force majeure."[55] In both statutes, a party is excused from the failure or delay in performing its obligations under a contract without penalty or liability unless such party has contributed to the relevant force majeure event and has expressly agreed to be held liable or the law specifically provides for such liability.

Conversely, a party cannot claim relief based on force majeure because of the mere difficulty in performing its obligation or because performance is more difficult than anticipated.[56] Under Mexican Law, the moving party under a force majeure provision has to meet a high burden of proof, which is a fact intensive inquiry that is performed case–by–case.[57] But, under Mexican Law, there are a number of precedents that can serve as an exception to the parties commercial agreement, and thus, tilts the parties renegotiating powers.[58] These situations may arise when, at the time the contract was executed, the underlying circumstances substantially change such

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[52] *See* Constitution Politica De Los Estados Unidos Mexicanos [C.P.], art 5, Diarios Oficial de la Federacion [DOF], 05-02-1917, últimas reformas DOF 10-02-2014.(Mex.).
[53] *Id.*
[54] *See* Código Civil [CC], art. 2111, Diario Oficial de la Federación [DOF] 14-05-19, últimas reformas DOF 28-01-2010 (Mex.).
[55] *See* Código Civil [CC], art. 1847, Diario Oficial de la Federación [DOF] 14-05-19, últimas reformas DOF 42-12-2013 (Mex.).
[56] Hwang & Martin, *supra* note 49, at 3.
[57] *Id.*
[58] *Id.*

that performance becomes unilaterally burdensome.[59] In these instances, the parties could not have anticipated such risk or negotiated alternative conditions when executing the contract.[60]

Contracting parties inherently assume risk but the pandemic magnified the risk parties undertake, especially for parties in credit agreements.[61] In Mexico, companies are facing financial hardship which have left many businesses unable to fulfill their commitments.[62] In response, parties have partially or totally deferred payments.[63] Others have sought contract modifications, which effectively allows the parties to change their risk allocation and reassign their risk.[64] But for many that still may not be enough.[65] Parties, similarly situated to the parties in *Cinemex*, have attempted to unilaterally terminate their agreements.[66] To do so, they have granted the right of one party to another for a period of time, thus, allowing them to dispose of their credit.[67] In Mexico, these unilateral changes are possible even if one party abides with its contractual obligation.[68] Yet in certain instances the debtor may be prevented from fulfilling their promises for no fault of their own.[69] In such instances, the right to invoke the force majeure event can also be waived, as long as: it does not impede public interest or third–party rights, the borrower has not contributed to the triggering event, and the forbearance is expressly provided for in the agreement.[70] But certain local civil codes provide for the application of the *rebus sic stantibus* principle, which protects the parties by allowing the affected party to

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[59] *Id.*
[60] *Id.*
[61] *See* Raúl Fernández-Briseño, Jan R. Broker & Romina Fernández, *The Impact of COVID-19: Legal Risks of Financing Commitments under Mexican Law*, MAYER BROWN (Apr. 28, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/the-impact-of-covid19-legal-risks-on-financing-commitments-under-mexican-law.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Fernández-Briseño, Broker & Fernández, *supra* note 61.
[68] *Id.*
[69] *Id.*
[70] *Id.*

recover for the balance due to the breach.[71] This doctrine, however, cannot be invoked for an agreement because of "the lack of regulation within the Federal Civil Code."[72]

4. Alternative Dispute Resolution as a Viable Option

Aside from a carefully drafted force majeure clause, foreign investors in Mexico should also consider the dispute resolution mechanism. If such avenues are available, either through contract or if allowed by Mexican law, arbitration may be a viable option for investors.[73] *First*, arbitration can take away any potential home court advantage.[74] *Second*, as shown by COVID–19, jurisdictions at all levels, federal, state, and municipal, have suspended litigation to varying degrees.[75] *Third*, arbitration may potentially avoid these prolonged delays since parties may be able come to a mutual agreement much quicker.[76] *Fourth,* the arbitration procedures render much more favorable awards relative to the complexity of the disputes.[77] But arbitration has its own downside.[78] Specifically, arbitral institutions provide arbitrators with the discretion to conduct hearings very broadly and there "are no specific rules for how some hearings should proceed" which leads to a lack of uniformity among decisions.[79]

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[71] *Id.*
[72] *Id.*
[73] Ritch Mueller et al., *Preparing for Investments in Mexico's Upcoming Energy Infrastructure Plan*, JD SUPRA (May 19, 2020), https://www.jdsupra.com/legalnews/preparing-for-investments-in-mexico-s-95431/.
[74] *Id.*
[75] *Id.*
[76] *See generally id.*
[77] Marco Tulio Venegas Cruz, *Arbitration procedures and practice in Mexico: overview*, WESTLAW PRAC. L. GUIDE (Jan. 1, 2021), https://us.practicallaw.thomsonreuters.com/9-381-2898.
[78] *See id.*
[79] Hwang & Martin, *supra* note 49. *Cf. Guide To Mexican Arbitration Law*, ZFZ, 1, 11-17, https://www.zeilerfloydzad.com/wp-content/uploads/2020/08/ZFZ-Mexican-Arbitration-Law-Guide.pdf (If an arbitration proceeding is conducted before a an arbitral institution, the rules of the institution may provide the mechanisms for the constitution of the arbitral tribunal).

B. United–States–Mexico–Canada–Agreement

There is widespread agreement that "it is critical that any trade agreement[s] support free trade."[80] USMCA retained much of the same information as NAFTA, but with some substantive improvement to capture changes in 21st century trade issues, intellectual property rights, and cross–border transactions.[81] In turn, when governments eliminate or lower tariffs barriers, contracting parties have greater freedom to make their own choices.[82] Trade freedom is a cornerstone of economic freedom, and studies indicate that increased trade freedom is strongly correlated to increased wealth, prosperity, human development, education, and even environmental protection.[83] The USMCA contains several chapters and provisions that will likely impact the contracts and trade between the United States and Mexico.[84]

USMCA protections address foreign investment, in Chapter 14, where it states provisions for Investor–State Dispute Settlement (ISDS) that only applies to certain sectors in Mexico.[85] ISDS provisions in USMCA are limited to investments in oil and gas, power generation, telecommunications, transportation, and infrastructure that is central to the Mexican government.[86] By limiting ISDS to this narrow list of sectors, USMCA is essentially determining which types of investment are allowed to succeed in Mexico and which are not.[87] An investor naturally wants stronger protections, but it is unclear whether the treaty will even contribute to its goal of promoting future investment because investors in other sectors, outside of oil and gas, power generation, telecommunications, and transportation, are limited to national treatment once remedies in the host state have

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[80] Tori K. Whiting & Gabriella Beaumont-Smith, *An Analysis of the United States-Mexico-Canada Agreement*, HERITAGE FOUNDATION (Jan. 28, 2019), https://www.heritage.org/trade/report/analysis-the-united-states-mexico-canada-agreement.
[81] *Id.*
[82] *See id.*
[83] *See generally id.*
[84] *See id.*
[85] *Id.*
[86] Joshua P. Meltzer, *Developing a Roadmap for USMCA Success*, BROOKINGS INST. (Sept. 1, 2021), https://www.brookings.edu/wp-content/uploads/2021/09/Developing-roadmap-USMCA.pdf.
[87] *See id*.

been exhausted.[88] This limitation will likely have an impact on other regulations, as well as American businesses contracting and operating in Mexico.[89]

