UNIVERSITY *of the*
WESTERN CAPE

FACULTY OF LAW

RETHINKING INTERNATIONAL INVESTMENT AGREEMENTS IN THE FACE OF COVID-19: NEED FOR THE INCORPORATION OF A FORCE MAJEURE CLAUSE?

A Mini-Thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws (LL.M) in International Trade, Business and Investment Law in the Department of Mercantile and Labour Law

By

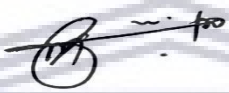
MWAPE M. SIMALAMBO

(Student Number: 4004864)

Supervisor: Professor Riekie Wandrag

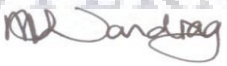
DECLARATION

I, **Mwape Mutinta Simalambo**, declare that the thesis titled "**Rethinking International Investment Agreements in the Face of Covid-19: Need for the Incorporation of a Force Majeure Clause?"** is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College, or other institution of learning for any academic or other awards.



Mwape Mutinta Simalambo

This mini-dissertation has been submitted for examination with my approval as Supervisor.



Professor Riekie Wandrag

December, 2023

DEDICATION

This mini-thesis is dedicated to my husband, Dr. Gift Siamutwa who has been a pillar of strength during my postgraduate studies. I am incredibly grateful and blessed to have you in my life.

To my ever-loving mother Georgina M. K. Simalambo, who has my lifelong gratitude for her unwavering support during my academic journey. I am grateful that you instilled in me the value of perseverance in achieving my goals in life, which has contributed to my academic achievement. I further dedicate this paper to my late dad, Major Lawrence Simalambo, though not here you sure would have been proud of my academic achievements.

As the aftermath of the Covid-19 pandemic confronts us, I dedicate this study to international investment law experts, legislative drafters, scholars, and stakeholders. My hope is that this study will inspire them to further develop international investment law and advance the reformation of IIAs to accommodate adequate safeguards against unforeseen health and economic crises such as the Covid pandemic to both host states and investors, that potentially disrupt global economies.

ACKNOWLEDGEMENT

I would like to express my sincere gratitude to God Almighty for the wisdom and fortitude he bestowed upon me during my postgraduate studies.

Immense acknowledgment goes to the many people that played a significant role in ensuring the successful completion of this mini-thesis.

First and foremost, I would like to express my appreciation and admiration to Professor Riekie Wandrag, for being an invaluable supervisor, course coordinator and a great source of encouragement during my master's program. Her proficiency and dexterity enabled her to surpass expectations in guaranteeing the accomplishment of this thesis.

I am equally indebted to Professor Kenneth K. Mwenda for his mentorship program, as he encouraged me to enrol for this master's degree program. Despite his hectic schedule, he never stopped encouraging and supporting me throughout my postgraduate studies.

I further extend my heartfelt gratitude to all my UWC lecturers that provided me with a vast knowledge base in different areas of law and particularly Dr. Jimcall Mfumorodze for the role he played in helping me attain unparallelled insight into international investment law.

My utmost gratitude goes to my two brothers, Lweendo and Hankombo, for their consistent love, steadfast support and an optimistic attitude throughout my academic journey.

Furthermore, am immensely grateful to my loving and caring husband, Dr. Gift Siamutwa who continues to be a great source of encouragement and encouragement.

Lastly, I am grateful to my colleagues in the master's program: Albert- Chris Puja, Pamela Mafongoya, Alfred-Paul Juwah, Abraham Zaqi Khroma, Samson, Setumo, Susan and Sia, who all contributed to making my studies and stay in Cape Town a delightful experience.

KEYWORDS

Bilateral Investment Treaties

Coronavirus pandemic (Covid-19)

Force Majeure

International Centre for Settlement of Investment Disputes

International Investment Agreements

International Investment Law

Pacta Sunt Servanda

ACRONYMS AND ABBREVIATIONS

BITs	Bilateral Investment Treaties
CISG	United Nations Convention on the International Sale of Goods
CIL	Customary International Law
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIDIC	Federation Interanationale Des Ingenieurs-Conseli
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIAs	International Investment Agreements
IHR	International Health Regulations
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
MERS	Middle East Respiratory System
MNEs	Multinational Enterprises
NAFTA	North American Free Trade Area
OECD	Organisation for Economic Cooperation and Development
PAIC	Pan-African Investment Code
PHEIC	Public Health Emergency of International Concern
SADC	Southern African Development Community
SADC FIP	Southern African Development Community Finance and Investment Protocol
SADC MODEL BIT	Southern African Development Community Model Bilateral Investment Treaty
SARZ	Severe Acute Respiratory Syndrome
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDROIT PICC	UNIDROIT Principles of International Commercial Contracts
US	United States
USMCA	United States of America, Mexico and Canada Agreement

WHO	World Health Organization
WTO	World Trade Organisation

TABLE OF CONTENTS

ABSTRACT

Covid-19 was first detected in December 2019 in Wuhan, China, and since its detection the pandemic had a disastrous effect on human health and well-being globally, with far-reaching implications for international investments and commercial businesses. Ever since the Great Depression of the 1930s, no single non-conflict event has had the broadest and most significant effects on health and the economy as compared to the novel Covid-19 pandemic. Consequently, it is now difficult to legally distinguish between the virus and the response policies, which have come together to create a singular event. Because of the extraordinary magnitude and scope of both variables which are unprecedented, governments and businesses operating around the globe have faced challenges in controlling their combined consequences.

Notably, the aftermath of Covid-19 has brought the *force majeure* doctrine into the limelight. Consequently, host states and foreign investors have now found it crucial to thoroughly prepare for the unexpected in a bid to honour contractual obligations by inserting carve outs in IIAs which exempt a defaulting Party from liability owing to an impossibility or impracticability to perform. The study therefore establishes that despite the existing IIAs providing for public health, emergency, and national security clauses, these carve outs do not aptly provide for a defence that would exempt the defaulting party from liability.

The study further provides that the application of *force majeure* as a defence for non-performance under contracts has become crucial owing to the emergence of the Covid-19 pandemic. In the event of comparable unforeseen situations, it is essential that IIAs provide for carve outs that are essential for assigning risks between the host state and the investors to reduce any potential investor-state disputes. In advancing this argument this study took a down road to the historical evolution and conceptual discourse of *force majeure*, it also provided for an analysis of the different jurisdictional approaches to *force majeure* interpretations particularly in China and USA. The study established whether Covid-19 is a *force majeure* event that would trigger a *force majeure* clause. In light of the pandemic, the effectiveness of *force majeure* clauses in international commercial contracts was under microscopic study by delineating the different aspects of *force majeure* clauses. In conclusion, this study has established that the success of the plea of *force majeure* will largely depend on the drafting of the clause in the IIAs. The study concludes by establishing that the *force majeure* clause is a necessary inclusion in IIAs and therefore, offers useful recommendations on the application of *force majeure* clause in IIAs.

CHAPTER ONE
INTRODUCTION

1.1. RESEARCH BACKGROUND

The coronavirus (Covid-19) pandemic and its various variants have posed various challenges to the global economy. First detected in December 2019 in Wuhan, China, the Covid-19 virus and the antecedent variants presented severe and unprecedented challenges that have proven to impact various aspects of society.[1] Globally, governments instituted unprecedented measures to contain the spread of the Covid-19 virus and mitigate its adverse impact on the global economy.[2] These restrictive measures included: quarantines, travel bans, additional visa requirements, closure of non-essential businesses, and nationalisation of private businesses, expropriation and export restrictions.[3]

Amid these preventive measures, States faced the need to strike a balance between public health interests or public interest and the rights of investors.[4] The undertones of the Covid-19 period were the high likelihood of States prioritising public interest over investment protection. The preventive measures that States implemented during the pandemic may in some circumstances be regarded as International Investment Agreement (herein after referred to as "**IIAs**") violations. Government policy measures, such as export prohibitions or the reallocation of industrial capacity from ventilator production, may violate the principle of fair and equitable treatment (FET)[5]. The acquisition of foreign-owned hotels and hospitals as quarantine centres could amount to expropriation.[6] Hence, these measures may constitute a violation of foreign investor rights under IIAs, notable legal protections of investors such as National Treatment (NT), Fair and Equitable Treatment (FET), Most Favoured Nation (MFN) and other broad guarantees of treatment for investors.[7]

[1] Trenor A J & Lim S H 'Navigating Force Majeure Clauses and Related Doctrines in Light of The Covid-19 Pandemic' (2020) 3 *Young Arbitration Review* 13.
[2] Melissa S G *et al* 'Covid-19 and Investment: Balancing the Protection of Public Health and Economic Interests' available at *https://www.jonesday.com/en/insights/2020/05/Covid19-and-investment-treaties* (accessed on 20 August 2020).
[3] Trenor A J & Lim S H (2020) 13.
[4] Melissa S G *et al* 'Covid-19 and Investment: Balancing the Protection of Public Health and Economic Interests' available at *https://www.jonesday.com/en/insights/2020/05/Covid19-and-investment-treaties* (accessed on 20 August 2020).
[5] Lee J (2020) 185.
[6] Sornarajah M 'The Covid-19 Pandemic and Liability under Investment Treaties' available at *https://www.southcentre.int/southviews-no-204-11august-2020/* (accessed on 20 August 2020)
[7] Lee J (2020) 185.

Certain Covid-19 measures may serve as a suitable foundation for legal challenges if there are no legitimate justifications for their implementation. As a result, given their apparent violation of IIA commitments, States may face a spate of legal claims. Thus, the proliferation of IIAs and investor-state arbitrations have culminated in concerns of investment promotion and protection of the IIA regime. Hence, this might unduly fetter a State's ability to pursue sustainable development policies.[8]

IIAs have, however, established clauses that safeguard a State's ability to waive its obligations under international law on the grounds of public interest, including the maintenance of public order and safeguarding of human health.[9] These are usually called general exceptions or security exemptions. States may alternatively depend on defences under customary international law in situations where these treaty-based defences may be ambiguous or non-existent. [10]

Customary international law is a notable source of international law and is made up of generally accepted practices of States with a binding character.[11] In justification of non-performance of commitments under IIAs, States can invoke customary international law defences such as *force majeure*, distress, necessity, or the police powers doctrine.[12] It is worth noting that the *Continental Casualty Company v The Argentine Republic* [13] brings to the fore how the defence of necessity has been relied upon, the facts leading to the holding of the Tribunal are that:

> 'The Continental Casualty an American company brought a claim against Argentina before the Tribunal alleging that it was in breach of their then existing Argentina - United States BIT… The Tribunal found in favour of the Respondents (Argentina) regarding their alleged breach by stating that they were not in breach of their BIT owing to the fact that, Argentina had acted out of necessity which served as a customary defence.'

[8] Newcombe A 'Sustainable Development and Investment Treaty Law' (2007) 8 *Journal of World Investment & Trade* 375.
[9] Lee J (2020) 185.
[10] Ostrove M *et al* 'COVID-19 – a legitimate basis for investment claims?' available at https://www.lexology.com/library/detail.aspx?g=4efe5923-7117-49cf-83c2-673a44e98148 (accessed on 19 August 2020)
[11] Ostrove M *et al* 'COVID-19 – a legitimate basis for investment claims?' available at https://www.lexology.com/library/detail.aspx?g=4efe5923-7117-49cf-83c2-673a44e98148 (accessed on 19 August 2020)
[12] Melissa S G *et al* 'Covid-19 and Investment: Balancing the Protection of Public Health and Economic Interests' available at https://www.jonesday.com/en/insights/2020/05/Covid19-and-investment-treaties (accessed on 20 August 2020).
[13] *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award, 5 September 2008, para. 227.

As opposed to necessity, the defences of *force majeure*, distress or police powers have seldom been invoked in past pandemic periods.[14] Notably, current security exception clauses in some IIAs lack sufficient detail to relate to global pandemics. Hence, the need to incorporate the defence of *force majeure* in IIAs has garnered attention. Conceptually, the defence of *force majeure* is relevant to the prevailing circumstances during and after the pandemic period.

A number of comprehensive bilateral treaties in Africa have been advanced which offer protection to the host state via recognition of right to regulate. The Southern African Development Community Protocol on Finance and Investment (2006) (SADC FIP), as amended by the SADC FIP (2016), Morocco-Nigeria BIT (2016), and the Draft Pan African Investment Code (2016) (PAIC) are examples of such bilateral treaties.[15] These treaties recognise the need to balance investor rights and the State's right to regulate in the public interest. This means that host states have been granted the policy space to regulate in the public interest to fulfilment of sustainable development.[16]

The unique circumstances of the Covid-19 era have tested the efficacy of BITs in ensuring that the right balance is struck and that States can regulate in public interest. This brings to the fore the need to safeguard sufficient regulatory space in IIAs to protect public health and minimize the risk of investor–state dispute settlement (ISDS) proceedings, while, on the other hand, to protect and promote international investment for sustainable development.[17]

1.2. STATEMENT OF THE PROBLEM

As a general practice, IIAs have been concerned with investment protection. Governmental approaches to investment governance have raised significant concerns. This concern is derived from their failure to achieve purported objectives.[18] This has led governments to undertake substantive and procedural reform of the international investment regime.[19] The Covid-19

[14] See Article 24 & 25 of the Internationally wrongful Acts of 2001 extracted from International Law Commission Articles on the Responsibility of States for International Wrongful Acts with Commentaries, U.N. G.A. Doc. A/56/10. Chapter V (2001)
[15] Zagel G 'International Investment Agreements IIAs and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?' available at *https://www.researchgate.net/ publication /337023200* (accessed on 10 September 2020)
[16] Zagel G 'International Investment Agreements IIAs and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?' available at *https://www.researchgate.net/ publication /337023200* (accessed on 10 September 2020)
[17] UNCTAD 'The Changing IIA Landscape: New Treaties and Recent Policy Developments' (2020) (1) *New York and Geneva: United Nations* 3
[18] Guven B 'Modern Provisions in Investment Treaties' in *AfCFTA Investment Negotiations* (ed) (2020) 40.
[19] Guven B 'Modern Provisions in Investment Treaties' in *AfCFTA Investment Negotiations* (ed) (2020) 40.

virus, along with its presented variants, has therefore shown the need to revisit the excuse or defence clauses of the IIAs. The measures adopted by governments may potentially affect the interests of foreign investors and bring to the limelight various national security and general exception provisions of the IIAs.[20] There is a high likelihood that host states might find themselves grappling with investor-state claims challenging their adopted measures in curbing the virus.

