Expecting the Unexpected: Force Majeure Clauses and the COVID-19 Pandemic

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Abstract

The COVID-19 pandemic profoundly disrupted the performance of business contracts around the globe. But does COVID-19 meet the requirements of a force majeure event, relieving contracting parties from their obligations? Using a sample of 621 joint venture (JV) contracts, we address this question by proposing a typology of force majeure clause specificity and identifying factors that affect the likelihood of a force majeure clause being included in a JV contract. Managerial recommendations are made for businesses and their partners dealing with disruptions in light of the COVID-19 pandemic as well as regarding the inclusion of force majeure in business contracts.

Introduction

We are facing unprecedented challenges in light of the COVID-19 pandemic: its impacts are taking tolls across many industries, stock markets have crashed, supply chains have been disrupted, and performance of business contracts has been frustrated as parties have been unable to fulfill their obligations. We have seen a proliferation of advice on how companies need to reinvent their businesses to survive, including calls to innovate,

redeploy existing resources, or go online. However, we hear less about a central element of many business transactions: contracts.

Business contracts provide many benefits to the parties involved: they can clarify expectations, reduce liability and risk, and determine how future disputes may be resolved. Specific clauses can help contracting parties reduce the liability and risk from unforeseeable events of precisely the type we are witnessing with COVID-19. *Force majeure* clauses excuse parties from fulfilling contractual obligations during the duration of unexpected events beyond their control.

The current crisis has engendered much speculation about the coverage and advisability of such clauses. A recent search through the webpages of different law firms confirms that one of the most common discussion topics during the pandemic is *force majeure*. A Google web search in July of 2020 for the terms "coronavirus" and "force majeure" yields an astounding 13.5 million results, the majority of which come from law firms attempting to clarify the question of whether the coronavirus pandemic qualifies as a *force majeure* event.

A visual demonstration of this interest is found in the Google Trends images for the terms "covid" and "force majeure" in Figures 1 and 2 below; peak interest occurred March 22-28, 2020, and these searches were primarily conducted in countries such as Australia and the United States (common law) and France and Belgium (civil law).

Following the initial emergence of the COVID-19 pandemic, economies around the world have begun phased reopenings and disputes over incomplete or vague contracts meant to be performed during the pandemic are expected to overwhelm law firms and judges. Yet many existing commercial contracts do not include *force majeure* clauses. Specifically, we analyzed a sample of 621 joint venture ("JV") contracts filed with the United States Securities and Exchange Commission (SEC) and found that a little less than half of them include a standalone *force majeure* clause. Why so few?

In this article, we first define *force majeure* and delineate the different aspects of *force majeure* clauses, including differences across legal systems and interactions with other types of common contractual clauses. We then perform a descriptive analysis of force majeure clauses using our sample of 621 joint venture contracts. We draw from the study of international institutions undertaken by political scientists to explore some variables that may increase the likelihood of including force majeure clauses in JV contracts. We find evidence that force majeure clauses are more likely to be included in contracts that also include specific breach clauses and clauses that establish a board of directors for the joint entity. We also propose a

typology of *force majeure* contracts. Finally, we offer a brief discussion, managerial recommendations, and conclusions.

Figure 1. Worldwide web search "interest over time" in 2020 for "covid" and "force majeure" (data source: Google Trends).