Arbitration is also essential for supporting foreign investment.[90] The ISDS has a specific arbitration process, which ensures that American businesses are guaranteed fair treatment, an especially important consideration for investments in developing countries.[91] Unlike the United State or Canada, Mexico is still a developing country and a robust and transparent rule of law in Mexico is still a work in progress.[92] The ISDS provides, albeit at a scaled back process, access to binding arbitration for investors in foreign jurisdictions who are dissatisfied with the relief available to them through U.S. court systems.[93] ISDS provisions are particularly helpful when they can "substitute weak legal and regulatory doctrines in a host country."[94] Even though the retention of ISDS provisions regarding U.S. investments in Mexico is an important and a positive element of USMCA, the ISDS protection is limited to the investments available through ISDS.[95]

Mexico–United States disputes are conducted in accordance with arbitration rules.[96] Unless the parties agreed upon otherwise, the parties appoint a three–panel arbitral tribunal, one appointed by

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[88] *Id.*
[89] *Id.*
[90] Daniel Garcia-Barragan, Alexandra Mitretodis & Andrew Tuck, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 J. OF INT'L ARB. 739 (2019).
[91] *See* Hwang & Martin, *supra* note 49.
[92] *Id.*
[93] *See generally id.*
[94] Garica-Barragan, Mitretodis & Tuck, *supra* note 90, at 740. *See also* Terry Miller, Anthony B. Kim, & James M. Roberts, *2020 Index of Economic Freedom*, HERITAGE FOUNDATION, https://www.heritage.org/index/pdf/2020/book/index_2020.pdf (last visited Mar. 6, 2020) (Mexico is considered at least "moderately free" with a 2020 index of 66, indicating a in institutional environments in which individuals and private enterprises benefit from at least a moderate degree of economic freedom in the pursuit of greater economic development and prosperity.); *cf.* U.N. COUNTRY CLASSIFICATION, U.N. DOCS., https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf (last visited Mar. 6, 2022) (listing Mexico as developing economy).
[95] *See generally* Hwang & Martin, *supra* note 49.
[96] Garica-Barragan, Mitretodis & Tuck, *supra* note 90, at 750.

each of the parties and a third, by agreement of the parties.[97] This roster–based mechanism established under USMCA regulates the available awards and form of relief.[98] The standard form of relief under the provision allows the panel to award restitution of property or monetary damages and applicable interest.[99] But it is well established that the tribunal will order the respondent to provide enough satisfactory evidence to show damages.[100] The arbitral tribunal also has broad discretion to award costs and attorney fees, as well as determining the manner which the costs and fees are paid, but punitive damages are strictly prohibited.[101] The provision also expressly states that the binding force of the award is limited to only the adverse parties for the specific issue that was arbitrated in front of the panel.[102]

Mexico relies on its cultural industries and negotiates for exceptions for cultural industries, such as cinemas and newspapers, that have strong commercial ties within the public and private sector.[103] Cross border trade, specifically for cinema services, is limited.[104] Foreign ownership of cinemas may only "reserve 10 percent of the

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[97] *Id.*
[98] *Id.* at 751.
[99] *Id.*
[100] *Id.* at 752.
[101] *Id.*
[102] Garica-Barragan, Mitretodis & Tuck, *supra* note 90, at 752.

> To qualify for substantive protections, the injured party must first establish the existence of a "covered investment"—which is defined by Article 14.1 "as an investment in one Part's territory by another investor of another Party, where 'investment' includes 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including . . . commitment of capital or other resources in [oil and gas, power generation, telecommunications, transportation, infrastructure].Once established, the substantive protections provided in Article 14, includ[e] that the host must accord the foreign investor and its investments "treatment no less favorable than that it accords, in like circumstances, to its own investors" or 'to investors of any other [country.]"

Id. at 747-48 (cleaned up).
[103] *See* Rodrigo Gómez, *Cultural Industries and Policy In Mexico and Canada After 20 Years of NAFTA*, 9 NORTEAMÉRICA 173, 176-79 (2014).
[104] *See* Whiting & Beaumont-Smith, *supra* note 80.

total screen time to the projection of national films."[105] This limitation on trade creates burdensome rules for businesses and investors. Foreign investment is a driving factor to increase the standard of living in Mexico, and as such, restricting the amount of investment may hurt Mexico's economy because it will lead to a reduction of opportunities and create uncertainty.[106] This could also directly harm Mexican citizens because increasing future investments is important for the country's national development and prospect.[107]

Chapter 15 of USMCA provides protections for certain cross–border trade issues. A Party may prevent or delay a transfer or payment through the "application of its laws that relate to (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities or derivatives; (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (d) criminal or penal offenses; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings."[108] This is important for contractual autonomy, which governs what laws apply in particular legal cases.[109] In sum, this provides legal safeguards for citizens or firms to avoid paying for services if they are not required to by law.[110] But this provision will likely depend on the when and where the exchange of payment was made.[111]

Conversely, Chapter 18 of the USMCA covers the telecommunications industry, and includes a number of provisions designed to ensure that dominant telecommunications companies do not use their power to keep international competitors out of the market.[112] Mexico's America Movil, a wireless telecommunication service provider, took this position in a recent case that was a contention under USMA.[113] In that case, AT&T had been challenging Movil over the years by flooding the market with large amounts of

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[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Whiting & Beaumont-Smith, *supra* note 80.
[111] *Id.*
[112] *Id.*
[113] *Id.*; *see* America Movil, *Our Company,* https://www.americamovil.com/English/about-us/our-company/default.aspx.

telecommunication infrastructure in Mexico.[114] The Mexican Supreme court overturned the regulations intended to limit Movil's ability to keep competitors, like AT&T, out of the Mexican market.[115] The position took by the U.S. under USMC was to freeze all existing restrictions on Movil.[116] Subsequently, the reform law that was passed helped level the playing field for large companies with greater bargaining power while still allowing lawmakers to include specific tariff measures that harmed smaller competitors.[117]

Chapter 10 of USMCA addresses trade remedies, which includes safeguard measures, that promote cooperation and information sharing, but it also provides a new mechanism for the United States to tighten the reins on globally integrated supply chains.[118] The actions of a private company's decision to form supply chains should not be dictated by government actions, unless in extreme circumstances, like for example, cases of national defense.[119] This section of the USMCA also sets a precedent for future cases by nudging legislation to further restrict regulations and impede supply chains.[120]

C. United Nations Convention on Contracts (CISG) and Its Impact

The United Nations Convention on the International Sale of Goods (CISG) is silent on the question of hardship as applied