New investment treaties merely provide arbitrators with a restrictive and narrow interpretation of liability.[21] Notably, various IIAs provide for security exceptions and general exceptions that may be triggered in an epidemic or in a public health situation as a regulatory objective.[22] However, the current carve-outs of national security exceptions in the old treaties are vague, with far-reaching obligations for States. Generally, there is a lack of provisions that seek to meaningfully preserve and protect the ability of States to regulate without having to pay compensation.[23] Furthermore, the interpretation of national security exceptions has been an inconsistent 'back and forth' of providing greater or less regulatory flexibility to host States.[24] The cited issues increase the likelihood of respondent host states being exposed to costly ISDS claims and proceedings challenging public interest measures.[25] It is paramount to note that, various law firms might be caught in the crossfire representing multi-national corporations in claims arising from the Covid-19 health crisis on strategies for relying on investment treaties and ISDS to bring claims against governments on the basis of Covid-related measures.

Notably, China has taken advantage of this *lacunae* in the IIAs to issue *force majeure* certificates in order to excuse them from any liabilities arising out of investor claims.[26] Thus, the non-incorporation of or reliance on the *force majeure* defence in international investment agreements places a challenge on both the host state and the foreign investor in assessing their contractual rights. This even makes it more complex for the arbitral tribunal to arbitrate over matters where there is no standard qualification of what events give rise to the *bona fide* claim of the *force majeure* defence. In worst cases, other customary international law defences such

[20] Lee J (2020) 185.
[21] Sornarajah M 'The Covid-19 Pandemic and Liability under Investment Treaties' available at *https://www.southcentre.int/southviews-no-204-11august-2020/* (accessed on 20 August 2020)
[22] Article 25 of the SADC Model BIT
[23] Guven B 'Modern Provisions in Investment Treaties' in *AfCFTA Investment Negotiations* (ed) (2020) 40.
[24] Newcombe A 'General Exceptions in International Investment Agreements Eighth Annual WTO Conference' (2008) 6 *Discussion Paper* 6-8.
[25] Guven B 'Modern Provisions in Investment Treaties' in *AfCFTA Investment Negotiations* (ed) (2020) 40.
[26] Melissa S. G & *et al* 'COVID-19 and Investment Treaties: Balancing the Protection of Public Health and Economic Interests'(accessed on 19 August 2020).

as necessity, have been interpreted and applied inconsistently by investment tribunals considering the same or very similar factual circumstances.[27]

It is worth noting that Covid-19 has brought to light the critical role of the *force majeure* defence in international investment law therefore, it has been an eye opener that possible reform might be needed in IIAs for a broad coverage of what constitutes national security and emergency exemptions. It is against this background that this paper examines whether IIAs need to be revisited to incorporate the *force majeure* clauses to serve as a defence for unforeseeable events such as the Covid-19 pandemic.

1.3. RESEARCH OBJECTIVES

1.3.1. General Objective

This study seeks to explore whether Covid-19 can give rise to the legitimate use of the defence of *force majeure* international investment law and the eventual incorporation of *force majeure* as a defence in IIAs.

1.3.2. Specific Objectives

1. To provide a conceptual overview of *force majeure* as a defence in IIAs.
2. To investigate whether Covid-19 can give a legitimate rise to the defence of *force majeure*.
3. To explore international jurisprudence on the *force majeure* doctrine.
4. To propose a suitable model for the incorporation and interpretation of the plea of *force majeure* in IIAs.

1.4. RESEARCH QUESTION

1.4.1. General Research Question

The main overarching question is, to what extent can the defence of *force majeure* be relied upon as an international investment law defence and whether it can be incorporated in IIAs in light of the Covid-19 pandemic?

1.4.2. Specific Research Questions

1. What is the conceptual overview of *force majeure* as a defence in IIAs?

[27] Bernasconi-Osterwalder N. *et al.*, Protecting Against Investor–State Claims Amidst COVID-19: A Call to Action for Governments (2020) 5, Commentary IISD.org also available at *https://www.iisd.org/system/files/publications /investor-state-claims-covid-19.pdf* (accessed on 20 August 2020)

2. How does international jurisprudence on the defence of *force majeure* apply in clearly interpreting cases arising from the Covid-19 pandemic?
3. What is the suitable interpretation of defence of *force majeure* vis-à-vis the Covid-19 pandemic in IIAs defences?

1.5. SIGNIFICANCE OF THE STUDY

This study is critical because, amidst the current international investment law concerns on the preservation of host states' right to regulate, it examines the need to incorporate *force majeure* clauses in IIAs. The study will provide clarity on the appropriate measures and provisions to invoke when States are faced with unprecedented events that make it impracticable for Parties to exercise their obligations under the IIAs.[28] If a clear framework is devised, stipulating what constitutes the defence of *force majeure*, it will reduce the number of disputes that arise due to similar crises such as the Covid-19. This will ensure that both Parties do not exploit this *lacuna* by justifying illegitimate claims. In other words, this study is critical in that the incorporation of an elaborate and high-standard clause will ensure that the defence succeeds on a case-by-case basis to cover even future crises.

Notably, the incorporation of a *force majeure* clause has a significant bearing on promoting the international investment law space and sustainable development objective of the preservation of States' right to regulate in accordance with public policy.[29] Hence, the study intends to fill this knowledge gap by addressing the afore-mentioned issues.

1.6. LIMITATION OF THE STUDY

Covid-19 pandemic has highlighted the deficiency in the existing IIAs, that there are no comprehensive defence clauses embedded in them to absolve or preclude a defaulting host state or foreign investor from their obligations under the treaties entered into. Hence, this study was limited to mostly international soft law instruments that have comprehensively provided for the defence of *force majeure* which aptly affords both parties a justification to not honour their obligations. Due to the inability of BITs or IIAs to extensively provide for a comprehensive defence on similar crises to the Covid-19 pandemic this study was limited to a narrow approach.

[28] Trenor A J & Lim S H (2020) 1.
[29] Chidede T *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* (LLD Thesis, University of the Western Cape, 2019)16

1.7. METHODOLOGY

As a unique study, this mini-thesis employs a qualitative approach and doctrinal approach. The two approaches are critical to the mini-thesis in that they provide a solid basis to the examination of whether IIAs need to be reformed to incorporate *force majeure* clauses in light of the Covid-19 pandemic. In achieving this, desktop and library-based research was employed to analyse primary and secondary sources. The primary sources to be considered will be in the form of international and domestic legislation, policies, regulations, and government documents. Secondary sources include journal articles, issues reports, books, theses, discussions, legal commentaries, conference papers, peer-reviewed journal articles and internet sources.

1.8. CHAPTER OUTLINE

This mini thesis comprises five chapters:

Chapter One introduced the subject by providing a general introduction and overview of the study. It presented the background to the study, which provided the genesis and impact of the Covid-19 crisis on the existing IIAs. The chapter then presented the problem statement, research objectives and questions, significance of the study, limitation and scope of the study and the methodology.

Chapter two presents the conceptual overview of force majeure. In understanding the concept, a brief historical development of the defence will be considered. Chapter two will also consider how different legal systems qualify *force majeure* as a defence. In addition, the chapter shall further distinguish force majeure from other defences.

Chapter three examines the interplay between the Covid-19 pandemic and *force majeure* in international investment law. In achieving this the chapter highlights the impact that the Covid pandemic has had on businesses. The chapter further discusses *force majeure* vis-à-vis Covid-19 and investigates whether Covid-19 can amount to a *force majeure* event as an escape clause from liability. In achieving this, the chapter also zeroed into the countries, USA and China to establish the approach they have undertaken as to whether Covid-19 falls within the purview of what amounts to a force majeure event.

The fourth chapter the international jurisprudence of *force majeure* and the approach it may take in its incorporation into IIAs. The chapter will achieve this by drawing lessons from selected soft law international instruments and identified treaties that have enshrined ideal

escape clauses, such as public health defences, national security laws as well as force majeure clauses.

Chapter five is the concluding chapter. It will provide a summary of what was discussed in each chapter, particularly, whether Covid-19 can give rise to the bona fide claim of *force majeure* and the ideal model structure of the plea of *force majeure* in IIAs.

CHAPTER TWO

UNLOCKING THE DOCTRINE OF FORCE MAJEURE AS A STATE DEFENCE

2.1. INTRODUCTION

The objective of any Party entering into an agreement is to ensure the legal certainty of the contractual Parties. This affords the Parties the opportunity to fully understand and reasonably anticipate their agreed-upon obligations, rights, and liabilities. Put differently, legal certainty is required to ensure that a contract is carried out, which promotes adherence to the obligations and rights outlined in the contract. The basis for this concept is the latin maxim pacta sunt servanda which states that, 'an agreement's provisions must be adhered to'.[30] It is noteworthy, however, that contractual performance is not unqualified. Events or situations may make it difficult to carry out the terms of the contract, or at the very least, open the door to renegotiation of the agreement's original conditions.

In the global arena, many States have invoked *force majeure* as a defence to absolve themselves of accountability for losses incurred by investors in the event of calamities. The global crisis brought on by the Covid-19 outbreak has shown the weaknesses in international investment agreements (IIAs) and functioned as an X-ray. Concerns regarding the definition of *force majeure* events, the inclusion of a suitable *force majeure* provision, and a clear interpretation of the defence have been brought up by the state of contractual relations during the pandemic.[31]

Given the aforesaid, this segment of the study shall explore the definition of *force majeure* as a State defence. This will be achieved by providing a study of the historical evolution of the doctrine from the nineteenth century till present day. To better understand the extent of its application, this paper evaluates the different definitions of what *force majeure* entails, as well as how different legal systems view *force majeure*. The paper also presents related different concepts that have a close relationship with the *force majeure* defence and are mostly misunderstood *as force majeure* events. Finally, the chapter provides a conclusion based on the foregoing.

[30] Tessema H Y 'Force Majeure and the Doctrine of Frustration under the UNIDROIT Principles, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis' (2017) 58 *Journal of Law, Policy and Globalization* 33.
[31] Zrilic J 'Armed Conflict as Force Majeure in International Investment Law' (2019) 16 (1) *Manchester Journal of International Economic Law* 2.

2.2. BRIEF HISTORICAL DEVELOPMENT OF FORCE MAJEURE DEFENCE

2.2.1. The 19th Century

Early nineteenth (19th) century riots, revolutions, and civil wars unavoidably disrupted the circumstances conducive to contractual fulfilment. Claims for damages were brought against negligent States due to the political unrest and its detrimental impact on the fulfilment of contracts.[32] At the onset of this political turmoil, States rarely invoked the *force majeure* plea to justify non-performance. This created a need to develop the law on State responsibility, particularly, the consideration of *force majeure* in inter-state relations.[33] In response to this need, *force majeure* developed as a plea to discharge a State from contractual responsibility and liability for damage caused by external, unforeseen or irresistible events.[34] During the 19th Century, a *force majeure* event related to limited external events, such as 'insurrections' and 'civil wars'.[35]

The *force majeure* argument was first used to justify non-performance by attributing it on a "superior force" that operated outside of a state's borders. It was intended to shift the blame and release any Party from accountability for the results of acts by a "superior force" by portraying the State as an innocent victim. As a result, claimants were given a risk assignment. The host States were not required to reimburse the claimant or pay damages for non-performance because the claimant took on the risk.[36] This was irrespective of any existing causal link between the State's actions and the resultant damage caused.[37] This position on the claimant's assumption of risk was buttressed in the 1830 Belgium incident between the USA and UK on the bombardment of Antwerp.[38]

[32] Arnulf Becker Lorca postulates that these claims displayed a situation that brought forward the 'centre' against those in the 'peripheries' and 'semi-peripheries'. This argument characterises the modern notion of national treatment and most favoured national treatment as it focuses on the how the host state treats foreigners, hence, prescribing a standard of treatment.
[33] Paddeu F 'Force Majeure' ed in *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018) 290.
[34] Paddeu F *Force Majeure* (2018) 290.
[35] Paddeu F *Force Majeure* (2018) 292.
[36] Paddeu F *Force Majeure* (2018) 290-291
[37] For further reference see, 'the French response to Spanish claims for indemnities in the Saida Incident of 1881, reported in Kiss, Répertoire de la pratique française en matière dedroit international public (1962) 3 *Journal* 618–19.
[38] See Laurent P H on 'State Responsibility: A Possible Historic Precedent to the Calvo Clause' (1966) 15 (2) (2) *The International and Comparative Law Quarterly* 395-421 and see also Laurent P H, 'Anglo- American Diplomacy and the Belgian Indemnities Controversy 1836– 42' (1967) 10 *Historical Journal 197,* with summarised facts.

