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MAY THE FORCE MAJEURE BE WITH YOU: THE IMPACT OF COVID-19 ON THE FORCE MAJEURE CLAUSE IN INTERNATIONAL COMMERCIAL CONTRACTS

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Abstract

Covid-19 has complicated the application of force majeure (FM) as an excuse for contractual non-performance worldwide. FM clauses are fundamental in allocating risk in international commercial contracts between parties in the event of similar unforeseeable circumstances. This paper aims to investigate the unintended consequences of present-day FM laws by identifying the required elements of FM clauses, tracing the historical evolution of the law, and analyzing various jurisdictional approaches to interpreting FM. Furthermore, a comparative analysis of FM laws adopted in the United States, China, and Germany are used to establish the efficacy of FM clauses in international commercial contracts in light of this pandemic. Finally, the paper will conclude with practical recommendations on keeping the force majeure with you when implementing future commercial contracts!

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INTRODUCTION

After watching the Mandalorian (Star Wars universe spin-off) on Disney+, I excitedly pre-ordered three new Baby Yoda dolls for my cousins in late February of 2020. We were eagerly awaiting the delivery when Hasbro, Inc., an American multinational corporation and manufacturer of Disney's Baby Yoda toys, announced their toy production would be derailed due to the Covid-19 outbreak.[1] The company cited that their "most significant disruptions [were caused by a low supply of] raw materials used to make the Hasbro toys" in addition to the travel restrictions that prevented its factory workers in China from assembling the toys.[2] To mitigate the impact of the delays, Hasbro tried to reschedule the shipments promised to other countries due to production setbacks of the toys.[3] However, this disruption to Baby Yoda toy productions led to "a significant negative impact on [their] revenues, profitability and business."[4]

Covid-19 has affected many companies like Hasbro and has compelled others to plead non-performance due to delays in shipping, manufacturing, and delivering commercial goods due to the outbreak.[5] Within only a few days after the outbreak, Covid-19 was declared a pandemic by the World Health Organization and governments around the world halted travel, implemented quarantines, and prevented movement, thereby causing business interruptions resulting in an unprecedented loss for companies in international commercial contracts.[6] The magnitude of the impact of Covid-19 on the supply chain and labor pressured parties to increasingly examine their contracts for "potential excuses of nonperformance, such as force majeure."[7] Nonetheless, the question remains of whether the Covid-19 pandemic counts as a valid reason to invoke existing force majeure (FM) clauses and how to excuse nonperformance without completely destroying the world's economy. Many countries have approached this question differently.

This paper will begin with an overview of force majeure clauses and how parties expressly allocate risk in unforeseeable circumstances. First, an exploration of the history and development of FM clauses will provide insight into the approach of various jurisdictions including civil law, common law, and international law. Then, this paper will delve deeper into a comparative analysis

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[1] *Coronavirus could slow down Baby Yoda toy production*, ABC 30 (Mar. 5, 2020), https://abc30.com/coronavirus-news-outbreak-baby-yoda-star-wars/5987769/.

[2] Chauncey Alcorn, *Baby Yoda toy production could be derailed by coronavirus*, KSL NEWS RADIO, (Mar. 12, 2020, 9:19 AM), https://kslnewsradio.com/1920486/baby-yoda-toy-production-could-be-derailed-by-coronavirus/.
("Industry expert, Jim Silver, CEO of Toys, Tots, Pets & More, a toy industry review website, cites that he only 'expects to see Baby Yoda toy production decline by 5% to 10% because of coronavirus, but said Hasbro is 'close to being able to ship what they originally projected.' However, Hasbro confirmed at the time that it has been forced to contend with coronavirus delays that impacted their overall business and revenues.")

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] H. Christopher Boehning et al., *UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic*, PAUL WEISS (Mar. 16, 2020), https://www.paulweiss.com/practices/litigation/litigation/publications/update-force-majeure-under-the-coronavirus-covid-19-pandemic?id=30881.

[7] *Id.*

of FM clauses implemented in the United States, China, and Germany with respect to international commercial contracts. It will further evaluate how each country's laws and procedures apply to parties affected by Covid-19 within different jurisdictions and the efficacy of those methods. Finally, the paper will conclude with practical recommendations to address FM events in future commercial contracts.

I. HISTORICAL & LEGAL OVERVIEW OF FORCE MAJEURE CLAUSES

A. What is a force majeure clause?

Force majeure (FM) is a contractual provision that expressly allocates risk of loss[8] and excuses the performance of one or both related parties in a contract due to unanticipated events beyond the parties' control.[9] The FM clause evolved from the application of the excuse doctrines to satisfy non-performance, including impossibility, impracticability, and frustration of purpose. This clause is generally used by parties to condition performance on the non-occurrence of unforeseen emergencies, such as "a) acts of God, b) floods, fires, earthquakes, hurricanes, or explosions, or catastrophe(s), such as epidemics, c) war, invasion, acts of terrorism, d) governmental authorities such as expropriation, condemnation, changes in laws and regulation, ... f) national or regional emergency, g) strikes and labor stoppages, or other industrial disturbances," and certain other accidents.[10] In modern days, FM clauses are included in long-term or ongoing commercial contracts for goods shipped locally and internationally in the following markets: mineral commodities (iron, coal, copper), ship building contracts, supply contracts for clothing, food, equipment (electrical, medical, tools), electronics, and more.[11] Most courts construe the clause narrowly and require more than a simple showing of economic hardship as a reason for excuse under FM.[12] However, the overall scope and effect of the clause depends on the language of the express terms negotiated and documented by the parties.[13]

B. How are standard force majeure clauses drafted and implemented?

Most companies choose to incorporate a "boilerplate force majeure clause," like the following:

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[8] Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, ABA (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/.

[9] Lawrence P. Rochefort & Rachel E. McRoskey, *The Coronavirus and Force Majeure Clauses in Contracts*, AKERMAN (Apr. 6, 2020), https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html.

[10] *General Contract Clauses: Force Majeur*e, PRACTICAL LAW STANDARD CLAUSES 3-518-4224, https://1.next.westlaw.com/3-518-4224?__lrTS=20210329110830899&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=7d428bdab6ef4d98afcc16417d48f4c6&isplcus=true&fromAnonymous=true&bhcp=1&view=hidealldraftingnotes.

[11] Claudia Galvis et al., *Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts*, BAKER & MCKENZIE (Mar. 3, 2020), https://www.bakermckenzie.com/en/insight/publications/2020/03/coronavirus-outbreak-global-guide

[12] Rochefort & McRoskey, *supra* note 9.

[13] Bagger, *supra* note 8.