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[114] Whiting & Beaumont-Smith, *supra* note 80.
[115] Robbie Whelan & Anthony Harrup, *Mexican Supreme Court Backs América Móvil on Interconnection Fee*s, Wall St. J. (Aug. 16, 2017), https://www.wsj.com/articles/mexican-supreme-court-backs-america-movil-on-interconnection-fees-1502920648; *see also* Whiting & Beaumont-Smith, *supra* note 80.
[116] Whiting & Beaumont-Smith, supra note 80.
[117] *See* Robbie Whelan & Anthony Harrup, *Mexican Supreme Court Backs América Móvil on Interconnection Fee*s, WALL ST. J. (Aug. 16, 2017), https://www.wsj.com/articles/mexican-supreme-court-backs-america-movil-on-interconnection-fees-1502920648.
[118] Whiting & Beaumont-Smith, *supra* note 80; *see also United States- Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
[119] Whiting & Beaumont-Smith, *supra* note 80.
[120] *Id.*

directly to force majeure.[121] In some instances, the pandemic has been used as a pretext to terminate contracts, especially in the case where foreign investors have been involved.[122] In one instance, COVID–19 was used to terminate an unpopular deal.[123] Constellation Brands, known for its Corona Beer, had a $1.4 billion dollar project to construct a brewery in Mexico which the Mexican government canceled.[124] The Mexican president, who had outwardly voiced his objection of the brewery, canceled the project as a direct result of local political events that occurred during the pandemic.[125] The Constellation Brands project housed more than 3,000 investment treaties that provided international legal protection to foreign investments.[126] These treaties, under the CISG, "offer a broad range of legal protection that might not be available under local law of the host country", and therefore, "can supplement the rights under contracts that involve foreign investment."[127] The international arbitration proceedings allow investors to enforce substantive legal protection directly against the host state of the investment.[128] In turn, CISG allows claims to be brought against parties when the host laws are unreasonable, arbitrary, or unilaterally disproportionate against the foreign investor.[129]

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[121] Stine Mathlide Eggers, *Hardship Within The Scope Of The CISG*, RETTID 1, 34, https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/Afh_2020/afh26-2020.pdf.

[122] Emma Upshall, *Grupo Modelo Suspends Corona Beer Production Due to COVID-19*, FOODBEV MEDIA (Apr. 3, 2020), https://www.foodbev.com/news/grupo-modelo-suspends-corona-beer-production-due-to-coronavirus/.

[123] *Id.*

[124] *See* Daniel D. McMillian, Richard Putrre & James Pickavance, *Construction Projects and Disputes in the COVID-19 World: A Look Beyond the Lockdown*, 37 PRAC. REAL EST. LAW 27, 49 (2021); *see also* Gabriela Mastache, *Plant Cancellation Leads to Losses for Constellation Brands*, Mex. Bus. News (Mar. 24, 2020), https://mexicobusiness.news/finance/news/plant-cancellation-leads-losses-constellation-brands.

[125] McMillian, Putrre & Pickavance, *supra* note 124, at 47.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] McMillian, Putrre & Pickavance, *supra* note 124, at 47; *see also United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG),* U.N. COMM'N ON INT'L TRADE L. (Apr. 11, 1980), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

Since Mexico is a signatory state of the CISG, the provisions governed by the CISG will generally always apply to international contracts for sales between Mexico and another signing CISG state, but also for international contracts of sale governed by Mexican law.[130] Article 79 of the CISG provides exemption from liability if failure to perform is due to acts of God or so called "hardship."[131] The CISG imposes notice requirements that mandates the nonperforming party to give reasonable notice to the other party of the impairment and inability to perform under the contract.[132] However, the threshold to invoke Article 79 is high, so direct failures to perform caused by COVID–19, such as travel restrictions or quarantines imposed by the government, will trigger a successful force majeure event.[133] Conversely, voluntary precautionary measures taken preemptively by parties, such as proactively closing a business prior to a mandate, will likely not qualify as triggering events because the event would not have "fundamentally altered the equilibrium of the contract."[134] Further, the date the contract was executed will also play an important factor in determining whether or not the failure to perform was directly caused by the force majeure event.[135] If the date was after the pandemic was declared, it is unlikely that contracts analyzed by the CISG will determine that the event was truly "unforeseeable." [136]

D. Bankruptcy Code Section 365(d)(3)

Debtors in a Chapter 11 case can utilize Section 365(d)(3) of the Bankruptcy Code, which requires debtors leasing non–residential real property to timely perform their obligations, including the

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[130] Carlos Vejar, Josafat Peredes & Laura Y. Zielinski, *Consideration for International Commercial Contracts Affected by the COVID-19 Crisis in Mexico*, HOLLAND & KNIGHT LLP (Apr. 7, 2020), https://www.hklaw.com/es/insights/publications/2020/04/considerations-for-international-commercial-contracts-affected.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*; *see also* Yasutoshi Ishida*, CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness—Full of Sound And Fury, but Signifying Something*, 30 PACE INT'L L. REV. 331 (2018).
[135] Vejar, Peredes & Zielinski, *supra* note 130.
[136] *Id.*

payment of rent in full, unless and until the lease is rejected.[137] Although section 365(d)(3) allows the bankruptcy court to suspend these obligations upon a Chapter 11 filing for sixty days, after the sixty days, the obligation to pay rent resumes.[138] But sixty days may not be enough.[139] This is especially for a commercial debtor seeking to abate a lease.[140] Due to this, parties have turned to other contractual provisions as alternatives, like the force majeure clause, by arguing that the global pandemic and related government regulations are unforeseen events that are beyond the control of either party.[141]

E. Force Majeure and Alternative Contract Excuse as Applied in United States

1. Doctrine of Impracticability and Impossibility

The doctrine of impracticability excuses performance when performance is impractical under the negotiated terms, even though it is still possible to perform.[142] Thus, impracticability is measured objectively.[143] To determine impracticability, the Restatement sets out a two– factor analysis.[144] *First*, the affected party must know or had reason to know of the factors contributing to impracticability.[145] To assert impracticability, the breaching party must lack formidable awareness of causal circumstances.[146] *Second,* there must be an indication of whether impracticability prevents a duty to perform or

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[137] 11 U.S.C. § 365(d).
[138] *Id*.
[139] *See id.*; *see, e.g., In re* Pier1 Imports, Inc.*,* 615 B.R. 196, 202 (Bankr. E.D. Va. 2020) (holding that §365(d)(3) does not compel a debtor to pay rent timely and if a debtor fails to perform its obligations . . . all a Lessor has is an administrative expense claim under §365(d)(3), and not a claim entitled to superpriority).
[140] *See* Quinn E. Urquhart, *March 2021: Bankruptcy & Restructuring Litigation*, JD SUPRA (Mar. 23, 2012), https://www.jdsupra.com/legalnews/march-2021-bankruptcy-restructuring-2924817/.
[141] 30 Richard A. Lord, Williston on Contracts § 77:31 (4th ed. 1990).
[142] *See* Piper Hampton, *Finding Our New Normal: Reevaluating Force Majeure Within Oil and Gas Contracts in the Wake of Covid-19*, 7 OIL & GAS, NAT. RES. & ENERGY J. 149, 174 (2021).
[143] *Id*.
[144] Restatement (Second) of Contracts, § 265. (A. L. INST. 1981).
[145] *Id.*
[146] *Id.*

whether an the duty should be worthy of discharge.[147] The latter of the two elements awards restitution to remedy partial performance after the discovery of impracticability.[148]

On the grounds of impracticability, COVID–19 can excuse performance only if the foreseeability is undermined and impracticability has objectively been determined.[149] If performance is restricted solely by COVID–19, the moving party under the impracticability doctrine must determine: *first*, whether nonperformance was a factor caused by the parties;[150] *second*, whether COVID–19 impact on the parties performance was foreseeable, and *third*, whether the parties negotiated an assumption of the risk.[151] Potential impracticability defenses are limited to circumstances when a party's performance was due to no fault of their own, COVID–19's impact on the parties performance was unforeseeable, and no assumption of any risk associated with the performance was negotiated in the agreement.[152]

Alternatively, the doctrine of impossibility refers to a party who is excessively burdened because of a change in circumstances.[153] In such instances, the unduly burdened party may obtain a discharge of the contract.[154] Alternatively, and perhaps more favorably, a court can adapt the contract to the changed circumstances but only if both parties want the contract to continue.[155] The changed circumstance must be exceptional, and the court is tasked with balancing the interests of both parties.[156] But the outcome remains the same even if a new law or government order prohibits the party's performance.[157]

When a contract has become excessively burdensome, the party subjected to the moving burden under the provision may request a

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[147] *Id.*

[148] Andrew A. Schwartz, *COVID-19: Impossible Contracts and Force Majeure*, COLUMBIA: THE CLS BLUE SKY BLOG (Aug. 11, 2020), https://clsbluesky.law.columbia.edu/2020/08/11/covid-19-impossible-contracts-and-force-majeure/.