The lack of consideration of the State's contribution or causation of the resultant damage in a *force majeure* event was a point of criticism. There was a growing consensus among States that certain instances indicated a causal link between damage and the conduct of a host State in response to the operation of the superior force.[39] This resulted in the formulation of broad concepts that recognized the causal relationship between the actions of the State and the harm caused by a *force majeure* occurrence. Therefore, when damage was inadvertent and involuntary, there could be no claim for reparation.[40] Furthermore, redress could be sought where one Party had intentionally, without provocation and necessity, decided to destroy the private property of the other Party.[41] Therefore, in 1930, the Hague Conference for the Codification of International Law established the *force majeure* argument as a basic concept of international law in an effort to absolve the State of any liabilities brought forward by the foreign investors.[42] However, this created many questions regarding the invocation of this defence because an overwhelming number of academics and adjudicators were unsure of the precise definition or nature of this defence.[43]

2.2.2. The 20th Century

Around the turn of the 20th century, the force majeure defence transitioned from being an artistic word to an established part of international customary law. There are occasions in which extraordinary circumstances make it difficult for a State Party to fulfil its commitments under a treaty or accord, a fact that is now widely acknowledged and accepted in domestic, transnational, and international legal systems.[44] However, in the first half of the 20th century, the customary status of the plea remained unclear. The doubts on the customary status of *force majeure* were, however, appeased by the UN Secretariat's impressive compilation of the practice of this defence.[45] Hence, this defence started to gain recognition under international law by arbitrators, diplomats as well as scholars.[46] Later, the 20th century saw the prominent

[39] Paddeu F *Force Majeure* (2018) 291
[40] Paddeu F *Force Majeure* (2018) 291
[41] Paddeu F 'A Genealogy of Force Majeure in International Law' (2012) 82 (1) *British Yearbook of International Law* 384.
[42] Zrilic J (2019) 7
[43] Zrilic J (2019) 7
[44] Zrilic J 2019) 2
[45] During the Vienna Conference several States where doubtful that this domestic concept was recognised under international law.
[46] Paddeu F *Force Majeure* (2018) 291.

application of the defence in broader circumstances, such as, the exercise of a State's right of self-preservation.[47]

2.2.3. Post 21st century

The recent international trend of developing international investment treaties has led to the defence of *force majeure* rarely being invoked. Furthermore, there are several cases where the defence has been unsuccessful. This is attributed to the high evidentiary standards for its success, particularly, the preclusion of a State's wrongfulness.[48] As international civil and legal procedure developed, host states began to call for arbitral procedures against host states on behalf of foreign investors. The host states retaliated by citing the defence of *force majeure* against these allegations. Accordingly, the Articles on Responsibility of States for Internationally Wrongful Acts (ARS) codified this defence.[49] In order to protect against non-performance liability in the event of an unforeseen event outside the contractual Parties' control, the word has been inserted into all legal frameworks, both local and foreign. State immunity from culpability for damages or compensation was one of the outcomes of classifying all wars, insurrections, and revolts as *force majeure* events.

2.3. THE DOCTRINE OF FORCE MAJEURE

The concept of *force majeure* has its origins in human responsibility and morality.[50] The doctrine was established under the French Civil Code in 1804 based on Roman Dutch Law which was referred to as *Vis Maior,* which meant a 'superior force'.[51] Under the French Civil Code the definition of *force majeure* encompasses two requirements, irresistibility and unpredictability.[52] It is implied that there are certain superior obstacles that prevent a Party from performing under the terms of the contract. Similar to that, these exceptional occurrences or obstacles are typically referred to as *force majeure*.[53] It was based on the moral principle *ad*

[47] See Arias 'The Non- Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War' (1913) 7 AJIL 724, 742. Also see Paddeu F *Force majeure* 290.
[48] Zrilic J (2019) 2
[49] An illustration of the use of the Articles in the case of *LAFICO v Burundi*[49] *(1991)* In addressing Burundi's argument of 'objective impossibility', the Tribunal turned, among others, to draft Article 31 adopted by the Commission in 1979. It endorsed the provision as adopted and dismissed the plea as 'the alleged impossibility is not the result of an irresistible force or an unforeseen external event beyond the control of Burundi'.
[50] Paddeu F *Force Majeure* (2018) 285
[51] Paddeu F *Force Majeure* (2018) 285 & 303
[52] Lorenzo & Partners 'Comparison of commonly-used Force Majeure and Hardship Clauses in International Contracts' available at *https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf* (accessed on 16 October 2020)
[53] Force majeure is defined by the Art.1218 of the French Civil Code as the occurrence of an event which is beyond the control of the obligor, which could not have been reasonably foreseen at the time of the entry into the

impossibilia meno tenetur (possibility is the limits of obligation) which means that 'no one is expected to perform the impossible'.[54] Therefore, in the event of a temporary incident, performance is only stopped if the delay makes it necessary to discontinue the contract. Similarly, in the event that the effects are irreversible, the agreement automatically ends, relieving the parties of any further obligations.[55]

Even though *force majeure* is widely acknowledged, the doctrine is referenced differently in different legal systems and regimes. Considering the many allusions or implications, it is generally agreed upon that the defence absolves a defaulting Party of any liability for treaty terms broken because of uncontrollably strong or unanticipated intervening circumstances.[56] The current inconclusive definition of *force majeure* was illustrated in the case of *National Oil Corporation v Sun Oil Company*.[57] In which the tribunal exhibited its appreciation in the complexities in the definition of *force majeure*. The tribunal equally observed a less strict application of the doctrine in long-term international contracts as compared to domestic contracts. In its *obiter dicta*, the tribunal recommended a revisiting in the application of *force majeure* under legislation.

In light of the aforementioned, the idea of *force majeure* is acknowledged as a defence in a number of international legal systems. Most legal systems agree that *force majeure* is a mechanism for fully or partially absolving the wrongdoer of various obligations arising under derelicts, torts, and other offences that are connected to unavoidable, supervening events due to their strength or predictability.[58] This common understanding has been linked to the notion that, *'one must not be bound to perform the impossible'*. This notion represents a legal excuse which excuses the defaulting Party from non-performance of an obligation due to an overpowering, supervening event.[59] This legal excuse relieves a promisor from responsibility for non-performance in certain circumstances.

contract and the effects of which cannot be avoided by appropriate measures, and which prevents performance of its obligation by the obligor.

[54] Sibert, Trait é de droit international public vol. 1, (1951) 333.

[55] Lorenzo & Partners 'Comparison of commonly-used Force Majeure and Hardship Clauses in International Contracts' available at https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf (accessed on 16 October 2020)

[56] Paddeu F *Force Majeure* (2018) 285

[57] *National Oil Corporation v Libyan Sun Oil Company* 733 F. Supp. 800 U.S. District Court D. Del March 15, 1990.

[58] Paddeu *Force Majeure* (2018) 285

[59] Zrilic J (2019) 1

The doctrine of *force majeure* may be used in the context of international investment treaties as a defence to absolve both the State and the investor of liability for failure to meet their obligations. It is evident that this defence focuses on circumstances when an unanticipated incident or irresistible force forces the State to act in a way that is averse to the terms of the treaty, so rendering the State's performance of its treaty-based responsibilities all but impossible. Article 23[60] of the ARS promulgates the aforesaid position. *Force majeure* may be said to have occurred "when the law recognizes that without default of either Party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible." As earlier stated, Justinanians Digest also opines that 'nobody is bound by the impossible' *impossibilium nulla obligatio.*[61] Hence, triggering a *force majeure* clause in contracts allows certain terms of an otherwise legally binding agreement to be ignored because of unavoidable circumstances.

2.4. RATIONALE FOR THE PLEA OF FORCE MAJEURE

A Party to a contract must uphold the interests of the other Party and be bound by their duties. This principle, known as pacta sunt servanda, has historically been emphasized by both the Common Law and Civil law systems. This rule is significant because it is predicated on the idea that trustworthy promises are necessary for productive economic activity.[62] The rationale for the plea of *force majeure* is to strike a balance between enforcing the principle of pacta sunt servanda and new circumstances arising after consummation of a contract which make the performance of a contract impossible or impracticable.[63] The balance is necessary for the occurrence of unknown circumstances may have a number of detrimental effects on the contract. These may include, amongst other things, impossibility to perform or where performance remains possible, but becomes exceedingly onerous or ceases to be of any use to the contracting Party.[64] The significance of a *force majeure* clause in a contract is apparent from the afore mentioned and should not be underestimated. The reason for this is that the pacta sunt servanda principle is not applicable in situations of *force majeure.*

[60] Article 23 of ARS
[61] Zrilic J (2019) 1-3
[62] Mikelenas 'General Questions on Contract Law: A Comparative Study' (Vilnius: justitia, 1996) 34
[63] Dadomo C & Farran S *French Substantive Law: Key Elements* (1997) 48-49
[64] Dadomo C & Farran S (1997) 48-49

2.5. FORCE MAJEURE AS AN EXCEPTION TO PACT SUNT SERVANDA

The principle of *'pacta sunt servanda'* is one of the most important and oldest principles in international law. The principle originates from the Latin maxim *pacta convent quae neque contra leges neque dolo mail inta sunt oemnimodo observanda sunt* which means, "agreements which are neither contrary to the laws nor entered into fraudulently should be observed in every manner".[65] The principle of *pacta sunt servanda* was initially in force as an uncodified custom, without being provided for in any treaty or legislation. However, around the 19th century, the principle was codified, without naming it as such, in various multilateral declarations and recognized in several rulings by international tribunals.[66] The principle was eventually adopted by the Covenant of the League of Nations, as well as the United Nations Charter[67]. In 1969, the *Vienna Convention on the Law of Treaties* explicitly incorporated the principle in its *Preamble and Article 26* of the Convention. The Article reads that "*every treaty in force is binding upon the Parties to it and must be performed by them in good faith*". As a result, the principle of *pacta sunt servanda* forms the basis of almost all international law in terms of the binding effect of treaties.

The component of *'good faith'* seeks to compel States to ensure that the conditions of treaties are fulfilled, and State signatories do not evade obligations based on restrictions borne out of domestic municipal law. Considering the above, it follows that the principle of *pacta sunt servanda* or sanctity of contracts extends to the arm of international investment law. In the case of *Lena Goldfields v. USSR*[68], the Tribunal held that, where a State unilaterally cancels a contract, the State must compensate the investor.

Similarly, in the case of *Sapphire International Petroleum Ltd. v National Iranian Oil Co ("NIOC")*[69], the government of Iran had nationalized assets belonging to Sapphire International. This was contrary to a stabilization clause in their concession agreement, which specifically Stated that the government would not take any administrative or legislative action that would adversely affect the investor.[70] The arbitral tribunal reasoned that the unilateral

[65] Marmins D J 'Is the Corona Virus a Force Majeure that Excuses Performance of a Contract?' available at https://www.agg.com/news-insights/publications/is-the-coronavirus-a-force-majeure-that-excuses-performance-of-a-contract/ (accessed on 10 October 2020)
[66] Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract' (2009) 198- 199
[67] Alina K *Public International Law* 3rd ed (2008)20-28
[68] *Lena Goldfields v. USSR* (1950-51) 36 Cornell law Quarterly 42 at para.22
[69] *Sapphire International Petroleum Ltd. v National Iranian Oil Co* (1963) 35 I.L.R. 136.
[70] *Sapphire International Petroleum Ltd. v National Iranian Oil Co* (1963) 35 I.L.R. 136.

termination of the contract rendered the State susceptible to pay compensation to Sapphire International. In arriving at their decision, the tribunal primarily relied upon the principle of pacta sunt servanda. This fundamental principle of law espouses that contractual undertakings must be respected, hence, failure to uphold that agreement amounts to a breach of contract.[71]

The two foregoing cases significantly acknowledge that the doctrine of pacta sunt servanda has been subject to certain qualification and any breach arising from the failure to uphold the terms of the contract will lead to the defaulting party compensating the other party.

Ideally, *Jus cogens* norms, which are fundamentally fundamental pre-emptory principles from which it has been agreed there shall be no departure, are the basis for one limitation under international law. Furthermore, the principle of pacta sunt servanda appears to be balanced by legal theory and practice with the *clausula of rebus sic stantibus*, which asserts that, "contracts are enforceable to the extent that matters remain the same as they were at the time of the contract coming into force".[72] This idea includes the Common Law notion of frustration as well as the Civil Law defence of *force majeure*. The rationale is that strict application of this principle may lead to infringement of justice, reasonableness, and good faith. Put simply under international law, a Party can invoke a defence under a *force majeure* and the doctrine of frustration in compelling circumstances, thereby deviating from the principle of pacta sunt servanda or sanctity of contracts.

2.6. CIVIL LAW PERSPECTIVE OF FORCE MAJEURE

As already noted, the plea of *force majeure* originates from French legal practice. The French Civil Code does not provide for any specific rules for situations where performance of a contract becomes compromised because of changed circumstances. However, the French Courts are famous for their extremely strict application of the principle of pacta sunt servanda in demanding performance of each Party's obligation under a contract.[73] For this reason, under French law, a Party may only be exonerated from performance of a contract in the case of a superior force *(force majeure),* accidental event or an external cause *(cause etrangere).* In

[71] The rule of pact sunt servanda is the basis of every contractual relationship, it is trite law that contracts are entered or agreed upon through the willingness of parties to contract under the guiding principle of 'freedom of contract' and hence must be upheld.