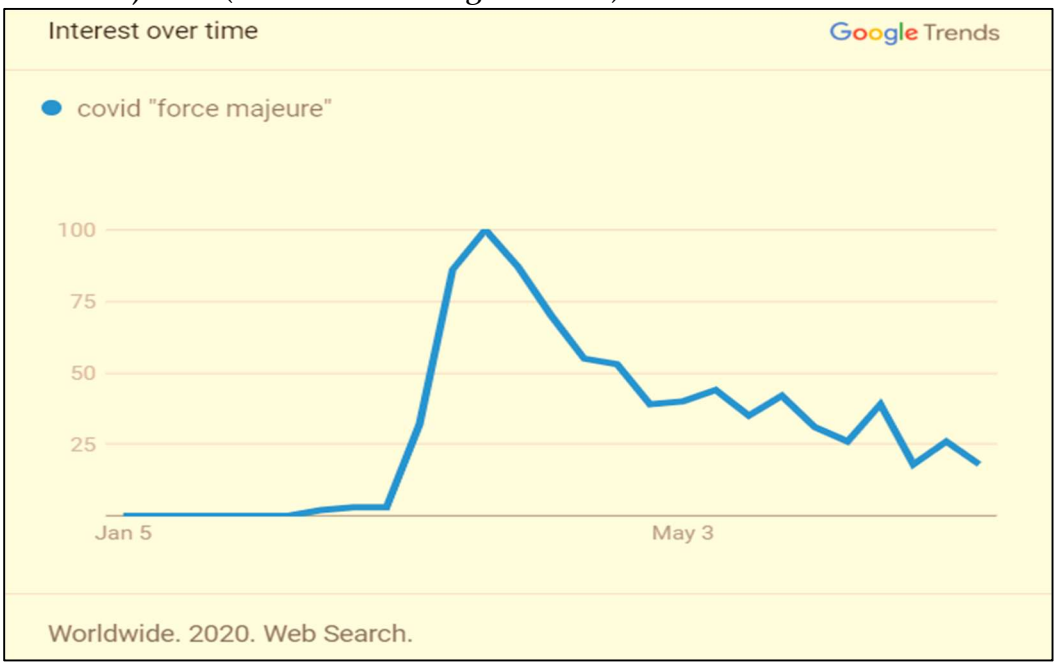
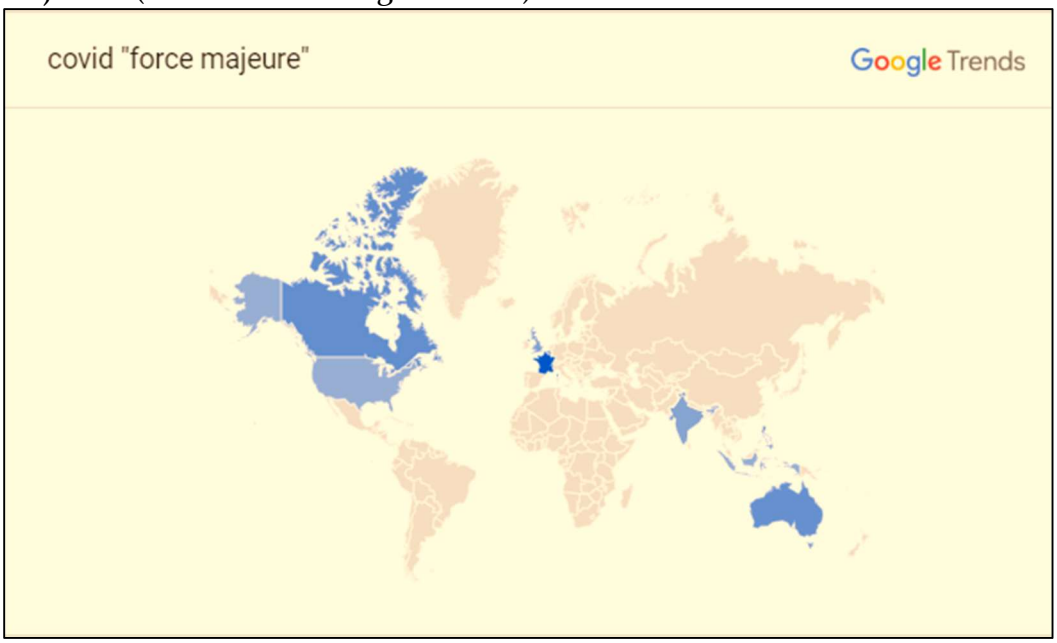


Figure 2. Worldwide web search geographic trends for "covid" and "force majeure" (data source: Google Trends).



The particular utility of the paper is in providing a reasoned and judicious examination of *force majeure* clauses in commercial contracts and their merits and costs. Unquestionably, the current pandemic highlights the potential importance of *force majeure* clauses. That said, it is not always the case that hindsight is 20/20, as crisis events such as COVID-19 have a potentially overbearing influence on long-term decisions made while they are occurring. Thus, while many of the parties to the more than 300 JV contracts we sampled that do not contain explicit *force majeure* clauses may now justifiably regret not including them (and many of those who did include *force majeure* clauses but without specific reference to pandemics or epidemics may now regret their lack of specificity) it does not necessarily follow that *all* of these parties should have acted differently.