> Neither party shall be held liable or responsible to the other party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any obligation under this Agreement when such failure or delay is caused by or results from causes beyond the reasonable control of the affected party, including but not limited to fire, floods, embargoes, war, acts of war, insurrections, riots, strikes, lockouts or other labor disturbances, or acts of God; provided, however, that the party so affected shall use reasonable commercial efforts to avoid or remove such causes of nonperformance, and shall continue performance hereunder with reasonable dispatch whenever such causes are removed. Either party shall provide the other party with prompt written notice of any delay or failure to perform that occurs by reason of force majeure.[14]

In contrast, other companies spend more time sculpting their own FM clauses that address the needs of their company, the geographical uncertainties imposed by their region, and the particular risks in their business.[15] In order to draft an effective FM clause, the parties must include four essential components: 1) definition of the breach to be excused, 2) definition of the "force majeure event" considered, 3) establishment of the causal connection between the above two elements, and 4) explanation of what will happen if performance is excused.[16] Parties ultimately retain the flexibility of selecting which intervening emergencies and remedies for non-performance to include during contract formation. Since the court's inquiry of the application of FM clauses primarily relies on determining whether the event giving rise to non-performance is specifically listed in the clause at issue, parties should draft the language of this clause carefully to include all foreseeable circumstances.[17]

C. When can a force majeure clause be invoked?

An FM clause can be invoked when an unforeseeable event gives rise to nonperformance by one party. In order to determine whether a situation counts as a FM event, an objective test is applied based on the relevant law or written contract.[18] The objective test is reliant upon the "specific wording of the provision."[19] Since most FM clauses follow a similar format, the underlying test utilized "requires the party invoking the clause to prove that the impediment is beyond the party's control, the impediment could not reasonably have been foreseen when the contract was concluded, and the effects of the impediment could not have been avoided or overcome by the party."[20] Parties also have the obligation to provide timely notice when availing the FM clause and to use its best efforts to mitigate the effects of the FM event.[21] If the party to a commercial contract succeeds in invoking an FM clause, the party is relieved of its duty to perform,

[14] Bagger, *supra* note 8.
[15] Bagger, *supra* note 8.
[16] Bagger, *supra* note 8.
[17] Boehning et al., *supra* note 6.
[18] Galvis et al., *supra* note 11.
[19] Galvis et al., *supra* note 11.
[20] *Force Majeure Clauses in Commerical Contracts: General considerations*, INT'L CHAMBER OF COM. (2020), https://iccwbo.org/content/uploads/sites/3/2020/03/2020-forcemajeure-commcontracts.pdf.
[21] Galvis et al., *supra* note 11.

excused from civil liability, and/or terminates the contract as a whole.[22] For this reason, it is imperative that the parties clearly define the language of the FM clause with precision.

Furthermore, despite the language of the clause, parties "cannot invoke force majeure if (1) it could have foreseen and mitigated the potential non-performance and (2) the performance is merely impracticable or economically difficult rather than truly impossible."[23] Since "non-performance dictated by economic hardship is [simply] not enough to fall within a force majeure provision," unless the parties are able to cite a reason beyond impact on business profitability, the FM clause cannot be invoked.[24] Additionally, contracts often require the claiming party to provide advance notice of non-performance and if this requirement is not met, the claiming party risks successful invocation of the FM clause.[25] This element is in place to ensure that risk allocation is not substantially skewed to one party and allows the contracting parties to determine how to proceed.[26] Ultimately, these standards for excusal under FM imply the need for parties to act in good faith when declaring non-performance.[27]

D. Force Majeure in Civil Law vs. Common Law Jurisdictions

The purpose of an FM clause is "to draw a reasonable compromise between two contradictory needs" of one party's right to be excused from its obligations due to unforeseen circumstances and the other party's right to obtain complete performance.[28] Although the goal of an FM clause is singular, the approach to drafting and enforcing FM clauses is different in countries with civil law jurisdictions compared to those with common law or international jurisdictions.[29]

Countries using a civil law system apply codified statutes that describe the standards required to initiate the FM clause and certain recognized defenses.[30] These jurisdictions allow "codification [to] predominate and the doctrine of FM typically is enshrined in statute."[31] Judicial decisions also impact the interpretation and application of codified FM clauses, based on historical precedent and statutory provisions.[32] Even when no FM clause is written into the contract, the codified statutes fill the gaps and provide civil law jurisdictions guidance on evaluating nonperformance under FM. Therefore, many countries have established distinct standards for FM, such as: 1) China - defined FM as "unforeseeable, unavoidable and insurmountable objective

[22] Galvis et al., *supra* note 11. *See generally* ICC General Considerations, *supra* note 20.
[23] Boehning et al., *supra* note 6. *See also* note 10.
[24] Boehning et al., *supra* note 6.
[25] Rochefort & McRoskey, *supra* note 9.
[26] Bagger, *supra* note 8.
[27] Rochefort & McRoskey, *supra* note 9.
[28] Int'l Chamber of Com., *ICC Force Majeure and Hardship Clauses*, Mar. 2020, https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/.
[29] *Id.*
[30] Andrew Smith, *Tour de Force: Force Majeure in Civil Law Jurisdictions – A Superior Force Majeure Doctrine?*, PILLSBURY LAW (Dec. 2, 2020), https://www.pillsburylaw.com/en/news-and-insights/force-majeure-civil-versus-common-law.html.
[31] *Id.*
[32] *Id.*

conditions,"[33] 2) Quebec, Canada - defined FM as a "superior force [that] is an unforeseeable and irresistible event,"[34] 3) Louisiana, United States - defined FM as "a fortuitous event that makes performance impossible."[35] Although the codified statutes provide straightforward guidelines to determine when to apply FM, parties in civil law jurisdictions are generally limited to the parameters of those statutes, which raises the concern of courts "excus[ing] obligations even where contractual language provides that the obligation is absolute."[36] In order to alleviate this concern, civil law lawyers focus on specifying the conditions, such as unforeseeability and out of reasonable control, for when an FM clause should be invoked in a contract.[37] Detailed statutes for FM clauses provide civil law jurisdictions a foundation of law to govern contractual excuses broadly in the context of commercial contracts.

Moreover, countries following the common law, also referred to as contractual FM regimes, draft provisions to include a list of definitive circumstances that qualify as a FM event.[38] Compared to civil law, common law FM clauses are more variable in scope and remedies because such clauses provide the contracting parties the discretion to decide the terms of their contract and the flexibility to write the clause broadly or narrowly to meet their needs (ie. New York, English, Australia, and Singapore law allow for wide or narrow language as drafted by the parties while also taking into account external factors, like known industrial practices).[39] The idea is that it will "be easier to bring a force majeure claim if the event is [explicitly] listed" in the plain language of the contract as an unforeseeable circumstance.[40] For example, epidemics have been relatively more common in recent years (i.e. diseases spread in one country, such as the plague, SARS, Ebola, other flu variations) compared to pandemics, diseases spread across multiple continents.[41] Thus, some FM clauses have specifically mentioned "epidemic" on their list of unforeseeable events, while others utilize general terms like "disease" or "illness" in combination with related emergency measures used to address health situations, such as "'government action,' 'government order,' 'national or regional emergency' or 'quarantine.'"[42] By precisely defining the types of qualifying FM events, both buyers and suppliers have the opportunity to allocate risk appropriately and create a plan to mitigate the harsh realities of doing business in fluctuating markets.[43] This practice also enables common law courts to quickly evaluate FM applications with respect to the plain language of the parties' contractual obligations rather than rely on judicial decisions or jurisdictional laws.