[72] Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract'(2009) 199

[73] Mazzacano J P 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2012) 2011 (2) *Nordic Journal of Commercial Law*

French jurisprudence, the foregoing three concepts are used interchangeably to define a situation where performance of a contract becomes impossible or impracticable owing to some objective circumstances. [74]

Almost all attempts by the French Civil Courts to expand the limits of the *force majeure* doctrine and apply it to cases of more cumbersome performance have failed. The Court de Cassation (the 'french supreme court') is committed to its conventional approach of relieving the debtor of their obligation to complete a contract only in situations where such performance is rendered impossible by unforeseen, unavoidable, and uncontrollable events like strikes, embargoes, natural disasters, war, and criminal offenses.[75] In the classic case of *Canal de Craponne*[76], the french supreme court Stated that since *Article 1134* is a general and absolute text, it is not for the Courts to take account of time and circumstances in order to modify contracts made by the Parties.[77] Such a strict approach by french supreme court has largely remained unchanged until present day.

The underlining principle is that the court's authority to amend the agreement or close any gaps in it cannot be supported by the application of fairness, good faith, or customary law standards. Stated differently, a judge cannot be granted the authority to void a contract or alter its terms due to any changes in the economic environment. Therefore, even in situations where performance becomes extremely difficult or impossible, the creditor has the authority to demand specific performance from the debtor.[78]

In comparison to civil courts, french administrative courts employ a more flexible approach in the application of the doctrine of *imprevision*.[79] This is because administrative courts mainly deal with claims related to matters of public interest, such as, service contracts, concession agreements and arrangements pertaining to public interests. To prevent distortion of public interest, there is a willingness by administrative courts to apply the doctrine of *imprevision*.[80] In contradiction, the french civil courts deal principally with disputes between private individuals or companies and thereby apply a strict approach by rejecting the plea of *force*

[74] Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract' (2009) 199
[75] Baranauskas E & Zapolskis P (2009) 199
[76] *Canal de Craponne case* (1876) 1 Cass civ
[77] Harris D & Tallon D *Contract Law Today: Anglo-French Comparisons* (1989) 228 -229.
[78] Schmidt S J *France International Encyclopaedia of Laws: Contracts* (1999) 221.
[79] Mazzacano J P (2012) 1
[80] Dadomo & Farran *French Substantive Law: Key Elements* (1997) 48– 49.

majeure and giving preference to the spirit and intent of *pacta sunt servanda* and Party autonomy.

The French courts encourage contract parties to include special adaptation terms in their agreements that permit contract modification in response to altered circumstances, as a remedy for the rigid approach. Indexation provisions, such as those based on stock exchange indexes or inflation, are recommended in modern contracts to enable automated recalculation of the contract price upon a specific degree of index fluctuation. Furthermore, hardship clauses are a common feature of modern contracts, requiring the Parties to rework the agreement if the extraordinary conditions specified in the clause materialize.[81]

The case of *Kahara Bodas*[82] and *Himpurna*[83] both agreed that the basis for the *force majeure* argument is civil law. Despite having its roots in civil law, common law recognizes its applicability just as much. English courts have the authority to determine the extent to which the *force majeure* plea can be used in this situation. The diverse body of case law originating from civil and common law implies that a universal definition of *force majeure* does not exist in case law. The interpretation of a *force majeure* is case-and jurisdiction-specific. In conclusion, it is evident that French legal systems take a rigid stance when it comes to the sanctity of contracts because their civil courts tend to uphold the ideas of *pacta sunt servanda* and party autonomy. The only exception allowed is the plea of *force majeure* which allows, in objective circumstances, the termination of a contract or exonerating Parties from performance.

2.7. COMMON LAW PERSPECTIVE OF *FORCE MAJEURE*

Under common law, there is no doctrine of *force majeure*. Rather, the term *force majeure* suffices as a convenient 'label' used to refer to clauses which relieve a Party from performance of its contractual obligation where the performance is rendered impossible by events outside its control. The foregoing clearly shows that *force majeure* is a contractual tool as opposed to a doctrine of common law. It therefore cannot exist independently of being written or incorporated in a contract. In this regard, English Courts are unwilling to imply a *force majeure* clause or provision into the contract where no express language exists. In such situations,

[81]Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract' (2009) 199-201

[82] *Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465* F Supp 2d 283 (SDNY, 2006).

[83] *Himpurna v. Indonesia* (2000) 25 YCA 13.

Parties may opt to rely on the doctrine of frustration instead.[84] A *force majeure* clause is a product of contractual drafting as opposed to a common law doctrine. Its effectiveness in protecting a Party's position largely depends upon the manner, style, and technique of its drafting. Generally, *force majeure* clauses are drafted in a similar manner. For instance,

(1) An event beyond a Party's control (reasonable control) which by the exercise of reasonable care the Party is not able to prevent or overcome; or

(2) An event beyond a Party's control (or reasonable control) which by the exercise of reasonable care, but excluding measures which are not economical or feasible, the Party is not able to prevent or overcome.[85]

In view of the literal clause, specific examples of *force majeure* events are then normally listed in the contract. Common examples include, but are not limited to, acts of God, industrial action, breakdown of machinery, inability to obtain approvals, failure of supplies and native title claims. Certain clauses will effectively deem such examples to be force majeure events by providing that a force majeure event means "an event beyond the reasonable control of a Party, including the following." It is worth noting that there have been a significant number of cases considering *force majeure* clauses in England and other common law jurisdictions, such as, Australia.[86]

Notwithstanding the foregoing, there is no established body of law as to the manner in which such clauses operate and may be construed. This is because the construction and interpretation of a particular clause depends largely upon the particular words used in the clause and the intention of the Parties as reflected in the wording of the contract. In addition, a Party who wishes to invoke a *force majeure* plea must show that it took all reasonable steps towards performance of a contract. This position is illustrated in *Brauer & Co (Great Britain), Ltd v James Clark (Brush Materials)*[87] where the sellers claimed the protection of the *force majeure* clause. The Court of Appeal held that,

> 'The clause protected the sellers in respect of the subject related to export licence clause. Singleton LJ considered the sellers had failed to demonstrate they had taken reasonable steps to obtain a licence. He further noted that the sellers may have been entitled to rely on the clause had they been able to demonstrate they could not obtain a licence except on

[84] Groom A Force Majeure Clauses (2004) *AMPLA Yearbook Paper*. 286-288
[85] Groom A (2004) 286-288.
[86] Groom A (2004) 286-288.
[87] *Brauer & Co (Great Britain), Ltd v James Clark* (Brush Materials) [1952] 2 All ER 497.

> prohibitive terms or terms entirely outside the contemplation of the Parties. However, there was no such evidence in the present case……. Lord Denning LJ[88] further stated that this clause is a special exemption inserted in favour of the sellers. To enable them to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a license to export during any part of the shipment period." His Lordship stated a price one hundred times higher than the contract price between the sellers and the buyers would create a fundamentally different situation entitling the sellers to relief. Therefore, a mere standard increase in market prices did not provide relief.'

It can then be discerned that the above analysis clearly shows that a plea of force majeure under common law is a tool of contractual mechanism as opposed to a legal doctrine. This invariably provides that the plea cannot be invoked independent of a contractual clause incorporated into the contract. Therefore, where a *force majeure* clause is missing in the contract, Parties under English law can rely on the doctrine of frustration. Unlike the civil law doctrine of *imprevision*[89] the English or common law doctrine of frustration creates more space, frustration covers frustration of purpose, a situation where performance remains possible but is no longer meaningful.[90]

2.8. DISCHARGE CLAUSES IN CONTRACTS

2.8.1. Force Majeure Clause

Force majeure relates to an unforeseen event which is beyond any State's control and renders the performance of an obligation under a contractual agreement practically impossible.[91] This is a concept and defence that essentially exists in both domestic and international law, inclusive of, international investment law.[92]

A *force majeure* clause is a contractual provision which excuses one or both Parties from liability due to the impossibility to perform their obligations as a result of circumstances beyond their human control.[93] It is a clause that allocates risk between the Parties when an unforeseen event makes it impossible or impracticable for a Party to perform. Ideally, *force*

[88] Brauer & Co (Great Britain), Ltd v James Clark (Brush Materials) [1952] 2 All ER 497.
[89] Translated as unforeseen circumstances doctrine.
[90] Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract' (2009) 200-201
[91] Article 23 of the Internationally Wrongful Acts of 2001 as established by the International Law Commission's Articles.
[92] Article 23 of the Internationally Wrongful Acts of 2001
[93] Groom A (2004) 286-288.

majeure clauses preclude a Party from liability by altering the Party's rights and obligations under an agreement when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations.[94]

Force majeure events stipulated under a contract might include acts of God, such as severe acts of nature or weather events including floods, earthquakes, hurricanes, or explosions. Acts of governmental authorities such as expropriation, condemnation, and changes in laws and regulations equally suffice as *force majeure* events.[95] Other human induced acts which constitute *force majeure* include wars, acts of terrorism, and epidemics, strikes and labour disputes. Certain accidents and typical economic hardship are not enough to qualify as a *force majeure* event on their own. [96]

The application of a *force majeure* clause varies from one jurisdiction to the other. However, it is trite law that the right of Parties to contract must be respected and upheld irrespective of their jurisdiction. The *force majeure* clause extends beyond acts of God in certain jurisdictions, like California, to include situations where there is an uncontrollable interference that occurs without the party's involvement and that could not have been avoided by exercising caution, diligence, and discernment.[97]

In the case of *Mathes v. City of Long Beach*[98] it was held that:

> 'Even in the case of a force majeure provision in a contract, the mere increase in expense does not excuse the performance unless there exists an extreme and unreasonable difficulty, expense, injury, or loss involved. Owing to its french origins, most force majeure clauses resort to consultation of French law in their interpretation.'

It follows therefore, that the purpose of such a clause is to release the Parties to an agreement from liability in the event they cannot fulfil the terms of a contract for reasons beyond their control.

---

[94] Moore F 'Will Covid-19 trigger a Force Majeure Clause?'available at *https://www.pinsentmasons.com/ out-law/ guides/Covid-19-force-majeure-clause* (accessed on 19 August 2020)

[95] Zrilic J 'Armed Conflict as Force Majeure in International Investment Law' (2019) 6-7

[96] Seng H 'Does the COVID-19 Outbreak Constitute a Force Majeure Event? A Pandemic Impact on Construction Contracts' (2020) 8 *Journal of Civil Engineering Forum.*

[97] Marmins D J 'Is the Corona Virus a Force Majeure that Excuses Performance of a Contract?' *https://www.agg.com/news-insights/publications/is-the-coronavirus-a-force-majeure-that-excuses-performance-of-a-contract/* (accessed on 10 October 2020)

[98] *Mathes v. City of Long Beach* [1953] 121 Cal. App. 2d para. 473, 477, 263

2.8.2. Hardship Clause

A hardship clause is a contractual term that refers to a situation when Parties to a contract may encounter a situation which may render it difficult for them to perform or fulfil their contractual obligations.[99] The Parties have the option to renegotiate the terms of their contract in this case thanks to the hardship clause. A hardship clause gives the parties the legal leeway to negotiate new, mutually beneficial parameters for the agreement. Hardship clauses deal with the presumption that the basis of the contract or the contractual equilibrium is destroyed if a dramatic change in circumstances occurs after the contract was established.[100]

As a result, hardship clauses force a contract to be revised whenever unfavourable events significantly change or affect its economy. In situations where the Parties to the contract choose to carry out the terms of the agreement rather than dissolve it, hardship clauses are applicable. The idea and workings of hardship clauses are ideally primarily intended for usage in long-term contracts.

Furthermore, the notion of hardship acknowledges that a significant modification of the contractual balance gives the underprivileged Party the right to request a sincere renegotiation of the agreement and to have it modified to reinstate the initial contractual balance, or to request that the agreement be terminated by the court in the event that the renegotiation attempt is unsuccessful. The unforeseen change giving rise to fundamental alteration in the economics of a contract as the situation covered by a typical hardship clause corresponds closely with the legal doctrine of *imprévision* (lack of foresight) in french law. However, the french concept concerns itself with instances where relative position of the Parties to a contract is completely modified or altered owing to supervening events, which were initially unexpected.[101]

Regarding international contractual practice, provisions speaking to hardship deal with instances which can be foreseen. Hardship will suffice where a change in circumstances is so

[99] Lorenzo & Partners 'Comparison of Commonly Used Force Majeure and Hardship Clauses' (2020) available at *https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf* (accessed on 14 October 2020)

[100] The term 'foundation of the contract' is more attributable to common law, the term 'contractual equilibrium' to civil law.