[149] Hampton, *supra* note 142, at 175.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *See* Peter Hat, *Frustration and Its Solution in German Law*, 10 AM. J. Comp. L. 345, 360 (1961).

[154] *See id.* at 346.

[155] *See id*. at 347.

[156] *Id*.

[157] Schwartz, *supra* note 148.

discharge of the contract, or a favorable term modification, so that the new terms accurately depict the changes in market conditions.[158] Sophisticated trade agreements generally contain renegotiation clauses or other similar adaptive clauses that provide for great flexibility to later renegotiate.[159] The existence of such clauses gives rise to the degree of their usage, which are frequently overlooked by unsophisticated parties but regularly deliberated by sophisticated drafters.[160] However, even if a party is excused from performing under the contract on the basis of impossibility, the excused party has neither performed under the contract nor breached, so any unjust enrichments are at the expense of the nonconforming party to provide reimbursement.[161]

Although relief under the doctrine of impossibility is generally narrow, the pandemic is just the "type" of triggering event that the doctrine was designed to safeguard.[162] In applying the doctrine, courts generally do not simply excuse a party from their contractual obligations.[163] The standard of impossibility is intended to prevent one party, who is seeking forfeiture, to unilaterally redraft the contract or add new terms that have not been previously negotiated.[164] Some courts have taken a more modern approach and instead focused on the commercial impracticability associated with the substantially higher commercial costs associated with performing the contract.[165] In some instances even government regulation may render a contract impossible to perform—making the event ripe for applying the doctrine.[166] The doctrine of impossibility robustly allows courts to determine whether contracting parties are excused from nonperformance because of COVID–19, subsequent government orders, or other events triggered by the pandemic.[167] But a determining

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[158] Perillo, *supra* note 37, at 25.
[159] *Id.* at 11.
[160] *Id.*
[161] Andrew A. Schwartz, *Frustration, The MAC Clause, and COVID-19*, 55 U.C. DAVIS L. REV. 1771, 1782 (2021).
[162] *Id.*
[163] Nguyen, *supra* note 43, at 454.
[164] *Id.* at 455.
[165] *Id.* at 456.
[166] *Id.* at 456-47.
[167] *Id.* at 457.

factor is the timing and duration of the triggering event.[168] For instance, the court in *Cinemex* hinged its analysis of whether nonperformance was due to impossibility when the government shutdown occurred and excused nonperformance *only while* the shutdown was in effect.[169] Thus, because *Cinemex* was able to operate at fifty–percent capacity *after* the shutdown, the court declined to grant any relief with respect to the post shutdown period.[170] The *Cinemex* court found that performance was not impossible but merely "impracticable," and held that the common law doctrine on frustration of purpose did not support partial relief.[171] Noting that under common law, "courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor," the court reasoned that the debtors' choice not to reopen for "primarily economic concerns" did not provide a sufficient basis for relief.[172]

2. Frustration of Purpose Doctrine

Frustration of purpose on the other hand, is predicated on contractual performance.[173] Parties enter into contract agreements with an objective purpose.[174] The reasoning behind why parties decide to enter into a contract can vary immensely, but they generally have a "common object" between them.[175] In contrast to the doctrine of impracticability or impossibility, the frustration of purpose doctrine does not depend on either impossibility or the difficulty of performance.[176] In other words, the doctrine of frustration applies even when parties lack any reason to continue under the contract.[177] The

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[168] *Id* at 457-59 (if the parties are fully aware at the time of entering into the contract that a state of emergency has been declared, then they cannot assert an impossibility defense and the lack of clarification in the contract about how to proceed if the pandemic were to interfere with the contract is not sufficient to avoid performance).
[169] *See In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693, 698 (Bankr. S.D. Fla. 2021).
[170] *Id.* at 700.
[171] *Id.* at 699.
[172] *Id.* at 699-700.
[173] Nguyen, *supra* note 43, at 457.
[174] 14 CORBIN ON CONTRACTS § 77.1 (Supp. 2020).
[175] *Id.*
[176] *See, e.g.*, Hampton, *supra* note 142, at 176-77.
[177] *Id.*

doctrines of impossibility, impracticability, and frustration are in theory different, however, supervening events, like an act of God or market failure, give rise to all three.[178] Frustration of purpose is generally asserted by buyers and lessees because payment is seldom impossible but rather the purpose for performing may no longer exist, while impossibility or impracticability is typically asserted by lessors and sellers whose contracting purpose may be to earn money but whose ability to perform has become severely impaired by post–contracting events.[179] Courts tend to interpret frustration of purpose doctrine differently.[180] And the relief may be limited because courts only excuse a parties performance for future performance once the frustrating event has occurred.[181] Anything prior to that, the parties are still bound to perform.[182] Some courts grant relief if frustration occurs jointly out of a "common object" to the contracting parties, while others take a fact intensive analysis and grant relief on a more one–sided basis.[183]

Whether COVID–19 frustrates contractual performance, like other doctrines, typically requires a factual analysis.[184] To evaluate, the Restatement establishes three requirements that sheds light on the survivability of a frustration claim.[185] *First*, the frustrated purpose must be the principal purpose of the parties.[186] *Second,* the principal purpose must be a fundamental element to the contracting parties.[187] *Third*, the parties must not have considered the frustration event prior to contracting.[188] Conversely, courts have interpreted

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[178] *Id. Cf.* CORBIN, *supra* note 174.
[179] CORBIN, *supra* note 174; *see also* Nicholas R. Weiskop, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 240 (1996) ("[I]t is not that either party's performance has become impossible or significantly more difficult than originally contemplated. Rather, the party seeking discharge on frustration grounds . . . can still do that which the contract requires, but no longer has the motivation to do so which originally induced its participation in the bargain.").
[180] Hampton, *supra* note 142, at 176.
[181] Schwartz, *supra* note 161, 1782.
[182] *Id.*
[183] Hampton, *supra* note 142, at 176.
[184] *Id.* at 174.
[185] Restatement (Second) of Contracts § 265 (Am L. Inst. 1999).
[186] *Id.*
[187] *Id.*
[188] *Id.*

that to survive a frustration claim, the contracting parties must have assumed the frustrated event as unforeseeable.[189] Foreseeability matters in a frustration of purpose analysis.[190] To survive the first element of the claim, the moving party must assert that the contested purpose was of principle nature.[191] The second element requires severe frustration beyond contractual risk.[192] And lastly, that the parties contracted, for example, the assumption of delivery, and that principle nature was frustrated.[193]

The underlying utility of the frustration of purpose doctrine is economic efficiency, waste prevention, and freedom to contract away supervening events.[194] During COVID–19, parties that breached contracts regularly asserted frustration of purpose as a principal defense.[195] For example, consider a tenant, like *Cinemex's*, asserting a defense of frustration of purpose for their nonpayment because of a government order stating that all non–essential business must close.[196] The tenant might claim that its staff could not come to work causing a frustration of the contract's purpose.[197] The tenant can request that the rent be excused but applying state contract law, but the court, like it did in *Cinemex*, will likely find that

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[189] *Id.*

[190] Andrew A. Schwartz, *Frustration, The MAC Clause, and COVID-19*, 55 UC Davis Law Review 1771, 1789 (2021); s*ee also* Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48, 50 (2020) ("If aliens from outer space land on Earth, that might not be foreseen, but it is certainly foreseeable — after all, countless books and movies specifically entertain that very possibility." (citations omitted)); *cf.* Nguyen, *supra* note 43, at 461 (The doctrine of frustration of purpose is inapplicable when one of the parties to a contract has been allocated the risk of . . . frustration.); *see* Restatement (Second) of Contracts § 265 (Am L. Inst. 1999) (explaining that frustration gives rise to excuse "unless . . . the circumstances indicate the contrary.").