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[33] Smith, *supra* note 30, at 2 (citing People's Republic of China General Rules of the Civil Law, Article 180).
[34] Smith, *supra* note 30 (citing Canada Civil Code of Quebec, Article 1470).
[35] Smith, *supra* note 30. (citing Louisiana Civil Code Articles 1873, 1875) ("Louisiana is the only civil law jurisdiction in the United States").
[36] *Id.* at 3.
[37] Int'l Chamber of Com., *supra* note 28, at 2.
[38] Int'l Chamber of Com., *supra* note 28, at 2.
[39] Galvis et al., *supra* note 11.
[40] Galvis et al., *supra* note 11.
[41] *See* Ş Esra Kiraz & Esra Yıldız Üstün, *COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards*, 25 UNIF. LAW REV. 437-465 (2020), https://doi.org/10.1093/ulr/unaa027.
[42] Galvis et al., supra note 11.
[43] Galvis et al., supra note 11.

E. Force Majeure in International Law Jurisdictions

Similar to how civil and contractual FM regimes differ in practice, FM clauses in international jurisdictions differ from national law systems.[44] International commercial contracts are typically governed by various international legal instruments including: the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles for International Commercial Contracts (PICC), and the International Chamber of Commerce's 2020 Force Majeure Clause (FMC).

In the 1980s, the United Nations Convention ratified an international treaty that outlines "the rules governing certain international contracts for the sale of goods and the rights and obligations of the parties," like the United States' Uniform Commercial Code (UCC).[45] The purpose of the CISG was to "provide a modern, uniform and fair regime for contracts for the international sale of goods."[46] Many countries, such as the United States, China, and several European Union countries, have voluntarily adopted the CISG as signatories to the treaty and included it in their choice of law rules.[47] The CISG primarily applies when there is a disagreement about the applicability of an FM clause between two different countries that are party to a contract (also known as "contracting states").[48] CISG Article 79 states that a party can be excused from performance due to changed circumstances when:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[49]

The CISG does not define what constitutes an "impediment beyond his control," but rather expects interpretations of impediments to be made with comparisons to international practice.[50] Although not explicitly mentioned, "under the CISG, a war, terrorist acts, riots, blockades, and acts of God are deemed to be impediments."[51] Furthermore, Article 79 only applies to supply contracts that meet the following conditions: 1) the contract does not have a FM clause, 2) the contracting parties are contracting states, 3) the contract is for the sale of goods (i.e. "manufactured goods, raw materials and commodities"[52]), and 4) the contract does not specify that the CISG will

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[44] Kiraz & Üstün, *supra* note 414141.
[45] Richard A. Walawender, *Invoking Force Majeure for COVID-19 in International Supply Contracts*, MILLER CANFIELD (March 9, 2020), https://www.millercanfield.com/resources-COVID-19-International-Supply-Contracts.html.
[46] *See* United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* UNCITAL (2021) https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.
[47] Walawender, *supra* note 4545.
[48] Walawender, *supra* note 4545.
[49] United Nations Comm'n on Int'l Trade Law, *United Nations Convention on Contracts for the International Sale of Goods*, art. 79, UNCITAL (Apr. 11, 1980), (entered into force Jan. 1, 1988) [hereinafter CISG].
[50] Kiraz & Üstün, *supra* note 4141.
[51] Kiraz & Üstün, *supra* note 4141.
[52] Walawender, *supra* note 45.

not apply.[53] This rule does not apply to service contracts, the sale of goods for personal use, the sale of ships, the sale of aircrafts, or the sale of electricity.[54] Despite the criteria set forth by Article 79 of the CISG, there are no presumed FM events or illustrative definitions of "impediments beyond control" included within the rules.[55] Yet, many countries prefer this rule because the CISG can either be the selected choice of law or simply be applied even if the CISG is not particularly elected by the parties, so long as the contracting countries have adopted the treaty or selected a CISG country's choice of law.[56] The FM exemption clause and the broad applicability of the CISG make it an ideal candidate for selection by countries participating in international commercial contracts.

In 2016, the UNIDROIT released Principles for International Commercial Contracts (PICC) defining FM as an exemption clause due to changing circumstances, similar to Article 79 of the CISG.[57] The PICC constitutes "a non-binding codification or 'restatement' of the general part of international contract law" and provides interpretations of nonperformance caused by FM clauses.[58] Notably, Article 7.1.7(1) of the PICC states:

> Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[59]

Similar to the CISG, the PICC also does not explain an impediment within the article or provide illustrations of FM events, but the Russian court interpreted an impediment as being "extraordinary and unavoidable under the given circumstances, such as e.g. floods, earthquakes, snow debris and other similar natural disasters, acts of war, epidemics, etc."[60] Based on this comparison, it is evident that the PICC's definition and requirements of FM largely mirror those of the CISG, which supports the notion that the "PICC serves 'to interpret or supplement international uniform law instruments.'"[61]

Finally, in 2020, the International Chamber of Commerce drafted a general FM formula with the intent of "assist[ing] the largest possible number of users" in drafting their own international contracts.[62] The ICC's FMC "combined the predictability of listed force majeure events with a general force majeure formula which was intended to catch circumstances which fall

[53] Walawender, *supra* note 45.
[54] Walawender, *supra* note 45.
[55] Kiraz & Üstün, *supra* note 454141.
[56] Kiraz & Üstün, *supra* note 454141.
[57] Int'l Inst. for the Unification of Priv. Law, *Contracts: Unidroit Work And Instruments In The Area Of Contract Law*, UNIDROIT, 2021, [hereinafter UNIDROIT PICC] https://www.unidroit.org/contracts/#1456405893720-a55ec26a-b30a.
[58] *Id.*
[59] *See* UNIDROIT PICC supra note 57 at Article 7.1.7.
[60] Kiraz & Üstün, *supra* note 41.
[61] Kiraz & Üstün, *supra* note 41.
[62] Int'l Chamber of Com., *ICC Force Majeure Clause 2003/ICC Hardship Clause 2003*, ICCWBO, https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/.

outside the listed events."[63] In March 2020, the ICC released a revised version of the 2003 FMC that contained a "simpler presentation and expanded options to suit various companies' needs."[64] The ICC's revised FMC provided the following definition:

> 1. Definition. "Force Majeure" means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves:
>
> a) that such impediment is beyond its reasonable control; and
>
> b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and
>
> c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.[65]

The drafters included a general FM clause in part one of the FMC's long form and an explicit list of presumed FM events in part three that parties could invoke.[66] This long form clause was particularly drafted to avoid providing one party too much protection and to clarify the applicability of FM, which is missing in other international laws.[67] The ICC's FMC also includes a short form, which is reduced to essential provisions, that can be incorporated into a contract requiring a "balanced and well-drafted standard clause" addressing the main concept of FM.[68] The short form purposefully is limited in scope for easy adaptability and interpretation.[69] Compared to the CISG and the PICC, the ICC's FMC is more thorough in defining and illustrating FM clauses that contracting states can rely upon to draft their clauses. Ultimately, these three international legal instruments together provide a strong framework that can be utilized in analyzing modern international commercial contracts in addition to the perspectives of civil and common law.