[101] Report of International Contracts Working Group ('Groupe de Travail Contracts Internationaux') on hardship provisions of 1975 in: M. Fontaine 'Droit des contracts internationaux, Analyse et commentaire de clauses' Paris, FEC, 1989.

severe and fundamental that the promisor cannot be held to its promise notwithstanding the possibility of performance.[102]

The prevailing consensus is that hardship clauses are divided into two main sections. Typically, the clause's initial section specifies when it applies. The repercussions of hardship are covered in the second section of the clause. A few of the clauses define or specify the standards for the contract's revision. Restoring the Parties' economic balance to what it was at the time the contract was finalized is one instance of such a clause. Hardship clauses provide for penalties in the event that the contract's parties are unable to come to a compromise and do not achieve an agreement. Generally, sanctions consist of a third party modifying a contract or ending a contract.[103]

A primary distinction between a *force majeure* provision and a hardship clause is how the altered circumstances impact the terms of the agreement. The principles of force majeure and hardship offer the possibility to renegotiate, terminate, or suspend the contract. Similar to a *force majeure* provision, if one of the Parties becomes temporarily unable to fulfil, the obligations to perform are only suspended; there is no duty to provide compensation. Suspension may also occur in the event that the hardship circumstances materialize, and the Parties negotiate the adjustment. If the parties cannot agree on the revised plan, the contract may be suspended for a predetermined amount of time, after which each party may cancel the contract if the hardship conditions persist.

2.9. THE DOCTRINE OF FRUSTRATION

As earlier alluded to, adherence to contractual terms is a strict legal rule. This legal principle is, however, absolutely unfair on the promisor to be held liable for breach of contract for failure to comply with his/her contractual obligations due to an unforeseen event that was beyond their control.[104] However, the law provides for an equitable remedy that discharges the promisor's liability by declaring the contract frustrated.[105] Frustration is a common law doctrine which provides that after a contract is made, subsequent events may occur through no fault of the Parties, to make its performance impossible, discharging the obligations under it.[106] Thus

[102] Jenkins H S 'Exemptions for Non-performance: CISG, UNIDROIT Principles - A Comparative Assessment' (1998) 72 (6) *Tulane Law Review* 13
[103] Rudolf D. *Principles of International Investment Law* 2nd edition (2012) 15-23.
[104] Richards P *Law of Contrac*t 13 ed (2017) 530.
[105] Richards P *Law of Contract* 13 ed (2017) 530.
[106] Elliott C & Quinn F *Contract Law* (2009) 302 London: Pearson Longman.

frustrating events are events subsequent to the conclusion of the contract that make performance impossible or radically change the contract in that the substantial object of the contract is no longer attainable. [107] It can then be adduced that frustration of the contract discharges the Parties from any future performance. The afore-mentioned position was advocated for in *Chandler v Webster*[108] where it was held that, Parties can be liable for rights accrued prior to the frustrating event, as opposed to the future event and equally where there is partial performance, the performing Party is entitled to recovery of the payment for the performance.

Therefore, literal performance may still be possible, but it will be radically different from the original contract.[109] Hence the frustration of a contract automatically discharges the Parties from any binding legal effect of the contract by bringing it to an end.[110]

There are certain circumstances that bring the doctrine of frustration into operation. One such circumstance, per the parent case of *Taylor v Caldwell*[111] is the destruction or unavailability of the subject-matter of the contract before performance falls due. Another is the subsequent change in the law which renders the performance illegal, Governmental interference in the activities of one or both of the Parties, equally amounts to frustration.[112]

The operation of the doctrine is subject to four limitations. Firstly, self-induced frustration will not discharge the obligations under the contract. Secondly, the contract will not be discharged where it is more onerous to perform because of an intervening event. Thirdly, if the frustrating event was foreseeable at the time the contract was formed, the contract is not discharged.[113] Lastly, if the Parties have provided for the frustrating event in the contract by inserting a *force majeure* clause, as per *Jackson v Union Marine Insurance*[114] the contract will be discharged.

English law rejects any granting of the relief for changed circumstances not amounting to impossibility. The doctrine of frustration is not extended to situations of impracticability where due to unforeseen circumstances, performance could be only rendered with 'extreme and

[107] Mvunga M P & Ng'ambi P S *On Contracts* (2010) 274.
[108] *Chandler v Webster* [1904] 1 KB 493
[109] *Davis Contractors v Fareham UDC* [1956] AC 696
[110] Richards P *Law of Contract* (2017) 530-531.
[111] *Taylor v Caldwell* [1863] 3 B&S 826.
[112] Richards P *Law of Contract* (2017) 530-531.
[113] Richards P *Law of Contract* (2017) 530-531.
[114] *Jackson v Union Marine Insurance* [1874] LR 10 CP

unreasonably difficulty, expense, injury, or loss.[115] Treitel,[116] concludes that no english decision supports a general discharge by impracticability and that several *dicta* of high authority appear emphatically to reject such a rule. Given the above, it can be concluded that economic fluctuations do not frustrate a contract under english law.

Before the doctrine of frustration was established in *Taylor v Caldwell*[117] the Court in *Paradine v Jane*[118] laid down the 'absolute contract theory'. This theory entailed that a contractual responsibility was absolute once the contract was made. Subsequent events could not justify non-performance. To deal with foreseen difficulties, hence, Parties often insert *force majeure* or hardship clauses in contracts.

2.9.1. Distinction between the Doctrine of Frustration and Force Majeure

There is a stark contrast between the plea of *force majeure* and the doctrine of frustration. As earlier noted, *force majeure* has its origins in French civil law and has no doctrinal position under common law. Under Common Law, the term *force majeure* suffices as a convenient 'label' used to refer to clauses which relieve a Party from performance of its contractual obligation where the performance by events outside its control. In similar respects, there exists several notable differences between the doctrine of frustration and standard *force majeure* clauses. Firstly, a *force majeure* clause suffices as a contractual term; the contents of which are consensually agreed to by the Parties. On 3the other hand, the doctrine of frustration is a common law doctrine. Secondly, in order for frustration to suffice, there must be occurrence of a radical change in the circumstances to the extent that contractual obligations can only be performed in a fundamentally different situation.

In contradiction, *force majeure* occurrences are typically specified or constructed with much less restrictions. There is no requirement for a *force majeure* occurrence to result in a drastic shift in the situation. Generally speaking, such an event must be outside of a Party's reasonable control and incapable of being stopped by the use of reasonable measures.[119]

A further distinction is that frustrating incidents usually must be unexpected. While there is very little foreseeability in terms of *force majeure* incidents. Even if the Parties may believe it

[115] Treitel G *Law of Contract* 11th ed (2003) 445.
[116] Treitel G *Law of Contract* 11th ed (2003) 445.
[117] *Taylor v Caldwell* [1863] 3 B&S 826.
[118] *Paradine v Jane* [1647] EWHC. KB. J5
[119] *Brauer & Co (Great Britain), Ltd v James Clark (Brush Materials)* [1952] 2 All ER 497.

is unlikely that certain *force majeure* situations, like supplier failures and mechanical breakdowns, will occur, the events are nevertheless predictable possibilities in many cases.

Furthermore, the prevailing consensus is that contracts are discharged by frustrating circumstances. On the other hand, the provisions of the applicable *force majeure* clause will often determine the consequences of a *force majeure* occurrence. While some *force majeure* agreements release a party from liability for non-performance during the event, others mandate that performance be resumed when the *force majeure* event expires, the former can extend the time period in which performance is expected. Additionally, a contract will typically specify what happens if a *force majeure* incident keeps performance from happening for a predetermined amount of time. However, the common position under English law with respect to the doctrine of frustration and *force majeure* event is that no relief will be granted in the case of an economic imbalance.

Conclusively, it is clear from the above that the common law doctrine of frustration acts to relieve Parties of liability where, the occurrence of a supervening event beyond the control of the Parties creates a radical change in the circumstances in which a contract is to be performed.[120] On the other hand, a *force majeure* plea is not a common law doctrine. Rather, it is a tool or mechanism of contractual drafting.

2.10. CONCLUSION

This chapter has established that the *force majeure doctrine* emanated from the French Civil law. The first inroad of the plea was in the 19th century which States used as an excuse from liability advanced by foreign investors for losses suffered during wars and other internal strife. Notable the defence did not gain much recognition in the 21st century under international investment law. The reason might be that the defence has a high standard of requirements that need to be met for one to succeed.

This chapter has equally established that there is no universally agreed upon definition of *force majeure*, therefore there is no universal law that has advanced the application of *force majeure*. The mere fact the plea is known by different connotations in various legal systems brings about complexities in international investment law in adducing what events constitute a *force majeure*.

[120] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 para.729

Further the chapter has brought to the fore that the codification of the doctrine under the ARS gave it a better standing in establishing the States' exoneration from liability, however, it does not comprehensively cater for the clear and precise requirements for one to satisfy what constitutes force majeure under international investment law. It has also established that force majeure is a defence that is case and jurisdiction specific. There is no 'one size fits all' approach in its application.

Chapter 3 will examine the placement of Covid – 19 pandemic and *force majeure* in international investment law. Thereafter the chapter will delve deeper into examining whether different countries have classified the Covid pandemic as a legitimate defence under *force majeure*.

CHAPTER THREE
COVID-19 PANDEMIC AND FORCE MAJEURE IN INTERNATIONAL INVESTMENT LAW

3.1. INTRODUCTION

Covid-19 is regarded as the biggest worldwide health emergency of the century and the biggest threat since World War II. The impact of the pandemic has been felt globally as it swept through the world economies ravaging even economic powerhouses such as the United States of America and China. The world is in silent prayer and as the dust settles from the pandemic its impact has been felt in the legal sphere. To address the Covid-19 pandemic and its variants, State governments imposed several restrictions on social and economic activities, including complete or partial lockdowns; closure of non-essential businesses; and restrictions on travel and public gatherings. Therefore, both the pandemic and State responses to the pandemic significantly impacted on investments, operations and industries related to foreign direct investment.[121]

According to expert predictions, the globe would henceforth be divided into two periods: the Pre-Covid-19 and Post-Covid-19 eras.[122] The novel Covid-19 pandemic has therefore put the defence of *force majeure* into sharp focus in international investment law. The *force majeure* principle and the common law doctrine of frustration are often invoked as solutions to the ongoing dilemma on how to go on with performance and/or how to discharge the Parties to a contract from the contractual obligations.[123] As earlier established in the previous chapter *force majeure* is a clause commonly found in both commercial and contractual agreements, which States that one or both Parties will not be held liable for damages occasioned by any delay in performance or non-performance of its obligations, upon the occurrence of certain unforeseen events which are beyond the control of the Party.[124] Thus, *force majeure* clauses mainly serve the purpose of allocating risk and providing notice of the event that may delay or exempt a Party from performing its contractual obligation under the agreement or contract.

The core objective of this chapter is to decipher the impact of Covid-19 on International Investment Agreements. In pursuing the said core objective, the chapter will preface by

[121] Mutubwa W A & Mohamed F 'Covid-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift' (2020) 4 *Journal of CMSD* 1.
[122] Lee J 'The Coronavirus Pandemic and International Investment Arbitration - Application of 'Security Exceptions Clauses in Investment Agreements' (2020) 13 (1) *Contemporary Asia Arbitration Journal* 185.
[123] Mutubwa W (2020) 1
[124] *Tennents v Earl of Glasgow* (1864) 2 Macph HL 22.

providing a general understanding of Covid-19 and its impact on businesses. It will further undertake an in-depth analysis of whether or not various States have considered the Covid pandemic as a legitimate *force majeure* event.

3.2. COVID-19 AND BUSINESS INTERRUPTION

The World Health Organization has declared Covid-19 a pandemic, marking the latest in a list of public health crises, which includes SARS, the H1N1 influenza virus, MERS, Ebola, and the Zika virus. The mounting human cost associated with the rapid spread of the Covid-19 virus, causing Covid-19, has provoked stringent preventative measures that restrict the movement of people, and encourage or mandate self-isolation. Some States have made the quarantine mandatory for people with a high risk of exposure to the Covid-19. In contrast, some countries have gone into complete lockdown, while some cities around the world were under near complete lockdown. Meanwhile, several States declared a State of emergency allowing the government to impose mandatory measures to contain the outbreak and some States had called for military assistance to tighten their grip in the battle against the pandemic.[125]

These measures were vital to prevent the Covid-19 from spreading further. Yet, their inevitable economic impacts are already being felt, and have given rise to numerous issues such as labour shortages, reduction in manufacturing capacity and prevention of the cross-border movement of products and services. As a consequence, supply chains have been disrupted, increasing the risk of a growing number of businesses halting their production and halting the provision of services. It has thus been predicted that the economic impacts of the Covid-19 pandemic for some States would be potentially greater than the global financial crisis, as it seriously impacted most sectors of the economy, particularly manufacturing, trading, retail and tourism and travel-related industries.[126]

The impact of Covid-19 has been severe all over the world. However, certain economies are observing a more significant drop, namely developing countries. Africa, developing Asia and Latin America, and the Caribbean are expected to take the biggest hit because developing economies rely more on investment in the global value chain intensive and extractive industries

[125] Pathirana D 'COVID-19 Preventative Measures and the Investment Treaty Regime' available at *https://www.afronomicslaw.org/2020/04/13/Covid-19-preventative-measures-and-the-investment-treaty-regime* (accessed on 13 November 2021).
[126] Pathirana D 'COVID-19 Preventative Measures and the Investment Treaty Regime' available at *https://www.afronomicslaw.org/2020/04/13/Covid-19-preventative-measures-and-the-investment-treaty-regime* (accessed on 13 November 2021).

which mainly were affected. Moreover, developing countries do not have the capacity to introduce the same economic support measures as developed States.[127] The sharp decline in FDI is especially undesirable for developing economies which count on foreign investors to increase employment and create better-paying jobs, as well as bring technical know-how and increase productivity.[128].