[191] Hampton, *supra* note 142, at 177.

[192] *Id.*

[193] *Id.* at 178.

[194] Nguyen, *supra* note 43, at 460.

[195] *Id.* at 461.

[196] *See also* Nguyen, *supra* note 43, at 462 (citing *Great New York Automobile Dealers Assn, Inc v. City Spec*, LLC, 136 N.Y.S. 3d 695 (N.Y. Civ. Ct. Dec. 29, 2020); *cf. In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693, 695 (Bankr. S.D. Fla. 2021). *See generally* Great New York Automobile Dealers Assn, Inc v. City Spec, LLC, 136 N.Y.S. 3d 695 (N.Y. Civ. Ct. Dec. 29, 2020).

[197] *See* Nguyen, *supra* note 43, at 462 (citing Great New York Auto. Dealers Assn., 136 N.Y.S. 3d at 695).

the tenant failed to meet the frustration of purpose test.[198] This is because, assuming that the tenant services fell within the essential services of the government order, the tenant *could* have all their staff continue in–person operations, but the tenants *decided* not to have the business operate. In other words, the tenant "frustrated its own purpose."[199]

Alternatively, consider the sale and delivery of a product, or resource like oil and gas, where there has been a drastic reduction in trade combined with a decline in demand.[200] Further suppose the purpose of the sale and delivery of the resource faces a significant contractual challenge due to port closure.[201] So, if ports become indefinitely closed because of the pandemic, the purpose of a delivery of the resource would be considered frustrated.[202] The delivery is the principal purpose of the contract, and the inability to deliver and receive the oil and gas, contractually frustrates both parties.[203] Moreover, global trading is implicated because indefinite port closure, which was caused by the pandemic, goes beyond any level of reasonable risk assumed by either party.[204] Arguably, when parties negotiate the delivery of a good, the oil and gas in this instance, they assume that the goods will eventually reach them.[205] The parties in these instances implicitly contracted under the assumption that the product will be delivered but also that non delivered goods would give rise to an equitable relief.[206] These common–law alternatives, such as frustration of purpose, will not apply "when the parties have contractually agreed to allocate risks" of nonperformance through a force–majeure provisions, or where performance has not been commercially impossible but "merely impaired."[207]

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[198] *See* Great New York Auto. Dealers Assn., 136 N.Y.S. 3d at 695; *cf. In re Cinemex*, 627 B.R. at 695.
[199] *See Great New York Auto. Dealers Assn*., 136 N.Y.S. 3d at 695; *cf. In re Cinemex*, 627 B.R. at 695; Nguyen, *supra* note 43, at 462.
[200] Hampton, *supra* note 142, at 177.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 178.
[206] Hampton, *supra* note 142, at 1778.
[207] *Bankruptcy Courts' Willingness To Apply Rarely-Invoked Force Majeure Clauses During Pandemic Enhances Debtors' Restructuring Options for Non-*

3. What Triggers an Effective Force Majeure Event?

Force majeure clauses are once again narrowly interpreted and only rarely successful litigation.[208] A force majeure clause is a contractual provision that allocates the risk of loss if performance becomes impossible as a result of an event that the parties could not have anticipated.[209] A force majeure clause holds no relevance to the frustration of purpose doctrine and does not supersede a claim based on it.[210] The subject of a force majeure clause—typically covering the situation where a party is prevented or delayed from performing—is based on performance being impossible, impracticable, or difficult.[211] The most common circumstances provoking force majeure provisions are: acts of God, acts of government, and market conditions.[212]

i. Force Majeure as Applied to Acts of God

An act of God has routinely been defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[213] Courts have been consistent in recognizing grave natural diesters and extreme weather conditions as acts of God.[214] Courts assess extraordinary condition in three parts.[215] The phenomenon must *first*, be abnormal or unusual in occurrence; *second,* be a

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Residential Real Property Leases, QUINN EMMANUEL (Mar. 23, 2021), https://www.jdsupra.com/legalnews/march-2021-bankruptcy-restructuring-2924817/.

[208] Schwartz, *supra* note 190, at 56 (" [A] [f]orce Majeure clause would be litigated [] when a party makes a baseless claim of Force Majeure and the other side is forced to sue, or in close cases where the proper meaning of the clause is unclear . . . [so] while Force Majeure clauses are construed narrowly and rarely successful in court, they are likely invoked with some frequency outside the public eye.").

[209] *Force-Majeure Clause*, Black's Law Dictionary (11th ed. 2019).

[210] Schwartz, *supra* note 190, at 1809-10.

[211] *Id*. at 1810.

[212] Hampton, *supra* note 142, at 155.

[213] *See, e.g.,* 33 U.S.C. § 2701(1) (2018); *see also* 42 U.S.C. §9601(1).

[214] *See generally* Michael Faure et al., *Industrial Accidents, Natural Disasters and "Acts of God"*, 43 GA. J. INTL. & COMP. L. 383, 392 (2015).

[215] 6 AM, JUR. PROOF OF FACTS 3D 319 §1 (1989).

force strictly of nature with no human assistance or influence; and *third*, be of such severity that human prudence or precaution could not have avoided the damage thereby caused.[216] An act of God signifies that an individual is not liable "for injuries or damages caused by an act that falls within the meaning of the term 'act of God."'[217] But this claim for relief is not automatic.[218] Instead, the "proponent bears the burden of proof."[219] In interpreting the phenomena, courts "consider acts of God absent fault of man, as the presence of one 'excludes the other.'"[220] Which in turn requires that the "act was unforeseeable and unanticipated."[221] If the act is foreseeable, then there is generally a requirement to exercise preventative due care efforts.[222] In addition to events like natural disasters, illness or death may also constitute an act of God.[223] But illness as an act of God defense is rarely invoked.[224]

ii. Force Majeure as Applied to Acts of Government

Another circumstance that may trigger a force majeure provision are the implications that result from government action.[225] When governments take action, by imposing restrictions, subsequent contractual performances are impacted.[226] One of the biggest limitations to declaring force majeure due to government orders is whether the action existed at the time the contract was executed.[227] Courts have rejected force majeure claims when the action existed prior to