II. APPLICABILITY OF FORCE MAJEURE CLAUSES DURING COVID-19

The presence of Covid-19 has complicated the application of FM as an excuse for non-performance considering its worldwide economic impact. First and foremost, the Covid-19 pandemic is historically unique due to its steep economic impact and loss of human capital.[70] Second, there is a strong public policy argument for protecting parties not only from business or governmental failures, but also from exposing employees to the virus.[71] Finally, since Covid-19 is a worldwide pandemic, the unexpected disruptions to international commerce and transportation will likely burden future collaboration across nations. The pandemic has rendered business owners, sellers, suppliers, and workers useless in protecting our supply chains against the force of a

[63] *Id.*
[64] Kiraz & Üstün, *supra* note 41.
[65] Int'l Chamber of Com., *ICC Force Majeure And Hardship Clauses March 2020: Long Form & Short Form*, ICCWBO, Mar. 2020, https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] King Fung Tsang, *From Coronation To Coronavirus: Covid-19, Force Majeure And Private International Law*, 44 FORDHAM INT'L L.J. 187, 189 (2020).
[71] *Id.* at 190.

microscopic virus due to demands of isolation, quarantine, and lockdowns. While FM clauses have traditionally been straightforward to implement according to the civil law, common law, and international law rules presented above, the element of Covid-19 has endangered our economic ecosystem and heightened the level of scrutiny required to evaluate its applicability.

Several interpretations of FM clauses have questioned whether Covid-19 counts as an unforeseeable, unavoidable event or impediment beyond our control while others attempt to fit pandemic into categories of natural disasters, diseases, or governmental regulations.[72] Other perspectives point out the necessity to limit the enforcement of FM clauses to prevent national economic collapses and promote market productivity.[73] Also, many sources challenge the applicability of FM clauses for Covid-19's second, third, and fourth waves of Covid-19 because after the first wave the pandemic was considered foreseeable.[74] As a result, countries have adopted differentiated approaches in drafting and implementing FM clauses to address Covid-19.[75]

III. COMPARISON OF FORCE MAJEURE LAWS IN THE UNITED STATES, CHINA, & GERMANY DURING COVID-19

A. United States

In the United States (US), FM provisions are not implied by law in most contracts because excuse doctrines are rules of common law.[76] Specific FM provisions within the contractual laws of the UCC are negotiated by the parties during formation of the contract.[77] A majority of US courts follow the common law jurisdiction and thus place a heavy emphasis on the plain language of the contract when interpreting FM clauses.[78] For example, New York courts interpret FM clauses narrowly and limit claims of relief only to the FM events expressly listed in the contract.[79] When there is no "catch-all provision" in the FM clause, New York courts act strictly according to those specifically enumerated.[80] The burden of proof lies on the invoking party to show that the event was unforeseeable and directly caused by the party's inability to perform.[81] In addition, California law has a higher standard than New York law; therefore, California law requires the

[72] Brad Peterson et. al, *COVID-19 Contractual performance – Force Majeure clauses and other options: a global perspective*, MAYER BROWN (Mar. 20, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/covid19-contractual-performance-force-majeure-clauses-and-other-options-a-global-perspective.
[73] Kiraz & Üstün, *supra* note 41, at 450.
[74] Daniel Sharma, *Coronavirus: The Second Wave and Force Majeure*, DLA PAPER (Dec. 9, 2020), https://www.dlapiper.com/en/germany/insights/publications/2020/12/covid-19-the-second-wave-and-force-majeure/.
[75] *Id.*
[76] Steven Molo et al., *Country Comparative Guides: United States: Force Majeure*, THE LEGAL 500 (2021), https://www.legal500.com/guides/chapter/united-states-force-majeure/.
[77] Peterson et al., *supra* note 72.
[78] Jennifer Semko, *US: When Is Force Majeure Really Force Majeure?*, BAKER MCKENZIE (Mar. 5, 2020), https://www.bakermckenzie.com/en/insight/publications/2020/03/when-is-force-majeure-really-force-majeure.
[79] *Id.*
[80] *Id.*
[81] Molo et al., *supra* note 76.

invoking party to demonstrate that nonperformance "could not have been prevented by the exercise of prudence, diligence and care," despite their efforts to mitigate the consequences of an FM event.[82] California courts will often require parties to demonstrate the steps towards mitigation to prove the alleged FM event materially interfered with their ability to perform.[83] Texas courts have distinguished its standards of evaluation by interpreting FM clauses solely based on the plain language and not applying FM clauses to excuses citing increased economic burden.[84] As evidenced, US courts establish plain language as the threshold for determining whether nonperformance by a party rises to the level of an FM event.

The courts also focus on whether the invoking party could have performed "but for" the cited FM event.[85] In Bush v. Protravel International Inc., the court concluded that New York's declaration of a state of emergency due to 9/11 supported excusal under FM since performance was impossible for this time.[86] During the 2008 financial crisis, the same New York courts held that a party's failure to build a restaurant due to limited funding was inexcusable under FM due to a reasoning of financial hardship.[87] US courts do not "recognize routine disruptions in supply chains, financing, demand, or the market" as FM events and instead gravitate towards FM events listed in the parties' negotiated contracts.[88]

On the other hand, FM clauses can be implied in commercial contracts for the sale of goods that are governed by the UCC for domestic contracts in the US or the CISG for international contracts.[89] Both the UCC § 2-615 and CISG Article 79 set forth clearly defined rules for nonperformance with a basis in frustration and impossibility that can be used to gap fill the expectations for an FM clause in the contract. UCC §2-615 excuses performance "under a contract if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption upon which the contract was made."[90] While the CISG allows parties to be excused from performance due to changed circumstances caused by "impediments beyond control."[91] These rules allow for the parties to interpret the definition of FM according to the standards set forth by general principles applicable to commercial contracts, even when no FM clause is explicitly articulated in the contract. When relief under a contractual FM clause or the above-cited rules is unattainable, parties can seek suspension or termination of the contract for the frustration of the purpose of the contract or impossibility of performance.[92] As a result, the US court prefers to analyze cases individually to determine whether a circumstance

[82] Christopher J. Cox & Joseph T. Spoerl, *A U.S. litigator's perspective on force majeure*, HOGAN LOVELLS (Mar. 20, 2020), https://www.hoganlovells.com/en/publications/coronavirus-pandemic-and-implications-of-force-majeure.
[83] Peterson et al., *supra* note 72.
[84] Semko, *supra* note 78.
[85] Cox & Spoerl, *supra* note 82.
[86] Cox & Spoerl, *supra* note 82.
[87] Cox & Spoerl, *supra* note 82.
[88] Molo et al., *supra* note 76.
[89] Peterson et al., *supra* note 72.
[90] *See* UCC § 2-615.
[91] *See* CISG *supra* note 49.
[92] Cox & Spoerl, *supra* note 82.

gives rise to an FM level event based on the language within the four corners of the contract between the parties.

With respect to nonperformance due to Covid-19, US courts have focused on analysis of the actual language of FM clauses and whether the outbreak was unforeseeable enough to render performance impossible. Most courts tend to rely on whether Covid-19 qualified as an "act of god" or specified as a "disease" or "epidemic" as drafted in FM clauses. The fact that "at least 140 countries have reported Covid-19 cases to the World Health Organization (WHO) distinguishe[d] it from other epidemics and weigh[ed] in favor" of Covid-19 falling under the prior mentioned categories as an FM event.[93] However, other courts also analyzed whether the travel restrictions, lockdowns, and quarantines imposed by the government constituted unforeseeable governmental actions that would give rise to FM.[94] Following this theory, the US government has assisted individuals and businesses by supplying them with loans, stimulus checks, and additional funding to help them comply with their contractual obligations (i.e.. paying rent, completing payroll for employees, making car payments).[95] Other legislation enacted by the government has expanded FM by "suspending [parties'] obligations to make payments [on rent] until the end of the pandemic" to postpone home evictions.[96] Despite the lack of case law in this arena, the US government has taken several measures to address the crisis of Covid-19, which validates its overall recognition of Covid-19 as an FM event. Thus, US federal and state governments have interpreted this question diversely while staying true to its foundational principle of relying on the plain language of the FM clause.