3.3. FORCE MAJEURE VIS-À-VIS COVID -19 PANDEMIC

As earlier alluded to in the preceding chapter, *force majeure* goes by many other terms, such as fortuitous events, impossibility, acts of God, unavoidable necessity, physical necessity, frustration, and impracticability.[129] *Force majeure* is invoked in the context of alleged irresistible or unforeseen or unforeseeable, or uncontrollable supervening events that the defaulting Party could neither have prevented nor controlled.[130] The Court in the Kenyan case of *Pankaj Transport PVT Limited v SDV Transami Kenya Limited*[131] quoting from Goirand's French Commercial Code, mentioned that the term *force majeure* is used with reference to all circumstances independent of the will of man, which is not in his power to control, and as such *force majeure* is sufficient to justify the non-execution of a contract.

The phrase *force majeure* does not have a definitive universal meaning, rather it is contemplated by the Parties in the wording of that particular clause expressed in the contract. The same goes to the consequences or effects of its occurrence. Therefore, a contract may be avoided, voided, delayed or given any other resultant effect, as contemplated by the clause.[132]

The boundaries of *force majeure* are constantly being pushed by situations like the Covid pandemic, therefore its application is inexhaustive. To that degree, disagreements on the use and parameters of *force majeure* are frequently feasible.[133] Contracts essentially provide that certain situations must be evaluated contextually as *force majeure*. The primary focus of Acts of God is essentially a *force majeure* event due to its frequently superior force or evident

[127] Guterres A 'World Investment Report' available at *https://unctad.org/publication/world-investment-report-2020* (accessed on 8 March 2021)
[128] World Bank 'How Developing Countries Can Get the Most Out of Direct Investment' available at *https://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report* (accessed on 8 March 2021)
[129] Dellinger M 'Rethinking Force Majeure in Public International Law' (2017) 455 *Pace Law Review 37, No. 2.*
[130] Polkinghorne M & Rosenberg B C 'The Ebola Epidemic and Force Majeure: Expecting the Unexpected, Alternatives to the High Cost of Litigation' (2014) 32 (11) *Journal* 165–78
[131] *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* [2017] eKLR
[132] *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* [2017] eKLR
[133] Nwedu N C 'The Rise of Force Majeure Amid Coronavirus Virus Pandemic: Legitimacy and Implications for Energy Laws and Contracts' (2021) 61 (4) *Natural Resources Journal Winter* 1

reasonable insensibility, supernaturalism, and inconceivability. On the other hand, human activity can cause certain *force majeure* occurrences, such as governmental actions. In contrast to the latter, which occasionally results from Acts of God, the former frequently consists of war, policies, and regulations, while the latter frequently consists of earthquakes, hurricanes, diseases, and similar disasters. For instance, governmental reactions to natural disasters like pandemics, might lead to the implementation of precautionary measures that can hinder the fulfilment of preexisting contractual obligations between Parties.[134]

3.4. WHETHER THE COVID PANDEMIC AMOUNTS TO A FORCE MAJEURE EVENT

There are divergent views on whether Covid-19 pandemic is a valid justification for bringing up a force majeure claim. These discussions primarily concentrate on one side of the argument, drawing conclusions from various premises, without taking into account as to whether Covid is a traditional force majeure example for various contracts. Hence, the main points of contention in the current arguments are as follows:

(i) wording or language of a contract for which a force majeure due to Covid-19 can be raised;
(ii) whether the contract even contains a force majeure provision;
(iii) whether the pandemic or a related concept is included in the reasons for excusing performance; and
(iv) whether a requirement for contractual notice was provided in the contract and has been met.[135]

Further arguments contend that the *force majeure* clause in a contract's exact contractual language is the only basis for analysing concerns regarding non-performance of obligations owing to Covid-19 and the ensuing effects.[136] Furthermore, it has been asserted that these provisions will be interpreted in accordance with the applicable law by means of general explanatory conventions.[137] More definitively, according to other scholars, Covid-19 by itself is not likely to be an example of a *force majeure*.[138] This article failed to explain what language

[134] Nwedu N C, (2021) 4.
[135] Nwedu N C, (2021) 10.
[136] Nwedu N C, (2021) 9-10
[137] Nwedu N C, (2021) 10-11
[138] Nwedu N C, (2021) 10-11

could be used for Covid-19 to become a classified *force majeure* in contracts, and instead resorted to past discussions about the language used in contracts.

In a similar vein, it suggested that Courts might view the government's containment measures in reaction to Covid-19 as a result of a *force majeure* situation rather than the virus itself.[139] This suggestion might imply that a move made by the government is not seen as using *force majeure* incident, either separate from or in addition to the pandemic, and may not benefit from a contractual Party's declaration of success. Because of this, it has become necessary for Parties to constantly take into account related government responses, actions, policies, or laws as components of a *force majeure* event. Although a disregard for others might not inevitably deny Parties a defence in the event that reasonable facts are present, to assume that governmental initiatives now hinder the effectiveness of already-existing contractual duties that Parties have agreed to.[140]

According to the civil law, common law, and international law standards set out on *force majeure* clauses, they have historically been easy to implement, however, the Covid-19 element has put the economic ecosystem in jeopardy and increased the level of scrutiny needed to determine its applicability.[141] Hence, the following must be taken into account in assessing whether COVID-19 amounts to *force majeure*; -

3.4.1. Unforeseeable

In general, unforeseeable means not reasonably foreseeable by Parties when they are entering into the contract.[142] This can also imply an event that has so very little chance of happening that it would have been unreasonable to have allowed it. This is observed in the Covid-19 outbreak that occurred suddenly in Wuhan district in China in December 2019. Neither Party thought that an epidemic outbreak would occur, which later became a pandemic. Some might argue whether the Covid-19 outbreak is a foreseeable event given other previous epidemic outbreaks such as SARS and MERS. However, similar arguments can be given against other

[139] Nwedu N C, (2021) 10-11
[140] Trenor A J & Lim S H (2020) 14
[141] Natarajan P 'May the Force Majeure Be With You: The Impact of the Covid-19 on the Force Majeure Clause in International Law' (2022) 21 (1) *Santa Clara Journal of International Law* 11.
[142] Lazarevic S 'Is There Force in Force Majeure After Covid-19 or The Freedom to Negotiate Risk?' (2023) 54 *University of Miami Inter-American Law Review* 102-104.

events such as earthquakes and tornadoes which are considered as *force majeure* events. It is also undeniable that the scale of this outbreak is unprecedented.[143]

3.4.2. Unavoidable

It means that neither Party could prevent the occurrence of the event or circumstance. This can be observed in the Covid-19 outbreak where since its appearance in December 2019, the spread had been very fast and alarming. On 11 March 2020, WHO declared it as a pandemic. All sectors, including the construction industry have been affected by the outbreak. Its spread through human-to-human transmission makes labour-intensive industries such as construction at a greater risk of contracting this virus. Related to the contractual relations of the Parties, neither Party could prevent the occurrence of this crisis.[144]

3.4.3. Uncontrollable

It refers to the incapability of contracting Parties to control the event and its impact. As the status and level of distribution continues to increase, many governments have taken steps to limit human activities and interactions such as physical distancing and lockdowns. For instance, in Indonesia as of 12 April 2020, the Ministry of Health established a large-scale social restriction in Jakarta, Bogor Regency, Bogor City, Depok City, Bekasi Regency, and other Cities, through the Minister of Health Decree No. HK.01.07/MENKES/239/2020 and HK.01.07/MENKES/248/2020. This shows the development of the Covid-19 had become beyond the control of the contracting Parties.[145]

3.4.4. Impracticable

This refers to the condition where the event and its impact have adversely affected the fulfillment of contractual obligations. The handling of Covid-19 has direct and indirect impacts on the construction industry including disruption to supply chain logistics, delays, suspensions, terminations, and insolvencies.[146]

---

[143] Mutubwa W *Covid-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift* (2020) 4 *Journal of CMSD* 16.
[144] Seng H 'Does the COVID-19 Outbreak Constitute a Force Majeure Event? A Pandemic Impact on Construction Contracts' (2020) *Journal of Civil Engineering Forum* 7.
[145] Kabir D 'Consequences of Crisis and the Great Re-think: COVID-19's Impact on Energy Investment, Sustainability and the Future of International Investment Agreements'(2021) *Journal of World Energy law and Business*
[146] Clearly G 'COVID-19 Public Health Emergency Measures and State Defence in International Investment *Law*' (2020) 8 Alert Memorandum.

Impracticability was illustrated in the English case of *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*[147] it was held that a party who seeks to rely on a *force majeure* provision to excuse it from non-performance bears the burden of proving (on the balance of probabilities) that;

> 'a force majeure event has occurred and that it had the effect specified in the contract such as it being prevented, hindered or impeded from performance, the Court further stated that its failure to perform was due to circumstances outside its control, and there was nothing it could reasonably have done to avoid the force majeure event or mitigate its effects.'

Beyond a Party's responsibility, this entails that the event is not substantially attributable to a Party. In the case of the Covid-19 pandemic, both contracting Parties do not have control or responsibility in accordance with the terms of the contract, unless previously stated in the contract. It is a global health issue that causes many governments in the world to declare a national disaster. Some countries have declared it as a *force majeure* event as observed in France, India, China, and Indonesia.[148]

3.5. DISPARITIES IN COVID-19 INTERPRETATIONS ACROSS DIFFERENT COUNTRIES AS A FORCE MAJEURE

The terms epidemic, pandemic or disease are rarely listed as one of the *force majeure* events. Courts usually tend to interpret *force majeure* clauses narrowly so that it covers only the listed events and similar ones. For instance, if a *force majeure* clause mentions an act of a labour strike is a *force majeure* event, this does not mean that the Courts will assume the threat of a labour strike as a *force majeure* event. Thus, it is crucial to list explicitly the circumstances in the *force majeure* clause. The success of reliance on a *force majeure* clause is very dependent on how it is drafted.

In light of this, there have been differing interpretations of *force majeure* clauses regarding the classification of Covid-19 as an unpredictable, unavoidable event or an impediment beyond our control. Some interpretations have attempted to classify the pandemic under the same headings as diseases, natural disasters, or laws.[149] Various viewpoints emphasize that in order to avoid national economic collapses and to increase market productivity, the enforcement of

[147] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm)
[148] Seng H (2020) 7
[149] Peterson B & *et. al* 'COVID-19 Contractual performance – Force Majeure Clauses and Other Options: a Global Perspective' available at *https://www.mayerbrown.com/en/perspectives-events/publications/ 2020/03/ Covid19-contractual-performance-force-majeure-clauses-and-other-options-a-global-perspective* (accessed on 23rd June, 2022)

force majeure clauses must be limited.[150] Furthermore, numerous sources contest the applicability of *force majeure* clauses for the second, third, and fourth waves of Covid-19, arguing that the pandemic was predicted following the first wave.[151] Consequently, various nations have chosen to utilize distinct strategies when creating and executing *force majeure* clauses in order to tackle the Covid-19 pandemic.

Therefore, the following are some of the countries that have rendered different interpretations of what constitutes the Covid Pandemic as a force majeure.

3.5.1. United States of America

Although State laws pertaining to *force majeure* clauses vary, in general, *force majeure* is not inferred into contracts; instead, the parties must have specifically allowed for *force majeure* as a justification for performance. States in the United States interpret *force majeure* provisions strictly and usually demand that the intervening incident be unanticipated and outside of the parties' control.[152] The contract's wording is frequently crucial; even in cases where an extraordinary and unexpected occurrence occurs, a party must usually prove that it qualifies as a *force majeure* event within the terms of the agreement. When a party uses a *force majeure* provision to exempt performance, it usually means that it has to prove that the occurrence was uncontrollable and not its fault or negligence.[153]

Therefore, during the contract formation process, the Parties negotiate specific *force majeure* provisions under the UCC's contractual laws.[154] Since common law jurisdiction is followed by most US Courts, the plain language of the contract is heavily considered when interpreting *force majeure* clauses. For instance, New York Courts strictly construe *force majeure* clauses and restrict relief claims to the *force majeure* events that are specifically mentioned in the contract and does not contain a catch-all provision.[155] As such, the Party claiming to be able to invoke must prove beyond a reasonable doubt that the event was caused by the other Party's failure to perform.