In short, we propose a framework to allow business professionals to consider when or whether a force majeure clause is necessary or advisable and offer guidance on how such clauses can be clearly drafted.

Force Majeure: is COVID-19 included?

Force majeure is a legal term of art, literally translated from French as "superior force," which refers to extraordinary and unforeseeable events that can excuse a party from its contractual obligations.[1] For any specific contract, a key consideration is whether the choice of law for the contract falls under a civil law (as in, *e.g.*, France, Greece, Latin America) or common law legal system (as in, *e.g.*, the United Kingdom, the United States). Generally speaking, *force majeure* is a civil law concept written into the law in such systems; it therefore may apply even if not specifically referenced in a contract. In contrast, there is no such "default" statute in common law jurisdictions, and thus a contract governed by common law must have a specific clause for the doctrine of *force majeure* to apply.[2]

Under common law, factfinders/judges may rely on doctrines such as frustration, impossibility, or impracticability to resolve contract disputes arising from crises such as the COVID-19 pandemic. Although functionally similar to *force majeure* in that they excuse a party's contractual obligations, reliance solely on the application of these doctrines presents a less straightforward avenue than explicit inclusion of a *force majeure* clause in a contract. Generally speaking, provisions of both common and civil law require a *force majeure* event to be unforeseeable, external (outside the control of the parties), and irresistible or unpreventable by the claiming party.[3]

In addition to these broad differences between common and civil law legal systems, there are differences regarding how *force majeure* provisions operate across countries, and even between states or provinces (particularly

in the US, where, for instance, the state of Louisiana generally follows civil law). The fundamental point is this: no matter the legal jurisdiction, when events such as COVID-19 occur and parties to a business contract are unable to complete their obligations, they may be able to avoid liability for this nonperformance if such events were unforeseeable and caused serious impediment to the execution of the contract. The invocation of *force majeure* in light of the 2020 pandemic accordingly raises two questions. First, was COVID-19 foreseeable? Second, was the disruption to the given parties' contract avoidable?

History is littered with previous disruptive events such as wars and pandemics; therefore, the decision to excuse parties from a contract in the case of COVID-19 will likely be determined by specific courts and judges via a detailed fact-finding analysis. For example, the entry of the US to World War II was deemed foreseeable by many US courts and performance was excused only under contracts that anticipated this contingency in specific *force majeure* clauses.[4] In other words, it is too early to determine how courts will view the COVID-19 pandemic. However, in light of previous epidemics (*e.g.*, SARS) and warnings about the likelihood of a global pandemic, it is still possible that some courts will find COVID-19 foreseeable.

A *force majeure* clause brings clarity to such crisis situations. As noted, the precise wording of the clause is key for a party claiming an event out of their control has impacted their ability to comply with or meet the demands of a contract, especially in common law jurisdictions. Below is an excerpt from an actual *force majeure* clause from a JV contract in our dataset between two contracting parties within the US (a common law jurisdiction):

> *"**Force Majeure.** Neither party shall be held responsible for any loss, damage or delay suffered by the other party owing to any cause that is beyond the reasonable control of the defaulting party and cannot be attributed to negligence or willful nonperformance of its obligation. Such causes include wars, terrorist acts, embargoes, riots, civil disturbances, fires, storms, floods, hurricanes, earthquakes, strikes and labor disputes and government acts and restrictions."*[5]

As is clear in the example, *force majeure* clauses in common law jurisdictions generally include a list of specific triggering events such as wars and terrorist attacks. Additionally, this list is usually preceded or followed by a "catch-all" phrase such as "any cause that is beyond the reasonable control of the defaulting party," as seen in our example. However, relying exclusively on such a catch-all phrase (and not listing any specific triggering events) is a risk best avoided as it may be considered too broad or ambiguous by a court;

this in turn could lead to the clause being ignored and performance under the contract required.[6]

Paradoxically, being too specific with a list of triggering events and including a catch-all phrase is also a risk. For example, if a *force majeure* clause only lists natural phenomena-related events in a list of triggering events (*e.g.*, hurricanes, earthquakes, volcanic eruptions, tsunamis, etc.) and includes a catch-all phrase, a global pandemic like COVID-19 may be found by a judge to *not* be included by the catch-all language because it was not similar enough to the listed events. Thus, if an event such as COVID-19 is not listed or there is only a non-specific catch-all phrase, a court or fact finder may turn to legal doctrines and engage in a fact-specific inquiry to determine if the event was really unforeseeable and beyond the parties' control.