B. China

Compared to the United States, the People's Republic of China (PRC) operates within the civil law jurisdiction and allows Chinese courts to determine the rules regarding FM.[97] The doctrine of FM exists under Article 180 of the General Rules of the Civil Law and Articles 117-118 of the PRC Contract Law, which define FM events as "unforeseeable, unavoidable and unconquerable situations, viewed objectively."[98] FM laws have existed in China since 1986, when the General Principle of Civil Law was adopted.[99] China's definition of FM was influenced by the "requirements of its French counterparts" and English law of the frustration of purpose.[100] In practice, these FM laws automatically apply to commercial contracts governed by PRC law, even if the contract contains no written FM clause.[101] If there is a written contract, Chinese courts enforce FM laws with a balanced approach of relying on Chinese law and plain language of the contract.

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[93] Cox & Spoerl, *supra* note 82.
[94] Cox & Spoerl, *supra* note 82.
[95] Molo et al., *supra* note 76.
[96] Molo et al., *supra* note 76.
[97] Carrie Bai & Jenny Y. Liu, *Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change*, PILLSBURY LAW (Mar. 16, 2020), https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html.
[98] *Id. See also* Galvis et al., *supra* note 11, at 2.
[99] Tsang, *supra* note 70.
[100] Tsang, *supra* note 70, at 199.
[101] Galvis et al., *supra* note 11.

Chinese courts have had the most exposure in ruling on FM clause cases compared to other countries and addressing the nuances that lie in between balancing civil and contract law. Considering that China has experienced the Severe Acute Respiratory Syndrome (SARS) epidemic caused by another strain of coronavirus, the Supreme People's Court in China has had the exact opportunity to issue several judicial interpretations applying the FM laws in pandemic situations.[102] China also has "more substantial national interests than other countries" because it houses a high number of enterprises and corporations with international involvement.[103] Hence, China's approach to FM is well-developed and noteworthy given its necessity to maintain its national economy via foreign contractual relationships.

Consequently, FM is "more difficult to trigger" under China's laws because the unforeseeable component is coupled with the alleged event being unavoidable and insurmountable, which is a greater standard than founding English law.[104] Discharging the party of responsibility either wholly or partly requires a showing of performance being more onerous in addition to timely notice.[105] PRC law also requires the defaulting party to produce FM certificates issued by the China Council for the Promotion of International Trade (CCPIT) when dealing with international contracts. The certificates validate the "occurrence of an event, which may qualify as an FM event under general circumstances" and "facilitate invoking FM remedies" by the government.[106] For international supply contracts, the CISG helps clarify the definition of an acceptable FM event for the to obtain the certificate. While they are not binding on the courts, the certificates "add a level of authenticity" and credibility when filing FM claims.[107] When all of these requirements are met, the defaulting party may either waive all or part of the contractual obligation or terminate the contract entirely under FM.

In the absence of an FM claim, parties can resort to relief under alternative principles of fairness and changing circumstances.[108] Particularly, parties can choose to submit a motion under the doctrine of material (adverse) change in Article 26 of Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law of the PRC, which states:

> Where any major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract, if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case.[109]

[102] Tsang, *supra* note 70.
[103] Tsang, *supra* note 70, at 194-95.
[104] Tsang, *supra* note 70, at 200.
[105] Bai & Liu, *supra* note 97.
[106] Galvis et al., *supra* note 11.
[107] Galvis et al., *supra* note 11.
[108] Peterson et al., *supra* note 72.
[109] Tsang, *supra* note 70.

By submitting evidence of a change that occurred, the invoking party can petition the court to allow contract modification to adjust the terms of performance or simply terminate the agreement.[110] The PRC courts have generally accepted substantial changes involving "change to China's national policies, laws, or exchange rate," as long as it is not a commercial risk.[111] When determining whether the alleged event counts as changing circumstances, the PRC court relies on evaluating the fairness to both parties and the overall contractual relationship.[112] As a result, the Chinese courts apply a high standard in deciding whether to allow contract modification or termination since they are conservative in their approach.

Chinese courts have also enforced a strict standard in interpreting FM clauses to Covid-19 cases to protect contractual agreements and ensure business continuity.[113] In addition to proving unforeseeable, unavoidable, and unconquerable situations, the invoking party must show that during the time of contract formation the coronavirus was not contemplated or known as a barrier to performance.[114] With SARS, China was unprepared to address the impact of nonperformance on a large scale and instead was compelled to issue a notice stating that nonperformance was permissible if it was impossible to perform or "directly caused by administrative measures taken by the government to prevent the SARS epidemic."[115] However, using the exposure to FM conflicts and experiences in judicial decisions from the SARS epidemic, China clarified its policies early on regarding FM clauses as applied to Covid-19. Specifically, China concluded that if parties claim nonperformance "due to the government measures relating to Covid-19, they should be allowed to claim FM relief in accordance with the PRC Contract law."[116] For example, in February 2020, both Beijing and Shanghai governments issued a notice requiring rent relief for tenants, office leases, and manufacturing companies to support those more significantly affected by Covid-19.[117] The government provided rules and offered financial incentives to provide relief to landlords who complied with these notices, but nonetheless granted landlords the option to make FM claims due to government actions like these that placed an onerous burden on performance beyond compensation.

Although China's courts still allow FM claims to be raised due to government directives, new policies, and local regulations that affect businesses due to Covid-19, the courts also require invoking parties to mitigate their losses and the effect of their nonperformance beyond merely providing notice of an FM event.[118] This poses a higher standard because mitigation is an element that was not previously required by the law. However, the benefit is that parties that cite difficulties

[110] Bai & Liu, *supra* note 97.
[111] Bai & Liu, *supra* note 97.
[112] Bai & Liu, *supra* note 97.
[113] Zunarelli Studio Legale Associato, *COVID-19, "Force Majeure" and Performance of Contractual Duties – Insights from Chinese High Courts*, ICLG (June 1, 2020), https://iclg.com/briefing/12928-covid-19-force-majeure-and-performance-of-contractual-duties-insights-from-chinese-high-courts.
[114] Bai & Liu, *supra* note 97 at 3.
[115] Ian K. Lewis, *Force Majeure Plus – The Use of Force Majeure Provisions in China during Covid-19*, MAYER BROWN (Apr. 22, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/force-majeure-plus-the-use-of-force-majeure-provisions-in-china-during-covid-19.
[116] Peterson et al., *supra* note 72.
[117] Lewis, *supra* note 115.
[118] Lewis, *supra* note 115.