---

[150] Natarajan P *May the Force Majeure Be With You: The Impact of the Covid-19 on the Force Majeure Clause in International Law* (2022) 21 (1) *Santa Clara Journal of International Law* 11.
[151] Natarajan P (2022) 11
[152] Trenor A J & Lim S H 'Navigating Force Majeure Clauses and Related Doctrines in Light of The Covid-19 Pandemic' (2020) 17 *Young Arbitration Review 13-22.*
[153] Trenor A J & Lim S H (2020) 17
[154] Natarajan P (2022) 12
[155] Jennifer S & Mckenzi B '*US:When Is Force Majeure Really Force Majeure?* available at *https://www.bakermckenzie.com/en/insight/publications/2020/03/when-is-force-majeure-really-force-majeure* (accessed on 12 July 2023)

Furthermore, the legal requirements for non-performance in California are more stringent than in New York, meaning that even with their best efforts to lessen the effects of a *force majeure* event, the invoking Party must show that non-performance "could not have been prevented by the exercise of prudence, diligence and care."[156] When a Party alleges that a *force majeure* event materially interfered with their ability to perform, California Courts frequently require them to show how they took mitigation steps. However, Texas Courts have set themselves apart in their evaluation standards by reading *force majeure* clauses strictly according to their plain language and refusing to apply them to justifications that point to an increased financial burden.[157]

As demonstrated, US Courts set plain language as the cutoff point for figuring out if a Party's non-performance qualifies as a *force majeure* event.[158] Regarding the cited *force majeure* event, the Courts also consider whether the Party making the invocation could have performed but for the unforeseen event which made it impossible for it to perform.[159] According to the Court's ruling in *Bush v. Protravel International Inc., New York's*[160] declaration of a State of emergency following the events of 9/11 justified a *force majeure* excusal because performance was not feasible at the time. In the midst of the 2008 financial crisis, the same Courts in New York decided that a Party's inability to construct a restaurant because of a lack of funds was not excused under *force majeure* on the grounds of hardship.[161] The *force majeure* events specified in the Parties' negotiated contracts are given precedence by US Courts, who do not "recognize routine disruptions in supply chains, financing, demand, or the market" as *force majeure* events.[162]

US Courts have concentrated on analysing the language of *force majeure* clauses and determining whether the outbreak was sufficiently unpredictable to make performance impossible when it comes to non-performance resulting from Covid-19. Most Courts typically depend on whether Covid-19 was defined as a "disease" or "epidemic" as written in *force*

[156] Cox J C & Spoerl T J 'A U.S. Litigator's Perspective on Force Majeure' available at *https:// www .hoganlovells. Com/en/publications/coronavirus-pandemic-and-implications-of-force-majeure* (accessed on 17 July 2022).
[157] Natarajan P (2022) 13
[158] Natarajan P (2022) 13
[159] Natarajan P (2022) 13
[160] Bush v. Protravel International Inc. 192 Misc.2d 743 (2002)
[161] Cox J C & Spoerl T J 'A U.S. Litigator's Perspective on Force Majeure' available at *https://www.Hogan lovells. Com/en/publications/coronavirus-pandemic-and-implications-of-force-majeure* (accessed on 17 July 2022).
[162] Natarajan P (2022) 13

majeure clauses, or if it qualified as a "act of god."[163] Covid-19 fits under the previously stated categories as an *force majeure* event because "at least 140 countries have reported Covid-19 cases to the World Health Organization (WHO), distinguishing it from other epidemics and weighing in favor." The US government has responded to the Covid-19 crisis in a number of ways, which supports its general recognition of the Covid-19 incident as a *force majeure* event, even though there isn't much case law in this area. The US federal and State governments have therefore given different interpretations to this question while adhering to their core tenet of using the straightforward language of the force majeure clause.[164]

Of interest is the case of *JN Contemporary Art LLC v Phillips Auctioneers*[165] where the Southern District of New York held that;

> The Covid-19 pandemic is a natural disaster in that it is beyond the parties' reasonable control and thus triggered the *force majeure* clause, following this pronouncement the Court excused the Defendant's termination of the agreement, despite the fact that the relevant agreement did not specifically enumerate "pandemic" or "infectious disease". As a result, it is possible that this decision could direct judicial opinion in favour of broader excuse of performance in Covid-19 disputes.

As a result, this decision might have an impact on future Court decisions that provide stronger defences of performance in Covid-19 instances. Because of this, the US Court favours a case-by-case consideration when determining whether a particular situation qualifies as a *force majeure* occurrence, while also considering the language contained in each of the Parties' four contract corners.

3.5.2. China

In contrast to the US, China is governed by civil law which permits its Courts to make *force majeure* related decisions.[166] *Articles 117-118 of the People's Republic of China* (PRC) *Contract Law* and *Article 180 of the General Rules of the Civil Law* establish the *force majeure* doctrine, defining *force majeure* events as "unforeseeable, unavoidable and unconquerable situations, viewed objectively." Since the General Principle of Civil Law was adopted in 1986,

[163] Cox J C & Spoerl T J 'A U.S. Litigator's Perspective on Force Majeure' available at *https:// www.Hoganlovells. Com/en/publications/coronavirus-pandemic-and-implications-of-force-majeure* (accessed on 17 July 2022).
[164] Natarajan P. (2022) 13
[165] *JN Contemporary Art LLC v Phillips Auctioneers* LLC No. 1:20-cv-04370-DLC (S.D.N.Y. 2020).
[166] Bai C & Liu J Y 'Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change' available at *https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context -force-majeure-and-material-adverse-change.html* (accessed on 17 July 2022).

force majeure laws have been in place in China.[167] In English law of the frustration of purpose and the "requirements of its French counterparts" shaped China's definition of *force majeure*.[168] In reality, even in the absence of a formal *force majeure* clause, these *force majeure* laws automatically apply to business agreements governed by PRC law.

Comparatively speaking, Chinese Courts have handled the most *force majeure* clause rulings and have dealt with the subtleties involved in striking a balance between contract and civil law. The Supreme People's Court of China has had the perfect opportunity to issue multiple judicial interpretations applying the *force majeure* laws in pandemic situations, given that the country has experienced the Severe Acute Respiratory Syndrome (SARS) epidemic caused by another strain of coronavirus.[169] Due in large part to the sheer number of multinational enterprises and corporations based there, China possesses "more substantial national interests than other countries."[170] Therefore, considering its need to sustain its national economy through contractual agreements with other countries, China has a well-developed and notable approach to *force majeure*.

Due to the combination of the unpredictable element and the claimed event's insurmountable and unavoidable nature a higher threshold than founding English law *force majeure* is therefore "harder to trigger" under Chinese law.[171] In addition to prompt notice, the Party seeking to relieve themselves of responsibility must demonstrate that their performance is more burdensome. When it comes to international contracts, PRC law additionally mandates that the Party in default provide *force majeure* certificates that have been issued by the China Council for the Promotion of International Trade–a trade association.

The certificates serve to "validate the occurrence of an event, which may qualify as a *force majeure* event under general circumstances" and "assist the government in invoking *force majeure* remedies."[172] The CISG provides clarification on what constitutes an acceptable *force majeure* event for the purpose of obtaining a certificate in international supply contracts. Although the certificates have no legal weight, they "add a level of authenticity" and credibility

[167] Natarajan P (2022) 13
[168] Bai C & Liu J Y 'Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change' available at *https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html* (accessed on 17 July 2022).
[169] Tsang K F 'From Coronation to Coronavirus: Covid-19, Force Majeure and Private International Law' (2020) *FORDHAM INT'L L.J.* 187-189
[170] Tsang K F (2020) 187-189
[171] Tsang K F (2020) 188-189
[172] Tsang K F (2020) 194-195

to *force majeure* claims.[173] Once all of these conditions are satisfied, the Party in default may choose to terminate the agreement under *force majeure* or waive any or all of the contractual obligations.

To safeguard contracts and guarantee business continuity, Chinese Courts have also applied a stringent standard when interpreting *force majeure* clauses in Covid-19 cases. The Party advancing a *force majeure* claim must demonstrate not only that unanticipated, inevitable, and insurmountable circumstances exist, but also that the pandemic was not recognized as a performance impediment at the time the contract was formed.[174] The SARS pandemic left China unprepared to deal with the widespread effects of non-performance; instead, it forced the country to publish a notice declaring that non-performance was acceptable if it was "directly caused by administrative measures taken by the government to prevent the SARS epidemic" or impossible to perform.[175] China, however, clarified its policies regarding *force majeure* clauses as applied to Covid-19 early on, drawing on its exposure to *force majeure* conflicts and experiences in judicial decisions from the SARS epidemic. China came to the specific conclusion that Parties should be permitted to seek *force majeure* relief in line with PRC Contract law if they allege non-performance "due to the government measures relating to Covid-19."[176]

Due to government orders, new policies, and local regulations that have an impact on businesses as a result of Covid-19, China's Courts still permit *force majeure* claims to be made, however, the Courts also require the Parties making the claim to do more than just notify the other Party of the *force majeure* event; they must also reasonably estimate their losses.[177] Since mitigation was previously not required by law, this creates a higher standard. But the upside is that, in a novel development in the realm of non-performance, Parties who claim hardship or performance issues owing to anticipated market risk brought on by Covid-19 may wish to renegotiate the agreement to maintain business operations despite the pandemic.[178]

[173] Natarajan P (2022) 13
[174] Zunarelli Studio Legale Associato, 'COVID-19, Force Majeure and Performance of Contractual Duties – Insights from Chinese High Courts, ICLG' available at *https://iclg.com/briefing/12928-covid-19-force-majeure-and-performance-of-contractual-duties-insights-from-chinese-high-courts*, (accessed on 12 March, 2023).
[175] Natarajan P (2022) 13-15
[176] Natarajan P (2022) 13-15
[177] Zunarelli Studio Legale Associato, 'COVID-19, Force Majeure and Performance of Contractual Duties – Insights from Chinese High Courts, ICLG' available at *https://iclg.com/briefing/12928-covid-19-force-majeure-and-performance-of-contractual-duties-insights-from-chinese-high-courts*, (accessed on 12 March, 2023).
[178] Natarajan P. (2022) 13-15

In order to maintain a productive economy, Courts are taking a calculated risk by enforcing slightly different policies for the Covid-19 pandemic than they did for the SARS pandemic. Contract modification or renegotiation is typically reserved for material adverse changes or changing circumstances prior to Covid-19. In the end, the Court has highlighted the "need for Parties to demonstrate flexibility and fairness" in order to comply with PRC laws for Covid-19, all the while preserving a robust business environment.[179]

Unlike the United States, China's government has shifted to rely more on *force majeure* clauses in contracts to maintain domestic and international business relationships during the pandemic rather than waiting for regulations from the government. Both practitioners and Courts point out benefits of specifically defining *force majeure* events in contracts with words like "governmental actions or disruptions," "epidemic," or "pandemic."

It would take more time for Courts to consider each situation under the PRC civil law definition on an individual basis in the absence of an explicit statement of *force majeure* events. Since it streamlines their analysis and cuts down on the time needed to consider each case separately, China's Courts accept and favour the straightforward language of *force majeure* clauses when deciding whether an event qualifies as an *force majeure* event.[180]

3.6. CONCLUSION

This chapter had the core objective of dissecting the interplay between Covid-19 and *force majeure* in international investment law, in executing this objective the chapter began by providing a general understanding of Covid-19 and its impact on businesses, it then proceeded to canvass the concept of *force majeure* vis-à-vis Covid-19 and determined whether Covid-19 can trigger a force majeure plea or clause. In light of the foregoing argument, it can be noted that there is no clear-cut answer as to whether Covid can stand on a *force majeure* plea. Courts have equally concurred that contractual language is crucial to establishing if Covid-19 falls within the ambit of what constitutes a *force majeure* event. Interestingly, Courts have further adopted a four-prong test in evaluating whether Covid-19 amounts to a *force majeure* event, which are questions are:

i. Whether the event qualifies as a *force majeure* under the contractual language. Based off this question it is important to ensure that the contract or agreement entered has

[179] Natarajan P. (2022) 15-16
[180] Natarajan P. (2022) 13-15

sufficiently provided for a *force majeure* event which caters for the application of Covid to fit within the parameters of a *force majeure* event;

ii. whether the risk of non-performance was foreseeable and able to be mitigated;

iii. causation between the *force majeure* event and the resultant non-performance; and

iv. whether performance is truly impossible.

It is sufficed to state that on one hand Covid-19 cannot be universally considered as an outright trigger of a *force majeure* clause, this is in view of the fact that it is established on fact-based case to case basis as can be seen from the approach undertaken by USA and China.

It is also worth noting that on the other hand Covid-19 has a high potential of triggering a *force majeure* clause as can be seen from the case of *JN Contemporary Art LLC v Phillips Auctioneers* and a Party can only be exonerated from liability if it falls within the ambit of the four-prong test. However, there are other instances where the second, third and fourth variants of the Covid pandemic might not be considered as a *force majeure* as they were probably foreseeable. Hence, a Party's claim of *force majeure* in this vein is most likely to fail.

Chapter four will examine the jurisprudence of *force majeure* and delve into examining international investment treaties and different pieces of legislations that enshrine emergency and *force majeure* clauses.

CHAPTER FOUR
INTERNATIONAL INVESTMENT TREATIES AND JURISPRUDENCE ON FORCE MAJEURE DOCTRINE

4.1. INTRODUCTION

The last decade of the 20th century witnessed a number of major events, including the fall of communism, a radical shift in economic and political regimes in many countries. Globalization and financial crises in many emerging countries have led to voices calling for a reform of the international financial architecture, and an explosion in the number of International Investment Agreements (IIAs) between countries, especially, at the bilateral level. A broad international legal framework is taking shape, consisting of a wide variety of principles and rules, of diverse origins and forms, differing in their strength and specificity and operating at several levels with gaps in their coverage of issues and countries. This framework includes rules of customary international law, soft law instruments, bilateral, regional and multilateral agreements.[181]

While the purpose of these government actions is legitimate and reasonable namely to protect public health these profound and unprecedented measures will adversely affect both domestic and foreign companies' managements and businesses. Under the typical protection of International Investment Agreements (IIAs), the affected foreign investor is entitled to initiate an investment claim, asserting that the regulatory environment of the host State has been changed, or arguing that the host State is in breach of the commitments which have been made and constituted the foundation for the investments.[182] And the host State might therefore be claimed to have failed to provide the Fair and Equitable Treatment (FET) required by the IIA. The tension between the host State's Covid-19 measures and the foreign investors' legitimate expectations hence arises.[183]

The core objective of this chapter is to decipher the impact of COVID-19 in International Investment Agreements, in pursuing the said core objective the chapter will review the international jurisprudence on *force majeure* and the approach it may take in its incorporation

[181] Annie T *International Investment Agreements and Their Impact on Foreign Direct Investment: Evidence from Four Emerging Central European Countries. Economics and Finance* (2007) 14-16
[182]Kabir D 'Consequences of Crisis and the Great Re-think: COVID-19's Impact on Energy Investment, Sustainability and the Future of International investment Agreements' (2021) 4 *Journal of World Energy law and Business* 4
[183] Kabir D (2021) 4

in IIAs. The chapter will achieve this by drawing lessons from various Treaties and Soft Law Instruments that have enshrined ideal escape clauses.