Again, recent epidemics such as SARS and the H1N1 Swine Flu make it reasonable to conclude that COVID-19 could be deemed foreseeable. Should that prove the case, contracts lacking a thorough *force majeure* clause including language referring to *epidemics* or *pandemics* in the list of triggering events may find courts disinclined to excuse performance. The sample *force majeure* clause above does not include such language. However, it does include government acts and restrictions as a "triggering event." Therefore, the border closures, non-essential business shutdowns, and similar restrictions enacted by governments during the COVID-19 pandemic would likely qualify as *force majeure* events, provided they made performance of the contract impossible for one (or both) parties.

As should be clear, *force majeure* clauses should be negotiated in light of a specific contractual relationship and circumstances. Yet the reality is that commercial contracts frequently include many standard, or boilerplate, clauses, such as a description of the parties, choice of law, and venue selection. Surprisingly, *force majeure* is usually considered boilerplate material and is frequently underemphasized in contract negotiation. This is likely because contracting parties often rely upon legal templates and do not spend much time negotiating or customizing them. But COVID-19 has reminded us that *force majeure* is a special clause that does require extra attention and customization.[7]

In the following section, we specifically focus on the use of *force majeure* in JV contracts.

Joint Venture Contracts and Force Majeure

A joint venture is formed when two or more parties create a new entity distinct from the partners. Such relationships are frequently, although not exclusively, described in formal business contracts. JV contract negotiation is a long process requiring careful examination of the conditions defining the

future collaboration. The purpose of such contracts is to find strategic alignment between the objectives of the JV and the parties' individual interests by deciding, in advance, the rules of the game.[8]

These rules take shape in specific clauses, or named paragraphs, that serve specific functions. For example, "deadlock clauses" define decision-making procedures to resolve misunderstandings or internal conflicts, while *force majeure* clauses give directions about how to proceed in cases where the contracting parties cannot complete their contractual obligations due to circumstances outside their control.

A critical aspect of JV contract negotiation should include defining what qualifies as a *force majeure* event.[9] But *force majeure* events, which could not only paralyze a JV but lead to its termination, are a neglected topic both in the business literature and in JV contracts themselves as, again, they are usually considered boilerplate material, not worthy of much attention or negotiation – or even worth including!

Such inattention occurs although almost no one is safe from events such as COVID-19. We were surprised to discover that half of JV contracts do not contain *force majeure* language, which leaves JV partners potentially unprotected from highly damaging eventualities. Why is this the case? We suggest such exclusion may occur when there are fewer governance mechanisms within an individual JV contract. That is, JV contracts that are less specific about how the JV entity will be managed, such as those that do not provide for the implementation of a board of directors or other common monitoring mechanisms and safeguards, are less likely to include *force majeure* clauses.

Thus, we expect that the inclusion of governance clauses, such as breach clauses or the establishment of a board of directors, to be more likely when *force majeure* clauses are also used. This is because contracts are not only about managing risk, which can be calculated with known probabilities, but also managing uncertainty over indefinite or incalculable eventualities. Insights from political science are useful here: contracts between companies are, in essence, institutions (as is a JV entity itself) and two key aspects of negotiating the creation of international institutions are, according to the political science literature, flexibility and centralization.[10]

A *force majeure* clause is an escape clause, which provides for adaptive flexibility and allows for easier contract negotiation since the purpose of such clauses is to hedge against uncertainty about future events. In this regard, the safeguards (or exit options) that a *force majeure* clause provides increase the willingness of contracting parties to commit to the institutional membership (or a contract/JV) because the parties have a "way out" if things go awry.