in performance or hardship due to expected market risk caused by Covid-19 are allowed to seek renegotiation of the contract to ensure economic activity despite the pandemic, which is a new development within the sphere of nonperformance.[119] Contract modification or renegotiation is generally reserved for material adverse change or changing circumstances prior to Covid-19, yet courts are taking a calculated risk by imposing slightly different policies for this pandemic than the SARS epidemic to ensure continuity of a productive economy. Ultimately, the court has emphasized the "requirement for parties to show flexibility and fairness" for the purpose of Covid-19 under PRC laws, while still maintaining a strong economy for businesses.[120]

To maintain foreign and domestic contractual business relationships during the pandemic, China's government has pivoted to rely more on FM clauses included in the contract, like the United States, instead of waiting for government-imposed rules.[121] Courts and practitioners both cite advantages in expressly defining FM occurrences in contracts using terminology like "epidemic," "pandemic," "health emergencies," or "governmental actions or disruptions."[122] Without an explicit statement of FM events, courts are left to evaluate each circumstance under the PRC civil law definition on a case-by-case basis, which would take more time. China's courts recognize and prefer the plain language of FM clauses when determining whether an event qualifies as an FM event because it simplifies their analysis and reduces the time to evaluate each case individually. Therefore, China continues to maintain a balanced approach of utilizing a combination of PRC civil law and plain language to interpret FM clauses.

C. Germany

Unlike the United States and China, Germany has no statutory provisions or case law governing FM.[123] Further, German law also "does not imply the concept of FM into commercial contracts" and instead leaves it to the parties to negotiate the presence of a FM clause in their contract.[124] There are instances where the term FM is present in legal regulations of other topics, but German statutory law itself does not define FM and its applicability.[125] Instead, it was the German Cassation Court that defined FM as "an event which is externally caused by elementary forces of nature or by actions of third parties and which, according to human judgement and experience, is unforeseeable and cannot be prevented or rendered harmless by economically justifiable means, even with all due care reasonably expected in the light of the circumstances of the case, and which the operator cannot reasonably be expected to accept because of its frequency."[126] German case law cemented this definition by describing FM as an "external,

[119] Lewis, *supra* note 115.
[120] Lewis, *supra* note 115.
[121] Ulrike Glueck et. al, *Law and Regulation of Force Majeure in China*, CMS (Jan. 12, 2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/china.
[122] *Id.*
[123] Joos Hellert & Ralf-Thomas Wittmann, *Force Majeure Global Guide: Germany*, EVERSHEDS SUTHERLAND (2021), https://ezine.eversheds-sutherland.com/force-majeure-global-guide/choose-a-location/overlay/germany/.
[124] Peterson et al., *supra* note 72.
[125] Friedrich Graf von Westphalen, *Force Majeure - under German, French and US law*, FGVW (July 8, 2020), https://www.fgvw.de/en/news/archive-2020/force-majeure-under-german-french-and-us-law.
[126] Hellert & Wittmann, *supra* note 123.

unavoidable and unforeseeable event."[127] For example, German courts accepted natural disasters as FM events only if the event is "exceptional, e.g. a storm of unusual intensity." [128] Strikes and governmental actions are also allowed as long as the situation was strictly unforeseeable and causation is established between the event and nonperformance.[129] The courts do not accept "anything that constitutes 'general life risk'" as an FM event, such as "flight turbulence, emergency landing, slipping on a wet hotel floor, and seasickness."[130]

German courts prefer to engage in individual analysis on a case-by-case basis when determining what events qualify under FM clauses.[131] Without clear guidance provided through the law, courts are left to determine whether a circumstance qualifies as an FM event strictly based on the "the specific nature of the agreement; the wording of the clause; and whether the incident giving rise to the Force Majeure claim is addressed in the Force Majeure clause."[132] Compared to the United States or China, the focus of German courts in interpreting FM clauses shifts to the plain language of the contract rather than the law itself. However, there are no prescribed FM clauses that parties can simply adopt into their contract as recommended by the CISG or ICC. Parties must negotiate their terms according to independent concerns about nonperformance and industry needs.

Although Germany does not provide a statutory framework for implementing or analyzing FM clauses, it still recognizes the concept of FM and other alternative theories of relief in its civil code.[133] In the absence of an FM clause, German civil code defaults to the concepts of 1) impossibility or 2) change in circumstances.[134] Under German Civil Code § 275, if a "contract is objectively impossible to perform, the contractual obligation is extinguished" and allows for a right to refuse performance.[135] Courts often lower this bar for impossibility when the contractual obligations pose a significant hardship or disruption to society, such as the Covid-19 pandemic.[136] The other alternative is to elect for a change in circumstances according to German Civil Code § 313, which allows parties to adjust or amend the contractual provisions to counteract the disturbance in meeting the contractual obligations.[137] For example, if there is an excessive increase in value of a product in the market, the contract can be adjusted to reflect a higher price for the final item.[138] If the amendment to the contract is impossible or unreasonable, only then can the

[127] Dirk Loycke, *Law and Regulation of Force Majeure in Germany*, CMS (January 15, 2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/germany.
[128] Steven Molo et al., *Country Comparative Guides: Germany: Force Majeure*, THE LEGAL 500 (2021), https://www.legal500.com/guides/chapter/germany-force-majeure/.
[129] *Id.*
[130] *Id.*
[131] Peterson et al., *supra* note 72.
[132] Peterson et al., *supra* note 72.
[133] *Id.*
[134] Hellert & Wittmann, *supra* note 123.
[135] *Id.*
[136] Philipp von Holst, et. Al, *COVID-19 and Its Impact on German Law Contracts*, DEBEVOISE & PLIMPTON (Apr. 1, 2020), https://www.debevoise.com/insights/publications/2020/03/covid-19-and-its-impact.
[137] Peterson et al., *supra* note 72.
[138] *Id.*

parties withdraw performance and terminate the contract.[139] Parties can also be relieved of their obligations through the implications of the international rules of CISG for international contracts because Germany is a signatory to the treaty. The blanket rule of CISG Article 79 will automatically apply to any international commercial contracts involving German law so long as the parties did not explicitly opt out of the CISG in the plain language of their written contract.[140] Since the parties have many alternative options to claim relief outside of the FM clause in Germany, there have been few judgments in case law regarding the applicability of FM, especially with instances of Covid-19.[141]

German courts recognize "Covid-19-related official closure orders as a case of frustration of contract" and thereby conclude that the pandemic will likely be recognized broadly as an FM event.[142] However, the courts reason that the qualification of an FM event is a "legal assessment that is at the sole discretion of the court."[143] While some lower courts in Germany have published decisions about the impossibility of performance during Covid-19, those decisions tend to vary greatly based on the FM clauses included in the contract and the overall impact of the actions.[144] For example, on March 27, 2020, Germany adopted a new law to "mitigate the negative consequences of the Covid-19 pandemic for consumers and businesses," which allowed for small businesses to refuse performance that would endanger its survival and prevented commercial rental agreements from being terminated due to delayed rent payment.[145] Similarly, the lower court of Bremen ruled that consumers were entitled to a full refund of their concert tickets since the concert was cancelled without a replacement date due to Covid-19.[146] Although consequences in the private and commercial sphere have generally been favorable towards businesses, not all court decisions have resulted in the same conclusion. Germany's new law has provided limited guidance to companies seeking relief from contracts, but there is still much work to be done in defining the instances where FM clauses are applicable in the context of Covid-19.