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[216] *Id*.
[217] 1 AM. JUR. 2D ACT OF GOD §3 (2021).
[218] *Id.*
[219] *Id.*
[220] Hampton, *supra* note 142, at 158 (quoting Cox v. Vernieuw, 604 P.2d 1353, 1356 (Wyo. 1980).
[221] *Id.*
[222] *Id.*; *see also* Schwartz, *supra* note 190, at 50 n.10 ("A party claiming that performance is impossible must prove that . . . the circumstances which made performance impossible were not reasonably foreseeable at the time the contract was made."(quoting *E. Capitol View Cmty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1039 n.5 (D.C. Cir. 2008))).
[223] Hampton, *supra* note 142, at 159.
[224] *Id.*
[225] *Id.* at 156.
[226] *Id.*
[227] *Id.*

the contracts execution.[228] Alternatively, courts have a greater inclination to uphold force majeure claims when the action postdates the contract.[229] An additional limitation to actions against government orders is whether the non–performance of the parties was beyond their control.[230]

Government orders unlock emergency powers that have previously been granted or new emergency powers that have been passed through legislation.[231] There are three different ways that the federal government can declare a state of emergency.[232] *First*, the president can declare a national emergency under the National Emergencies Act (NEA).[233] But "the NEA imposes procedural requirements on the president to declare a national emergency."[234] Of course, Congress has the power to limit the president's emergency authority if it generates enough votes to overturn a veto.[235] *Second*, "the Secretary of Health & Human Services (HHS) possesses the power to declare a national public health emergency."[236] Essentially, the Public Health Act empowers the HHS Secretary with the authority to act. From there, the "Secretary may determine that 'a disease or disorder presents a public health emergency' or 'a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, otherwise exists.'"[237] *Third*, the Robert T. Stafford Disaster Relief & Emergency Assistance Act gives the governor the power to petition the president to declare a major disaster or emergency.[238]

Strictly speaking, both foreign and domestic government action could invoke a force majeure provision to trigger.[239] If the parties anticipated the events and included them in the force majeure clause

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[228] *Id*.
[229] Hampton, *supra* note 142, at 156.
[230] *Id.*
[231] Sarah Lynch, *Fact Check: Stay -at-home and other state emergency orders are not unlawful*, USA TODAY (June 11, 2020, 11:13 AM), https://www.usatoday.com/story/news/factcheck/2020/06/11/fact-check-stay-home-other-state-emergency-orders-arent-unlawful/5336956002/.
[232] Nguyen, *supra* note 43, at 423.
[233] *Id*. at 424.
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.* at 424-25.
[238] Nguyen, *supra* note 43, at 424-25.
[239] Hampton, *supra* note 142, at 156.

in their contract, then the party seeking relief could invoke the clause and would be relieved of liability.[240] But if the parties included government action in their force majeure provision as an event that would not excuse performance, then the invoking party would not be relieved of their duty to perform under the contract.[241] The pandemic and subsequently, governmental actions, have caused numerous financially strapped tenants to bring suit against their landlords seeking to rescind their leases on the basis of force majeure clauses.[242] Victoria's Secret, for instance, sued its landlord to avoid paying its monthly rent of $1 million on the ground that the pandemic and related stay–at–home orders excused its performance under the lease.[243] Government restrictions, like the one Victoria Secret attempted to invoke, would fall within the force majeure provision only if the parties did not allocate the risk and only for the duration of the order. [244] Once the order is lifted, the party would no longer be excused and would have to perform as promised.[245] If a state made a less–restrictive order, for example, by only allowing outside dining or curb–side delivery, such recommendation would not come within the sphere of acts of government.[246]

iii. COVID–19 Impact on Market Conditions

Parties generally will not be able to anticipate all possible changes that should be included in a force majeure clause as a triggering event.[247] Instead, parties may choose to broaden the scope of their force majeure provision.[248] Since the pandemic, one

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[240] Nguyen, *supra* note 43, at 442.
[241] *Id* at 468.
[242] Schwartz, *supra* note 190, at 1811-12.
[243] *See, e.g.,* Victoria's Secret Stores, LLC v. Herald Square Owner LLC, 136 N.Y.S.3d 697(N.Y. Sup. Ct. Jan. 7, 2021) (granting summary judgment because the plaintiff erroneously stated that the "parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law," which is "contrary to the express allocation of these risks set forth in [the force majeure clause] of the Lease Agreement . . . .").
[244] Schwartz, *supra* note 190, at 1811-12.
[245] *Id.* at 1811-13 (citing *In re* CEC Ent., Inc, 625 B.R. 344, 349-59 (Bankr. S.D. Tex. 2020).
[246] *See* Schwartz, *supra* note 190, at 50.
[247] Nguyen, *supra* note 43, at 443.
[248] *Id.* at 443.

reoccurring theme for courts has been determining if non–performance is excused in the contracts force majeure clause because of the change in market conditions.[249] Courts generally recognize that changes in prices alone do not trigger a force majeure clause.[250] But there is an element of foreseeability, thus, nonproduction in an economic downturn is arguably expected, so such events generally do not satisfy a successful force majeure excuse.[251] However, if a contract contains an express provision considering market failure, a different result may occur.[252] Historically, pandemics, epidemics, and other related global events have sometimes been included within force majeure provisions.[253] But such contracting is rare.[254]

V. RECENT IMPLICATIONS

As previously stated, the court in *Cinemex* held that a lease's provisions allowed for a full rent abatement during the government shutdown.[255] In contrast, the court in Chuck E. Cheese (CEC), "a place where a kid can be a kid," rejected both a force majeure and a frustration of purpose argument.[256] CEC argued that the global pandemic and accompanying government regulations were force majeure events that would allow CEC to delay its contractual obligations.[257] Once again, the Court looked to the specific contact language, however this time, the court determined that a force majeure

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[249] Hampton, *supra* note 142, at 155.
[250] *Id.* at 156.
[251] *Id.*
[252] Schwartz, *supra* note 190, at 1806 (citing The Gap, Inc. v. Broadway Retail Owner, LLC, No. 652732/2020, 2020 WL 64351136, at *2 (N.Y. Sup. Ct. Oct. 30, 2020); *but see* Gap, Inc. v. Broadway Retail Owner, LLC, 151 N.Y.S.3d 37, 40 (App. Div. 2021) (cleaned up) (reversing lower court and granting defendant's motion to dismiss on the grounds that tenant was not 'completely deprived of its benefit of its bargain and reduced revenues do not give rise to a valid defense).
[253] *See* Schwartz, *supra* note 190, at 56-7; *see also* James B. Stewart, *The Victoria's Secret Contract That Anticipated a Pandemic*, NY TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/business/victorias-secret-sycamore-coronavirus.html.
[254] *See* Schwartz, *supra* note 190, at 56
[255] *See generally In re* Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021).
[256] *See In re* CEC Entm't, Inc., 625 B.R. 344 (Bankr. S.D. Tex. 2020).
[257] *Id.* at 351.

clause would not excuse the inability to pay rent or failure to perform caused by a lack of money.[258] The contract provision contained the following language:

> Subject to . . . this lease, if either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this lease by . . . acts of God, unusual government restrictions, regulation, or control . . . then the time to perform such obligation or to satisfy such condition shall be extended on a day–for–day basis for the period of the delay caused by such event . . . .***This Section shall not apply to the inability to pay any sun of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose***. [259]

Notably the provision states the parties expressly allocated the risk contractually to CEC requiring the party to perform all obligations, even in the face of "acts of God . . . or any other causes beyond reasonable control of either party."[260] The court also determined that the requested relief due to frustration of purpose is inapplicable if the parties have contracted with reference to the event or have contemplated the risk arising under a force majeure provision.[261] As such, the court rejected the debtors excuse of nonpayment due to a lack of funds because the parties specifically agreed that there is no relief in situations where the parties could have reasonably protected themselves.[262]