Breach clauses provide parties with similar safeguards, but the mechanism is different: if *force majeure* clauses are about protecting oneself when it is not possible to fulfill one's obligations, breach clauses are about protecting oneself from the other party's failure to fulfill its obligations. In addition, breach clauses increase certainty about what is acceptable behavior by all parties, as well as what to do in the event of non-compliance. Given that breach and *force majeure* seem to be "sister" or complementary concepts, we expect that *force majeure* clauses are more likely to be present in contracts that also have a breach clause.

Including *force majeur*e clauses, however, comes with inherent risks: some lawyers jokingly rechristen these clauses "price majeure," as parties sometimes take advantage of them to get out of contracts when prices do not go their way.[11] To hedge against this, we would expect more efforts to be put into governance mechanisms within the contract, further reinforcing the expectations noted above.

The formation of a board of directors can be another tool for addressing uncertainty in JV formation. Forming a board, in political science terms, refers to centralization, *i.e.* the delegation of institutional tasks to a single entity.[12] This has several advantages. First, centralization allows for better gathering and dissemination of information, which is useful for gauging compliance and performance. Second, centralization may reduce bargaining and transaction costs because it clarifies the rules of engagement for the parties. Finally, centralization allows for easier enforcement, since only the designated entity is responsible for it.

The creation of a board thus goes hand-in-hand with *force majeure* clauses, especially since the latter creates enforcement issues of precisely the nature a board can address. Indeed, as shown in our sample contracts, some contracts specify that boards have a role to play in the invocation and enforcement of *force majeure* clauses. Moreover, because they centralize and diffuse information, boards enable the JV parties to make informed decisions about whether to invoke *force majeure* or breach. We thus expect that *force majeure* clauses are more likely to be present in contracts that also mandate the creation of a board of directors.

Finally, we propose a few contextual factors that may also impact the inclusion of *force majeure* clauses, as they also affect risk management. First, if the country where the contract will be enforced is politically unstable, then it would be more likely that parties hedge against social or political unrest by including a *force majeure* clause. Second, international JVs (that is, those among parties from different countries) may be riskier than domestic ones due to differing cultural norms or other factors. Thus, a higher likelihood of *force majeure* clauses existing within such contracts may reflect a higher

degree of general uncertainty prevailing between the parties. Third, the more parties involved in the JV, the more complex the JV contract negotiation, which should increase the likelihood of a *force majeure* clause being included as it provides an "escape" option (that is, flexibility, as mentioned above). Fourth, if the JV entity will be focused on research and development (R&D) – an activity requiring intense levels of commitment, resources, and stringent deadlines – then the stakes of non-compliance are higher and some hedging is accordingly desirable. Finally, we expect there to be industry-level variations in whether *force majeure* clauses are included, as some industries, *e.g.*, mining, may be more likely to encounter events beyond the control of the parties than, say, the service industry.

Analysis: Force Majeure Clauses in Joint Venture Contracts

Our sample includes 621 joint venture contracts collected from publicly available SEC filings.[13] In this section, we analyze these contracts and identify notable *force majeure* clauses as well as the features of such clauses. Only 48% (296) of the sample JV contracts include a standalone *force majeure* (or equivalent) clause, although this increases to 50% when we consider contracts that contained either a standalone *force majeure* (or equivalent) clause or had language effectively similar to a *force majeure* clause elsewhere in the contract. Just over half (52%) of the contracts involved parties from different countries. Seventy percent were enforced in civil law countries, and most contracts were enforced in politically stable countries, according to the World Bank's index. Seventy percent of the contracts also established a board of directors for the JV entity, and 86% contained breach clauses. Only 14% of the contracts were focused on research and development.

Of the contracts that contained standalone *force majeure* clauses, 57% (167) of these 296 contracts were enforced in common law countries. While this number in and of itself may appear unsurprising, what is striking is the corresponding reality that 42% (125) of these contracts were enforced in civil law countries, which do not generally require standalone *force majeure* clauses.[14] A possible explanation for this may be that lawyers from common law countries are used to including these terms, even if the contract will be enforced under civil law. We verified this intuition with data from our sample, which show that 67% of the civil law contracts that include *force majeure* clauses are between parties from different countries where one of the parties is from a common law jurisdiction.