Further, announcements by other governmental organizations about Covid-19 actions have had a positive effect on speeding up the court's decision making process, such as recommendations by the World Health Organization (WHO), the Federal Ministry of Foreign Affairs and other public health institutes, but legislative changes in this area have been slow nonetheless.[147] The German federal courts "ha[ve] not yet ruled on the matter, leaving some uncertainty as to the outcome of [these] court cases."[148] Due to a lack of statutory law about FM, German courts are forced to address questions of nonperformance due to Covid-19 through its rulings on independent cases. Until the federal courts establish precedent through case law or legal rules for FM claims due to Covid-19, parties will be subjected to the court's review of FM clauses on an individual basis.

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[139] Hellert & Wittmann, *supra* note 123.
[140] Peterson et al., *supra* note 72.
[141] Molo et al., *supra* note 128.
[142] *Id.*
[143] *Id.*
[144] Loycke, *supra* note 127.
[145] *Id.*
[146] *Id.*
[147] Molo et al., *supra* note 128.
[148] Loycke, *supra* note 127.

IV. ANALYSIS

A. Similarities & Differences Between US, China, & Germany's Force Majeure Laws

As discussed above, the US, China, and Germany have each adopted different approaches in addressing FM historically and during Covid-19. The US primarily uses the contract's plain language to interpret FM occurrences while using the UCC and CISG to imply common law into commercial contracts. China's law contains express civil law and contract law provisions by which courts examine FM clauses cited by invoking parties. Germany has no statutory provisions or governing laws that recognize FM clauses, but instead relies on a case-by-case analysis contingent on the contract's plain language.

Despite their differences, all three of these countries provide importance to the plain language of the written contract in interpreting the scope and applicability of the statute. A well-defined contract is the strongest basis for understanding exceptions to performance as negotiated and agreed upon by the parties. The more specific the contract, the more clear parties and courts alike can determine the applicability of a FM clause. In addition, all three countries cite some requirement of unforeseeability in the FM event that causes the parties to invoke this clause. While the range of events accepted under each country's laws may be different, unforeseeability is a non-negotiable factor.

Finally, the US, China, and Germany have implemented changes in their FM laws to reflect the impact caused by Covid-19 to include more flexibility for the overall impact on the economy. All of these countries aim to preserve the international economy and prevent it from crashing all together due to the recession preempted by the pandemic by allowing claims under FM. Therefore, parties would benefit from employing certain favorable components from each country with respect to Covid-19 FM laws: the plain language foundation of the US, the civil law gap filling of China, and the case-by-case attention to analysis of Germany.

B. Impact & Interpretation of Covid-19 on Force Majeure

Most countries have recognized the Covid-19 pandemic as an unexpected event that gives rise to FM or alternative remedies; however, the extent to which they have allowed excusal of nonperformance through FM clauses is different. Countries, like China, who's economy mainly depends on foreign and domestic business, prefer to limit enforcement of the FM clause to prevent economic collapses. If courts were more lenient in excusing parties from performing, trade and shipment of commercial goods would virtually stop, leaving citizens without products in the market to purchase. For example, when a container ship was stuck in the Suez Canal for six days in 2021, $400 million worth of international commercial goods were stranded and the entire world's commerce was impacted since other ships also could not pass through the canal.[149] Sellers could not properly fulfill their contractual obligations and buyers did not receive their required goods, which impacted a multitude of transactions. Although this is an extreme and uncommon

[149] Kelsey Vlamis, *The giant ship stuck in the Suez Canal is costing the global economy an estimated $400 million per hour*, INSIDER (Mar. 25, 2021), https://www.businessinsider.com/boat-stuck-suez-canal-costing-estimated-400-million-per-hour-2021-3.

situation, if sellers were excused by FM for every shipment delay or minor risk, parties would be unable to execute the commitments they provided to their customers. For example, during Covid-19, there is a greater need for commercial goods like masks, gloves, personal protective equipment, and food supplies, and if sellers are not able to fulfill these requests, the reputation of their businesses will be ruined and the needs of consumers will remain unmet.

On the other hand, countries like Germany have no FM laws and leave negotiations of its applicability to the parties. Since the courts have not legislated to provide relief, parties are bound by their contracts to ensure performance if there is no FM clause (or claim relief through alternative methods). This signals to parties that contractual performance is significant and nonperformance is not an option under the law, unless there are dire circumstances. The German courts did recognize Covid-19 as an unprecedented circumstance and provided guidance for specific sectors, but they have not created new national laws to address FM clauses.

In addition, many international sources have challenged the applicability of FM clauses to the subsequent waves of Covid-19. International parties have attempted to argue that the second and third wave of Covid-19 spikes were unpredictable to escape performance of their contractual obligations. In order to limit reliance on FM clauses to cite nonperformance, most countries, including China, Germany, and the US, have chosen to recognize Covid-19 as a whole. For contracts that concluded after the pandemic began, Covid-19 is deemed foreseeable and can no longer be claimed as a FM event.[150] Contracts formed during the pandemic did not allow Covid-19 to be considered an excusable FM event. A pandemic could be added to the list of unforeseeable events when drafting contracts in the future, but the Covid-19 pandemic itself would not count. If each wave was an acceptable excuse in international commercial contracts, then the worldwide economy would crash. Therefore, international and domestic courts have concluded properly regarding this matter by considering Covid-19 holistically.

C. International Uniformity in Force Majeure Clauses

To promote uniformity and provide simplicity, the PICC, CISG, and ICC's FMC have all instituted rules for international commercial contracts to use when defining FM. International treaties and agreements between different nations establish the rules for interpreting FM clauses in all of the signatory countries, regardless of their own rules for domestic affairs. This streamlines the analysis used by courts in signatory countries when determining whether FM events have occurred and the relief international parties are entitled to receive as a result of their contractual obligations. Instead of having to worry about the various laws of each nation, contracting parties have the certainty that all countries signatory to international treaties will handle their case in the same way and provide the same outcome. This would provide more clarity in parties' decision-making process and confidence in contracting with international sellers. Furthermore, the fact that international treaties can be amended or modified to include more specific guidance, like the ICC's FMC of 2020 compared to 2003, ensures that all signatory countries will accept the same definitions and process when interpreting changes to the application of FM clauses. It also reinforces the idea of fairness and transparency when litigating issues regarding FM internationally.

[150] Glueck et. al, *supra* note 121.

The uniformity in application offered by international laws when dealing with FM is beneficial for international contracts and should also be considered by countries to adopt domestically, rather than each country following different rules about FM. Although following different rules aligns better with the civil versus common law jurisdiction in each country, a similar approach in each country would allow parties and businesses to know the law better and reduce complexity. Parties would not be confused or have to research how FM clauses are applied in each country before considering contractual agreements with other international parties. Also, if the same FM law is applied in each country, it would eliminate the need for countries to specify a choice of law clause in their contracts.