Parties may now look to add, with particularity, "pandemic" as a specific event in the force majeure provision. But courts, especially in those sitting in equity, might still limit the provisions application.[263] For instance, the acquisition of Victoria Secret to a private equity firm was called off even after the contract specifically

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[258] *Id.* at 354.
[259] *Id.* at 353-54 (emphasis in original).
[260] *Id.* at 353.
[261] *Id.*
[262] *In re CEC Entm't,* 625 B.R. at 345-46.
[263] *See In re* Pier1 Imports, Inc., 615 B.R. 196, 202 (Bankr. E.D. Va. 2020) (reasoning that the court's equitable power to alter contractual relations is limited.).

accounted for the "pandemic."[264] The decision came as a surprise especially since the language in the agreement said that even if the pandemic stuck, the seller would be legally obligated to complete the deal.[265] Nevertheless, the parties walked away from the deal to avoid costly litigation.[266] Arguably, even if the parties litigated the matter, courts could have found other ways to limit the scope of clauses that used the specific and not general language.[267] In the past, courts have held that it is not enough to show that an event listed in a force majeure clause occurred but rather that the party was affected by the occurrence of a force majeure event.[268] Conversely, other courts have shown that they are willing to give a very narrow definition of force majeure provisions in the context of market–related conditions even if the clauses include specific language.[269]

VI. FUTURE CROSS BORDER IMPLICATIONS

The pandemic has disrupted contractual expectations in profound ways.[270] The doctrine of impossibility and impracticability, like in *Cinemex*, will likely continue to be enforced narrowly and apply only in a limited instance when it relates to government orders or other natural disasters.[271] However, we will likely see pandemic carve outs in force majeure provisions occur much more frequently and provisions with particularity will not only be negotiated among parties but will likely be used as leverage in negotiations.[272]

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[264] Sapna Maheshwari, *Victoria's Secret Sale to Private Equity Firm Falls Apart*, NY TIMES (May 4, 2020), https://www.nytimes.com/2020/05/04/business/coronavirus-victorias-secret-sale-falls-apart.html.
[265] *Id.*
[266] *Id.*
[267] *See* Ghodoosi, *supra* note 11, at 42.
[268] *Id.* at 32.
[269] *Id.* at 55.
[270] *See generally* Schwartz, *supra* note 190, at 1774.
[271] *Id.*; *see also* Anne G. Crisp, Joan MacLeod Heminway & Gray Buchanan Martin, *Business Law and Lawyering in the Wake of COVID-19*, 22 TRANSACTIONS: TENN. J. BUS. L. 365, 384 (2021).
[272] *See generally* Robert L. Gegios & Lance Duroni, *The Legal Domino Effect: COVID-19 & Contracts*, 93 WIS. LAWYER12 (2020). *See generally* Robert L. Gegios & Lance Duroni, *The Legal Domino Effect: COVID-19 & Contracts*, Wisconsin Lawyer (May 1, 2020), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=5&ArticleID=27708.

A. Suggestions for United States Contracts

There is no clear–cut answer whether COVID–19 clearly fits within a force majeure clause.[273] Defining force majeure has been a critical element of contract negotiations since the onset of the pandemic and will continue to be so in the coming years.[274] One thing courts have agreed on is that that contract language in the provision is paramount.[275] The actual language the parties insert in their contracts is the first and foremost consideration.[276] Arguably, if a force majeure clause lists "pandemic," application is much more likely than if the language only contained "act of God" or general catch–all phrases.[277] Parties are given the freedom to contract and as such, their ability to declare a force majeure event is a matter of ascertaining the parties' agreed intent. But even if a party lists "pandemic" within their force majeure clause, parties must consider the future consequences of invoking the clause, against say key suppliers or customers, and what effect such provisions might have on future business.[278] Parties will need to carefully analyze the risk profile and structure of their future contracts to address the ongoing effects of COVID–19, including adjusting the risk allocation, but also, bearing in mind that "supervening and unforeseeable" requirements may be

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[273] *See generally* Schwartz, *supra* note 190, at 58-59.

[274] Fareya Azfar, *The Force Majeure 'Excuse'*, 26 ARAB L.Q. 249, 253 (2012).

[275] *See* Nguyen, *supra* note 43, at 444 ("[T]here are no uniform court interpretations with respect to force majeure provisions . . . courts generally embrace narrow interpretations to respect parties' freedom to contract and avoid rewriting agreements for the parties.").

[276] *Id.*; *see* American Bar Association, *The Importance of Force Majeure Clauses in the COVID-19 Era*, A.B.A (Mar. 25, 2021) http://ambar.org/businesslaw ("Force majeure is generally limited to the circumstances or conditions specifically identified in the parties' agreement.").

[277] *See* Hampton*, supra* note 142, at 166-67; *cf.* Schwartz, *supra* note 190, at 55-57. *But see* Ghodoosi, *supra* note 11, at 836 ("If a promisor desires to broaden the protections available under the excuse doctrine he should provide for the excusing contingences with particularity and not in general language because when parties specify the force majeure language with particularity, courts have found other ways to limit clause's scope.").

[278] *See* Schwartz, *supra* note 190, at 60 ("[T]he savvy business move may be to delete the Force Majeure clause entirely . . . [because] [i]f you try to list all of these in a Force Majeure clause, they will be interpreted narrowly, and you may well fail to include the one that eventuates.").

more difficult to meet for contracts signed after the pandemic.[279] And while some courts use foreseeability to decipher parties' intent, they also use the same standard to limit the scope of force majeure clause.[280]

B. Suggestions for Mexican Contacts

Mexican civil law still recognizes and enforces both typical and atypical contracts.[281] In other words, so long as the parties contract stipulated the terms, provisions, and allocated the risk, such factors will be enforced.[282] Force majeure clauses, in Mexico, are construed strictly.[283] If an event is reasonably foreseeable by the contracting parties, failure to provide for the event in the force majeure clause leads to assumption of the event.[284] The reasonable standard resembles the foreseeability test of civil law.[285] Well drafted force majeure clauses maximize the protection of contracting parties and minimize the likelihood of unintended results.[286] Going forward, international contracts with force majeure clauses will likely incorporate a long list of force majeure events, including pandemic and epidemics, that were not present in previous versions of the clause.[287] Expressly stating with particularity: epidemics, pandemics, quarantine, disease, illness, and travel restrictions, can give rise to force majeure relief, but more likely, such relief will be of little immediate assistance.[288] This is because, with respect of COVID–19, relief hinges on the event or its effects being unforeseeable.[289] The existence of the pandemic is presently known but more importantly, if litigated,

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[279] Ghodoosi, *supra* note 11, at 829.
[280] *See id*.
[281] *See generally* Perillo, *supra* note 37, at 27.
[282] Frenendez-Brise, *The Impact of COVID-19: Legal Risks of Financing Commitments under Mexican Law,* MAYER BROWN (Apr. 28, 2020*Id.*
[283] Hwang & Martin, *supra* note 49.
[284] Cosmos Nike Nwedu, *The Rise of Force Majeure amid the Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts*, 61 NAT. RES. J. 1, 5 (2021)
[285] *See id.* at 9; *see also* Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses*, 12 UNIF. L. REV.101, 105 (2007).
[286] Katsivela, *supra* note 285, at 113.
[287] Hampton, *supra* note 142, at 178; *cf.* Vejar, Peredes & Zielinski, *supra* note 130.
[288] McMillan, Putrre & Pickavance, *supra* note 124 at 31.
[289] *Id.*

courts will apply a gap–filling function to determine the degree of control—i.e. if the promisors ability to control the triggering event and weigh it against the promisee's degree of reliance.[290] In jurisdictions where parties have the freedom to contract relief regardless of foreseeability, this element may be the subject of negotiation.[291] The allocation of control or in other words, whether the event was beyond the control of the parties, is by far the most important predictor for courts decisions when force majeure provisions are litigated.[292]