Of the 296 contracts that include standalone *force majeure* clauses, 150 specifically list "acts of god"; 110 of these are enforced in common law countries and only 40 are enforced in civil law countries. This common versus civil law distinction is interesting in light of the fact that since medieval times

Anglo-Saxon law (equated with common law) has described natural disasters beyond human control as acts of god. Such metaphysical language is still used in modern-day common law contracts to denote catastrophic natural events. In contrast, Roman law (equated with civil law) described *force majeure* events as those making performance impossible due to natural disasters or certain accidents beyond human control.

Our analysis also explored how likely certain clauses were to appear with other clauses. In line with our expectations, *force majeure* clauses were generally found in contracts that included breaches clauses and/or clauses established a board of directors. We also noticed that it was generally unlikely for a contract to be enforced in a civil law jurisdiction when the parties came from different countries. This suggests either that international JV partners prefer enforcement in common law jurisdictions, or that domestic JV partnerships are more common in civil law countries.

Exploratory Model Results

Table 1 summarizes the results of our logistic regression analysis exploring the likelihood of a force majeure clause being included in a given contract. Logistic regression utilizes a binary dependent variable (in our case, whether there is a *force majeure* clause) but the specific coefficients of the independent variables are not interpretable without additional calculations. Thus, in Table 1, for clarity we only report the sign of the coefficient (whether the variable has a positive or a negative impact on the inclusion of a *force majeure* clause) and its statistical significance, meaning the degree of certainty we have of the results. The lower the p-value (represented in the table by asterisks) the more certain we are of the influence of a given variable.

As shown in Table 1, the number of parties to a contract and whether such parties are from different countries do not have significant effects (*i.e.*, statistically different from zero) on the probability that a *force majeure* clause is included in a JV contract. On the other hand, the JV being for R&D, having a breach clause and/or mandating the creation of a board have positive and significant effects on the inclusion of a *force majeure* clause. Conversely, enforcement of the JV contract in a civil law system or in politically stable countries make force majeure clauses less likely to be included. Except in the first two cases, these findings are in line with our expectations.

The regression analysis also allows us to compare whether contracts in some industries are more likely than others to have a *force majeure* clause. We used manufacturing as the baseline for comparison, and find JV contracts in mining, finance, and retail are more likely to have *force majeure* clauses than JV contracts in manufacturing, whereas the services and transportation industries seem to exhibit no particular tendency.

Table 1. Logistic Regression Analysis Results

Variable	Impact on likelihood of Force Majeure clause	Effect statistically different from zero?
Number of Parties	-	no
International JV (dummy)	+	no
R&D JV (dummy)	+	yes*
Breach Clause (dummy)	+	yes***
Board (dummy)	+	yes***
Civil Law (dummy)	-	yes***
Political Stability	-	yes**
Industry (manufacturing is the reference category)		
Mining	+	yes***
Services	-	yes**
Finance	-	yes**
Transportation	-	no
Retail and Wholesale	-	yes**
Other	-	no

*Statistical significance level: * $p < .10$, ** $p < .05$, *** $p < .01$*

Our finding that JV contracts enforced in civil law countries are less likely to include *force majeure* clauses is in line with the recognized *force majeure* civil laws in such systems.[15] Common law systems, conversely, have no such provision in the absence of specific clauses included in a contract. Therefore, it is riskier to leave force majeure out of a contract enforced in a common law jurisdiction (*e.g.*, the US) than in a civil law jurisdiction (*e.g.*, France). It accordingly makes sense that we should encounter *force majeure* clauses more frequently in contracts enforced in common law jurisdictions than in those enforced in civil law jurisdictions.

Finally, in Table 2 we created a typology of *force majeure* clause specificity, rating such clauses on an ordinal scale from 0 to 5 based on the inclusion of specific dimensions in light of the COVID-19 pandemic. To bring further clarity, we provide illustrative examples of actual clauses from our sample of JV contracts. A well-drafted force majeure clause should be customized to both increase available protections for the contracting parties and reduce any risk of misinterpretation should a dispute or litigation occur.[16]