Conversely, countries should also have the ability to act independently from the international sphere in order to best serve their citizens. This raises the question of sovereignty. Similar to tension between the US federal government and state governments, international governance and countries carry the same tension between international laws and national laws. While uniformity would clarify the process, countries should have independent reign over their citizens and be authorized to change or amend FM laws to address the issues impacting their nation, as the US and China have affected during Covid-19. Independent case-by-case analysis would help establish the country's approach to FM laws throughout a historical period and allow courts to make decisions necessary for their country in that moment according to its jurisdictional preferences. Altogether, the comfort of uniformity is most appropriate for the realm of international commercial contracts and continues to present a reliable framework for FM analysis but should not extend to individual countries.

D. Implications of Force Majeure Clauses in the Future

Considering the use of FM clauses historically and the nature of impact caused by Covid-19, it is likely that FM clauses will continue to be employed by contracting parties in the future to insulate their businesses. FM clauses provide parties an option for nonperformance, withdrawal, or termination of the contract in extreme and unexpected circumstances. FM clauses allow parties to insert contingencies on performance and ultimately protects their business or company from total collapse in the event that a seller is unable to deliver based on their commitment. The future is unknown to everyone and the FM clause acts as a safety net in the case of nonperformance.

After Covid-19, parties tend to view FM clauses with a level of increased scrutiny and detail to avoid common mistakes in general FM provisions. It is important for parties to include a termination clause and details regarding the level of mitigation that must be proven by the invoking party when claiming FM. Some contracts require a showing of ongoing mitigation before termination while others require good faith mitigation prior to the withdrawal of performance. Specifying these details are crucial to both parties to ensure that the standard set forth is reasonable and does not place an onerous burden on one side.

A choice of law clause is also important to include in combination with an FM clause to clearly establish which country's law will apply in the event of disagreement and which court of law should preside over future disputes. Omitting a choice of law clause can cause several issues long term and could prevent a party from receiving timely relief from its contractual obligation. In

addition, if a chosen country's laws change over the course of the contractual obligation, it could impact the contractual relationship and make it more difficult for the FM clause to apply. Parties should certainly consider including a clause stating the time period or decisions of law that will apply to a long term international commercial contract to establish protection from evolving laws. For example, parties could assert that US UCC rules as of 2021 apply to this international contract or the ICC's updated FMC rules of 2020 apply to this international contract. Adding this level of detail can safeguard parties from debates or litigation about the applicability of FM clauses. Finally, parties should determine the form of dispute resolution when there is uncertainty about the application of FM clauses to their contractual performance, such as arbitration, mediation, litigation, or a combination. Selecting a dispute resolution method in advance will save time and money for the parties involved. By spending time in drafting a comprehensive FM clause, parties will have more security and protection when it comes to unforeseeable events.

Given the debates around narrow FM applicability to Covid-19, courts have also provided more importance to FM clauses written in contracts. Hence, it will be worth the initial time investment for parties to draft their own FM clauses rather than leaving it up to the generalized laws of a particular country. Although FM will not apply in circumstances related to Covid-19, it is still relevant to other unforeseeable impacts to the nation like labor shortages, supply shortages, governmental actions, bio war, or other natural disasters. Thus, international parties have learned from this first-hand experience the relevance and weight of incorporating an FM clause into any future transactions, especially in international commercial contracts.

E. Recommended Actions for Future Force Majeure Clauses

Moving forward, contracting parties should be proactive in mitigating the risk of unforeseeable events through well-drafted FM clauses. First, parties should review their existing international commercial contracts to identify the presence of an FM clause and the scope of FM events it covers.[151] Parties should determine the existing standard of performance as well as the acceptable reasons for nonperformance required to invoke FM clauses.[152] Next, parties should clearly define the events the FM clause covers (i.e., pandemics, labor or supply shortages, governmental disruptions, etc.) and the causal links to nonperformance (i.e. hindered, delayed, stopped, etc.) to update the existing clause.[153] The more clearly defined the FM events are within the clause, the easier it will be for parties when trying to invoke the clause for specific reasons. However, the clause also should not be construed too narrowly or else it will impede excusal of performance. Finally, parties should include when and how notice should be given when invoking the FM clauses.[154] This element is essential for declaring nonperformance and would give the buyer a chance to find alternative options to achieve their purpose.

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[151] Cox & Spoerl, *supra* note 82.
[152] Shireen A. Barday & Nathan C. Strauss, *An Updated Checklist & Flowchart for Analyzing Force Majeure Clauses During the COVID-19 Crisis*, GIBSON DUNN (Aug. 4, 2021), https://www.gibsondunn.com/an-updated-checklist-and-flowchart-for-analyzing-force-majeure-clauses-during-the-covid-19-crisis/.
[153] Cox & Spoerl, *supra* note 82.
[154] Barday & Strauss, *supra* note 152.

Drafting an FM clause is the most important aspect of the entire process to ensure that parties have allocated risk appropriately for unforeseeable events like Covid-19. Several law firms have created checklists for the public that provide direction to parties in drafting and interpreting FM clauses. These checklists serve as an instructional guide to help parties evaluate their legal options with regards to their contractual relationship when an FM event occurs.[155] Providing a checklist or flowchart without legal jargon allows parties the ability to understand the process of invoking or receiving notice of FM claims. Even without legal counsel, parties can act according to the rules using practical tools of evaluation like the FM checklist and advance their own knowledge. Other firms have created checklists for litigators outlining the requirements to invoke FM clauses and the elements to consider for alternative methods of relief.[156] Practical creations like checklists simplify the process of attaining relief and confirm the actions of individuals, companies, and lawyers alike. Hence, parties should use these resources to support their development of FM clauses for the future.

CONCLUSION

Therefore, it is evident that FM clauses are fundamental in allocating risk in international commercial contracts between parties in the event of unforeseeable circumstances. The historical development of FM clauses in various jurisdictions provided insight regarding the justification for their separate approaches. A comparative analysis about FM laws in the US, China, Germany, and the international sphere introduced distinct perspectives for FM application while establishing collective values in the preservation of the economy, recognition of Covid-19, and specificity in drafting FM clauses. Ultimately, despite the differences proposed by each country, the impact of FM clauses on the global economy and markets drives jurisdictional decision-making and governmental action to address these claims. In the future, FM will continue to be a critical element of international commercial contracts incorporated by parties to cultivate their contractual relationships.

When finally tracking our pre-ordered Baby Yoda dolls, I noticed that Disney attempted to postpone our delivery date for a few days before clarifying a finalized timeline. Luckily, Hasbro, Inc. was able to deliver Disney's shipment despite a delay caused by the Covid-19 outbreak. Eventually, my package arrived and Disney reimbursed me the shipping costs for my order since I received my Baby Yoda dolls two weeks later than the estimated delivery date. Both Disney and Hasbro could have benefitted from including strict FM clauses in their contracts with material suppliers and individual buyers to avoid granting reimbursements to consumers. After this experience with Covid-19, not only have Disney and Hasbro learned their lesson, but many other international commercial contractors also understood the significance of including precise FM clauses. As Yoda would say, may the force majeure be with you as you too enter into future contracts!

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[155] Barday & Strauss, *supra* note 152.

[156] Saul Ewing Arnstein & Lehr LLP, *A Litigator's Checklist of Force Majeure Considerations in the COVID-19 Era*, SAUL (May 22, 2020), https://www.saul.com/sites/default/files/Force%20Majeure-%20Checklist_052220.pdf.