C. Is CISG a More Favorable Resolution?

This same hypothesis can occur in contracts of international goods.[293] CISG is applicable if the parties are nationals of a contracting state and have not expressly agreed to exclude it.[294] Among other countries, Mexico and the United States have adopted the contracting state of CISG.[295] Going forward, international contracting parties should consider whether the automatic opt–in to CISG's substantive laws is more favorable than leveraging parties' negotiating powers.[296]

Under CISG, as in the common contractual practice in Mexico, unforeseeable circumstances that make performance impossible are exempted from legal liability.[297] Again, the measures related to the control of COVID–19, and of the virus per se, are relevant, as they can justify the failure to perform contractual obligations and exempt the legal liability that could arise from it.[298] While an arbitrator will

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[290] *See* McMillan, Putrre & Pickavance, *supra* note 124, at 31; *see also* Ghodoosi, *supra* note 11, at 807.
[291] *See* McMillan, Putrre & Pickavance, *supra* note 124, at 31.
[292] Ghodoosi, *supra* note 11, at 850.
[293] *See generally* André Janssen & Christian Johannes Wahnschaffe, *COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?*, 25 UNIF. L. REV. 466 (2020).
[294] Jillian B. Hirsch, *Convention on Contracts for the International Sale of Goods (CISG)*, WESTLAW PRAC. L.COM. TRANSACTIONS, https://us.practicallaw.thomsonreuters.com/2-523-2126 (last visited Mar. 6, 2022).
[295] *Id.*
[296] *See generally* John F. Coyle, *The Role Of The Cisg In U.S. Contract Practice: An Empirical Study*, 38 U. PA. L. LEGAL REPOSITORY 195, 208 (2016).
[297] Carlos J. Bianchi, *Force Majeure and Tariffs: International Contracts Under Stress*, 73 DISP. RESOL. J. 55, 60 (2018).
[298] *See generally* Janssen & Johannes Wahnschaffe, *supra* note 293, at 486.

once again look at the specific contract language, there is an inherent amount of uncertainty that follows.[299] *First*, the treaty acts as a complete code with natural laws that is accepted by both sides.[300] And unless parties have specifically and unequivocally opt–ed out, choice of law provisions are not enough to trigger an opt–out, the parties will be bound to CISG.[301] The upside of these default CISG provisions are the flexibility and costs that accompany them, but international disputes are multidimensional and because CISG is a self–contained framework, they are therefore not comprehensive and no other laws can subsidize the process.[302] Thus, parties do not know how the arbitrator will interpret the treaty and apply it to their specific contract dispute.[303] *Second*, and more importantly, the goal of the treaty is to establish a uniform platform for international commerce, that is, to facilitate trade by removing legal barriers among contracting parties.[304] This is significant because the primary purpose is to fill in gaps in areas where parties' contracts are *silent* and to provide an avenue for resolution if a dispute arises.[305] The remedies available in the case of hardship, CISG is flexible enough to reach equitable and just results.[306] On one hand, CISG provisions guarantee some certainty, while on other hand, they contribute to

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[299] Coyle, *supra* note 296, at 208-09.
[300] *Id.* at 199 n.6.
[301] *Id.* at 199.
[302] *See* U.N. Comm'n On Int'l Trade L., *supra* note 129, at 27; *see also Guide To Mexican Arbitration Law*, *supra* note 79, at 2.
[303] Janssen & Johannes Wahnschaffe, *supra* note 293, at 493-95.
[304] *See* U.N. COMM'N ON INT'L TRADE L, *supra* note 129; *see also The Purpose of the CISG*, AALBORG U. DEP'T L., https://projekter.aau.dk/projekter/files/343223625/Thesis_CISG_Inger_Ericson_14_8_2020.pdf (last visited Mar. 3, 2022); *see also* Coyle, *supra* note 296, at 231.
[305] *See* U.N. Comm'n On Int'l Trade L., *Legal guide to Uniform instruments in the Area of International Commercial Contracts,* UNCITRAL, at 31, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf (last visited Mar. 4, 2022); *see also Advantages and Disadvantages Of CISG,* LAWYERS & JURISTS, https://www.lawyersnjurists.com/article/advantages-and-disadvantages-of-cisg/ (last visited Mar. 3, 2022).
[306] CISG Advisory Council Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG*, CISG ADVISORY COUNCIL, https://www.cisgac.com/cisgac-opinion-no7-p2/ (last visited Mar. 3, 2022).

implementing unilateral conduct in accordance with the parties' silent intent.[307]

Contractual regulations under CISG often contain a lavish list of events covered within it.[308] CISG also seems to suggest that COVID–19 would generally be covered if the affected party can show that it could not have avoided or overcome the impediment.[309] Under CISG, parties must renegotiate, but should renegotiations fail, the clause provides for a subsidiary right to terminate the contract through mutual agreement by the parties or by an order from the arbitrator.[310] Simply put, CISG may provide a desirable remedy but any remaining uncertainty can be negotiated.[311] As previously stated, the major problem with CISG is that it is an international law that is applied locally, which enviably puts a strain on interpreting of the CISG provisions when applied to locally.[312] Therefore, because CISG articles provide relief for a broad range of legal issues and rules on exemptions, parties are likely better off negotiating individual contractual clauses about force majeure and hardship in order to determine the desired distribution of risk and ensure that in advance the contract is not silent as to that risk.[313]

VII. CONCLUSION

Courts, applying common law and force majeure provisions to interpret contracts, highlight the importance of properly allocating risk in force majeure provisions. The analysis of typical and atypical contracts demonstrates that agreed upon language, where parties have the freedom to negotiate their contracts, is paramount. More notably, with this freedom comes the responsibility to carefully draft provisions to ensure that the language and scope of the clauses clearly identify the intent of the contracting parties and—in light of the pandemic— the need to relook at foreseeability and control.

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[307] *Id.*; *see also* U.N. Comm'n On Int'l Trade L.*, supra* note 305, at 32.
[308] *See Advantages and Disadvantages Of CISG*, *supra* note 305.
[309] *See* Vejar, Peredes & Zielinski, *supra* note 130.
[310] Janssen, *supra* note 293, at 493-95.
[311] *Id.* at 495.
[312] *See Advantages and Disadvantages Of CISG, supra* note 305; *see also* U.N. Comm'n On Int'l Trade L., *supra* note 304, at 65.
[313] *See Advantages and Disadvantages Of CISG, supra* note 305; *cf.* Janssen & Johannes Wahnschaffe, *supra* note 293.

Cases involving force majeure clauses will largely hinge on the standard of control—whether the triggering event was beyond the control of the parties—to determine the outcome of the case. In such instances, courts will need to balance the ability to control the effects of the triggering event against the degree of reliance placed by the parties. In the end, there is no simple answer—rather a nuanced decision left to contracting parties to evaluate the degree of risk they are willing to take and to use their power to negotiate to mitigate or transfer any degree of uncertainty.