Table 2. Force Majeure Clause Specificity

Ranking	Description	Example Clause or Fragment
0	Contract does not have a clause nor a mention of *force majeure* elsewhere	N/A
1	Contract has no separate *force majeure* clause but uses a similar term or a catch-all phrase	"Notwithstanding any term in this Agreement, if a Party is at any time delayed from carrying out any action under this Agreement due to circumstances beyond the reasonable control of such Party (aside from circumstances arising from the financial difficulty of such Party), acting diligently, the period of any such delay shall be excluded in computing, and shall extend, the time within which such Party may exercise its rights and/or perform its obligations under this Agreement"[17]
2	Contract has a simple, standalone *force majeure* clause (possibly boilerplate)	"Neither Participant will be liable for its failure to perform any of its obligations under this Agreement due to a cause beyond its control (except those caused by its own lack of funds) including, but not limited to, war, insurrection, civil unrest, adverse weather conditions, environmental protests or blockages, protests, blockages or legal challenges by First Nations, disputes or disruptance of permitting, acts of God, fire, flood, explosion, strikes, lockouts or other industrial disturbances, laws, rules and regulations or orders of any duly constituted governmental authority or non-availability of materials or transportation (each an "Intervening Event")"[18]
3	Contract has a standalone *force majeure* clause that specifies triggering events (including epidemics/ pandemics and governmental action)	"Force Majeure shall mean all events which were unforeseeable at the time this Contract was signed, the occurrence and consequences of which cannot be avoided or overcome, and which arise after the signature of this Contract and prevent total or partial performance by any Party. Such events shall include earthquakes, typhoons, flood, fire, war, failures of international or domestic transportation, actions of or inactions by governments or public agencies, epidemics, civil disturbances, strikes, denial of access to the Cooperation Area by landowners or others and other events which are accepted as force majeure in general international commercial practice. A Party's lack of funds is not an event of Force Majeure"[19]
4	Contract has a *force majeure* clause that specifies triggering events and has a notification requirement when invoking it	"The Party claiming Force Majeure shall promptly inform the other Party in writing and shall furnish within fifteen (15) days thereafter sufficient evidence of the occurrence and duration of such Force Majeure"[20]
5	Contract has a *force majeure* clause that specifies triggering events and requires both notification when invoking it and efforts to mitigate before invoking it	"The Party that is prevented from carrying out its obligations under the Agreement as a result of Force Majeure must: (a) remedy the Force Majeure to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible; and (b) take all action reasonably practicable (but without any obligation to make any monetary payment) to mitigate any Liability suffered by the other Party as a result of its failure to carry out its obligations under the Agreement"[21]

To develop our typology, we relied upon the International Chamber of Commerce's model *force majeure* clause.[22] In our typology, a well-specified *force majeure* clause should contain the following: (a) clear identification of the clause as one describing *force majeure*, including a catch-all term such "causes beyond the parties' control;" (b) a list of specific triggering events, which, in light of the COVID-19 pandemic, should include language regarding pandemics, epidemics, and/or government regulations; (c) provisions for notification to the other party or parties if contractual performance is obstructed due to a *force majeure* event; and (d) how the parties agree to mitigate the harms of the contractual non-performance in light of a *force majeure* event.

Discussion and recommendations

The legal and business ramifications of COVID-19 may last for decades, and our focus is on how COVID-19 may affect contracts, a foundational element of modern business operations. When contractual obligations cannot be performed, there is a risk of upending our society itself. *Force majeure* clauses are a way in which such disruptions can be mitigated, if not avoided entirely.

In this section, we make two sets of related managerial recommendations based on our research and literature review. First, we identify some potential courses of action that managers may wish to take if their firm or a partner firm cannot perform contractual obligations in light of the COVID-19 pandemic. Second, we make some general recommendations about the inclusion of *force majeure* clauses in JV contracts.

COVID-19 Contractual Issues: If a firm or its business partner is having difficulty or finding it impossible to perform contractual obligations in light of the COVID-19 pandemic, including because of government restrictions or shutdowns, we first recommend a detailed review of the applicable contract and application of the typology we defined in Table 2 to answer basic questions such as, "is there a force majeure clause," and, if so, "what does the clause specify?"

Such a review can be conducted independently of or in consultation with an attorney, at the manager's discretion or as needed in light of other contractual provisions such as choice of law. For instance, if the contract is governed by civil law but does contain a *force majeure* clause, a careful comparison of the civil law provisions on *force majeure* and the contractual clause will be needed to clarify which language will govern. In contrast, if the contract does not contain a *force majeure* clause but is governed by civil law, review of the applicable civil law provision(s) should be initiated.

If the *force majeure* clause contains notice provisions or mitigation efforts, managers should verify whether these have been followed and, if not, should implement them immediately. However, litigation should be a last resort. Despite the potential foreseeability of a pandemic in light of other recent regional or local epidemics (*e.g.*, SARS) the amount of global disruption due to COVID-19 is unprecedented.[23] We thus recommend treating contractual partners with leniency rather than turning immediately to litigation, and we encourage managers to consider renegotiating contractual terms to provide the greatest benefit to all parties.

Of course, we recognize the best course of action will depend on individual circumstances and, as such, recommend managers consult a trusted legal advisor. We also note that depending on the legal jurisdiction, there may be additional avenues for remedy based on the availability of other legal doctrines or statutes, particularly under common law jurisdictions which may include frustration or impossibility provisions or even (if the contract is adjudicated in the US) application of the Uniform Commercial Code.

Force Majeure in JV Contracts: Our unique dataset affords us the exclusive capacity to provide recommendations on when *force majeure* clauses should be included in JV contracts – and, to an extent, in commercial contracts generally. As a first step, we encourage partners in JVs to view the process of contract formation (or, if applicable, the process of re-negotiation) as an opportunity to build trust. While litigation is an option of last resort, a positive relationship will go a long way towards avoiding it by generating goodwill and minimizing contractual misunderstandings or mishaps.

More specifically, we note that if a JV contract will be governed by civil law, there is no requirement to include a *force majeure* clause. In fact, the inclusion of such clauses in civil law jurisdictions may raise issues of determining whether the civil law statute or the contractual provisions will govern. Nonetheless, our data clearly demonstrate that it is not uncommon to include *force majeure* clauses in such contracts, so we would recommend there be a baseline match between the civil law provisions and the contractual *force majeure* clauses, provided the civil law provisions consider epidemics, pandemics, or government regulations.

Our next recommendation is that contracting parties not consider *force majeure* clauses as boilerplate material unworthy of attention or negotiation. JV partners should inform each other of their expectations regarding the occurrence of a *force majeure* event; such a conversation may be especially important when the JV partners are from different countries or legal regimes.

If the contract will be governed by common law, we strongly recommend that a *force majeure* clause be explicitly included and that it meet the

requirements of a level 5 clause in our typology specified in Table 2. That is, the clause should contain a list of triggering events, a catch-all phrase, notification requirements, and clarifications as to how the parties will mitigate any negative impacts. We further recommend that the list of triggering events in a *force majeure* clause include pandemics, epidemics, and government regulations or actions, especially if the country is politically unstable.

Finally, we encourage parties to ensure that their JV contracts also include other important governance clauses. As noted above, contracts are not only about managing risk, they also help manage uncertainty and clarify business relationships. The accompaniment of *force majeure* clauses with governance provisions such as breach clauses or the establishment of a board of directors for the JV entity can facilitate both flexibility and centralization. These critical components work best together, so we recommend they all be included when feasible.

Conclusions

The COVID-19 pandemic took the world by storm and should serve as a wakeup call for practitioners and lawyers in charge of negotiating, drafting, and implementing contracts. This global event provides a clear example of how unexpected and uncontrollable events can disrupt business transactions. Therefore, such events should be carefully examined and anticipated in contracts through *force majeure* clauses that act as an "escape" by excusing contractual performance when they occur.

However, such clauses should be meticulously customized to best serve the needs of the contracting parties. Additionally, careful attention must be paid to contractual provisions regarding enforcement to determine when or if *force majeure* will apply in a given legal jurisdiction.

While this article does not constitute legal advice, we generally recommend including *force majeure* clauses in JV contracts, yet caution against their blind inclusion as mere "boilerplate." Specifically, we propose a typology of *force majeure* contracts based on the model clause from the International Chamber of Commerce that can serve as a guide for which provisions should be included in a well-crafted *force majeure* clause.[24]

Finally, and above all, we recommend contracting partners focus on building trust during negotiations; this will both help eliminate contractual inconsistencies and facilitate better communication during a crisis.

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