4.2. POTENTIAL PUBLIC HEALTH DEFENCES UNDER IIA'S

The host State may argue that its regulatory changes to combat the spread of Covid-19 can be justified through the carve-out and exception clauses that are explicitly set out in IIAs and which aim to protect legitimate public welfare objectives, such as public health, even if the arbitral tribunal finds that the obligations of foreign investors are hindered and the host State violates its FET obligation.[184] These defensive clauses are specifically outlined in a few more recent IIAs or investment chapters under free trade agreements. In *Article 31.1 of the Taiwan-India IIA*[185], for example, reference is made to the general exception clause found in *Article XX of the GATT*[186] which provides that the IIA shall not be interpreted to prohibit the host State from implementing or enforcing measures that are necessary to safeguard human life and health, so long as those measures are applied in a compassionate manner. Thus, it is suffice to note that provided the specified conditions are satisfied, such a provision can act as a safety valve for the host State's public health-related Covid-19 mitigation measures.[187]

For instance, the host nation can contend that the decision to halt operations for the most part was made in order to safeguard the lives and health of the local populace, which are more important concerns than the financial interests of foreign investors. Furthermore, since the suspension affects both domestic and foreign businesses equally and there are no reasonably available alternatives with less restrictions that could provide the same level of protection for the population of the host State, the order should be justified under the IIA's public health exception clause on a non-discriminatory basis.[188] Accordingly, if the specified conditions are satisfied, such a provision can act as a safety valve for the host State's public health-related Covid-19 containment measures.

[184] Lucas B & Jingtian C 'Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses' available at *http://arbitrationblog.kluwerarbitration.com/ 20 20/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/* (accessed on 2nd July, 2022)
[185] Article 31.1 of the Taiwan-India IIA of 2018
[186] Article XX of the WTO General Agreement on Tariffs and Trade 1994
[187] Bilateral Investment Agreement Between the Taipei Economic and Cultural Center in India and the India Taipei Association in Taipei Art. 31.1, The India Taipei Ass'n in Taipei–The Taipei Econ. and Cultural Ctr. in India, Dec. 18, 2018 ("Nothing in this Agreement shall be construed to prevent the adoption or enforcement by the authorities of the territory, of measures of general applicability applied on a non-discriminatory basis that are necessary to: . . . (b) protect human, animal or plant life or health; . . .").
[188] Mao-Wei L 'Legitimate Expectations in a Time of Pandemic: The Host State's Covid-19 Measures, Its Obligations and Possible Defenses under International Investment Agreements' (2020) 259-260

It is worth noting that not all IIAs have a clause like this or a public health exception; this is particularly the case for IIAs that were completed much earlier. Nevertheless, the International Law Commission's Draft Articles on States' Responsibility for Internationally Wrongful Acts codify customary international law, which still justifies the Covid-19 preventive measures and potential regulatory changes. The Draft Articles State that;

> In the event of a *force majeure* event or if the suspension affects the population of the host state and affects both domestic and foreign enterprises, a state's liability for failing to comply with its international obligations will be barred. Additionally, the public health exception clause under the IIA should be invoked to support such an order[189].

In view of the foregoing, it can be discerned that the despite the IIAs not being conclusive enough on health exceptional clauses, the defaulting party is at liberty to rely on the Draft Articles on State's Responsibility for Internationally Wrongful Acts. Therefore, if the provision in the IIAs is insufficient to render a defence for non-performance owing to a *force majeure* event, the host State or investor can invoke the force majeure clause under the Draft Articles to exonerate itself from liability.

4.3. HOST STATES' RIGHT TO REGULATE

International law does grant the countries the freedom to make independent decisions, even in a dire situation such as Covid-19, when every nation is obligated to defend its citizens, borders, and sovereignty.[190] A new international relation question emerges when all national and international borders are closed. The rapid spread of the virus seemed to highlight how the international order, which is based on borders and political-territorial spheres, battling complex problems brought on by factors like innovation and the flow of people, goods, and information. The UN Charter gives the State the authority to decide how to uphold international law's protection of its sovereignty.[191] According to *Article 1(1)*[192] of the United Nations Charter provides that, any action taken for protecting one's sovereignty is to deter threats and not to break peace. Further *Article 2(1)*[193] of the UN Charter provides for States and Sovereign

[189] Mao-Wei L (2020) 260
[190] Oishy A & Fariha T M, *International Law and Covid-19,* Research Paper, The University of Asia Pacific (2021) 18
[191] Alam & Mitu, *International Law and Covid-19,* (2021) 18
[192] Chapter 1: Article 1 - Charter of the United Nations - Repertory of Practice of United Nations Organs - Codification Division Publications. (2020).
[193] Chapter 1: Article 2(1)- Charter of the United Nations - Codification Division Publication, (2020).

Equality under this provision the Charter addresses all the privileges it has within its territory and the jurisdiction and freedom of other countries.

Additionally, many scholars have drawn attention to the conflict that exists between upholding the regulatory space of host States and safeguarding the investment interests of foreign investors under IIAs.[194] The spread of Covid-19 is just one more global crisis example of these possible conflicts or healthy global crisis, that is unquestionably a significant example in shaping the narratives of the opposing camps in the modern day.

Further, in light of the classification of Covid-19 outbreak as PHEIC by WHO in accordance with *Article 12 of the IHR,* the arbitral tribunal might consider the existence of PHEIC when deciding whether the public health considerations supporting the measure imposed to stop the pandemic's spread can outweigh the interests of the foreign investor and, therefore, be found legitimate under IIAs, when an investment dispute pertaining to the measure arises?[195]

In arbitral jurisprudence, this method has been used. The guidelines for implementation of *Article 11 of the Framework Convention on Tobacco Control*[196], which is a soft law and not legally binding, were cited and mentioned by the host State and international or non-governmental organizations in the case of *Philip Morris v Uruguay*[197] which illustrates this position, as the tribunal enunciated that a plain packaging requirement for tobacco products did not breach international laws as the measures were taken by the State to protect public health in a valid exercise of police powers. This case has provided a new outlook on the international jurisprudence on a State's right to regulate in the public interest, as well as a State's application of police powers.

The debate in the arbitral proceeding concerned is whether the host State's regulatory measures violated its obligations under the investment treaty. The arbitral tribunal determined and upheld the Guidelines' status and role, which are to, on the one hand, show the genuine public health purpose behind the measure and, on the other, act as factual evidence and a "point of reference" for the reasonableness, proportionality, and justifiability of the measures.

[194] Mao-Wei L (2020) 263
[195] Mao-Wei L (2020) 260-261
[196] Article 11 of the WHO Framework Convention on Tobacco Control, 2005
[197] *Philip Morris Brand Srl (Switzerland), Philip Morris Products S.A (Switzerland) and Abal Hermanos S.A (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case ARB/10/7)

This study, however, makes the argument that, even though stare decisis isn't directly applicable to investment arbitration, the way the arbitral tribunal in the case of *Philip Morris v. Uruguay* addressed non-binding WHO norms should have positive consequences and serve as a model for future tribunals discussing whether the host State's Covid-19 measures are appropriate considering the FET.

In a different flight the Case of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe SADC (T)*[198] illustrates this position in which host States end up paying exorbitant fines to foreign investors and consequently impede states from exercising their right to invoke public policies in the states interest.

4.4. SOFT LAW INTERNATIONAL INSTRUMENTS

In international law of State responsibility, *force majeure* doctrine presents one of the circumstances that preclude the wrongfulness of a State's conduct. In other words, it is one of the circumstances that exonerates a State from responsibility for not performing a particular international obligation. As such, *force majeure* constitutes a defence against a claim of State responsibility and could potentially be used as a host State's defence against claims of foreign investors for the alleged breach of investment treaty obligations.[199]

There are important areas of an international legal regime that governs the legal elements as well as effects of *force majeure* and hardship clauses. The following are some of the Soft Law Instruments and Treaty pieces under review: the FIDIC Standard Form Contract, the UNIDROIT Principles of International Commercial Contracts, the International Chamber of Commerce (ICC) *force majeure* and Hardship Clauses of March 2020 that published model clauses on *force majeure* and Hardship.[200]

4.4.1. The Federation Interanationale Des Ingenieurs-Conseli Standard Form Contract (FIDIC)

The FIDIC form provides general conditions that are widely used for international construction contracts; it is intended to be used in any jurisdiction. It represents fair, balanced and well recognized forms of construction and engineering contract and agreement forms. It is also

[198] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe SADC (T)* Case No. 2/2007 (Judgment of November 28, 2008)
[199] Zrilic J 'Armed Conflict as Force Majeure in International Investment Law' (2019) 16 (1) *Manchester Journal of International Economic Law* 13.
[200] Dessie T *A Comparative Legal Analysis of the Application of Force Majeure and Hardship Clauses in Ethiopia and China in Light of International Law in Situations of COVID-19 Pandemic: The Law and Practice* (2020) 12

based on fair and balanced risk or reward allocation between the employer and the contractor and is widely recognized as striking an appropriate balance between the reasonable expectations of these contracting Parties. Accordingly, the conditions have real commercial value to both the Employer and the Contractor, both at the tendering stage, and during execution of the Contract.[201]

Generally, *force majeure* provisions are construed narrowly as a result, it is typical to advise a party that if a certain catastrophic event is not explicitly specified in a *force majeure* clause's language, then it is not likely that a party could rely on such an event to trigger the rights that the clause envisions. Indeed, it is uncommon to see terms such as "pandemic" or "infectious viral disease" referred to in a construction contract's *force majeure* clause.[202] For instance, according *to sub-clause 19.1 of the FIDIC standard form*[203], *force majeure* is defined as:

> An event or circumstance:
>
> (i) is beyond a Party's control;
>
> (ii) the Party could not reasonably have provided against before entering into the contract;
>
> (iii) having arisen, such Party could not reasonably have avoided or overcome; and
>
> (iv) is not substantially attributable to the other Party.

Sub-clause 19.1 goes on to set out the following non-exhaustive list of exceptional events that may constitute *force majeure* provided the four requirements listed above are met:

i) War, hostilities (whether war be declared or not), invasion, act of foreign enemies.
ii) Rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war.
iii) Riot, commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors.
iv) Strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors.
v) Encountering munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity.

[201] Abdal R 'International Federation of Consulting Engineers (FIDIC) Foundation, Contraction and Publication' (2020) Technical Report.
[202] Mark M. 'Recent COVID-19 related force majeure decisions: what do they mean for construction contracts?' (2021) available at *http://constructionblog.practicallaw.com/recent-Covid-19-related-force-majeure-decisions-what-do-they-mean-for-construction-contracts/* (accessed on 11th December 2021)
[203]

vi) Natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.

In the case of sub-clause 19.1, a pandemic may well be captured if a tribunal was satisfied that conditions are met.

However, in the case of a more limited and specific *force majeure* clause, one party might have to contend that, on the whole, a pandemic is analogous to the events usually specified in such a clause and ought to be applicable; this is not an easy argument to make in the context of intricate international construction disputes, as any party putting forth such an argument would probably be confronted with charges that it is a sophisticated commercial entity that had the chance to modify such a clause during the negotiation process.[204] This kind of counterargument could be convincing if it is frequently the case that the agreement has several customized clauses. Therefore, it is generally preferable to link a claim under a *force majeure* clause to an enumerated event, rather than relying on a catch-all clause or attempting to read the event into the enumerated events.

4.4.2. The UNIDROIT Principles of International Commercial Contracts of 2016

The *UNIDROIT Principles of ICC, 2016*, under its Article 7.1.7 proclaimed *force majeure* as follows:

> (1) Non-performance by a party is executed if the 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.
> (2) When the impediment is only temporary, the excuse shall effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
> (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

[204] Mark M 'Recent COVID-19 related force majeure decisions: what do they mean for construction contracts?' available at *http://constructionblog.practicallaw.com/recent-Covid-19-related-force-majeure-decisions-what-do-they-mean-for-construction-contracts/* (accessed on 11th December 2021)

(4). Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold a performance or request interest on money due.[205]

Therefore, the UNIDROIT Principles of ICC recognize the legal concept of *force majeure* as one of the exemption clauses that limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.[206]

The exemption clause of UNIDROIT Principles therefore includes hardship clauses in addition to *force majeure* clauses. The *force majeure* clause, also known as the doctrine of frustration in the common law system, therefore has the effect of excusing the non-performing party from liability in damages if the preconditions of non-performance owing to an impediment beyond its control, cannot reasonably be expected to have taken into consideration at the time of the conclusion of the contract. In International Investment Arbitrations, there are arbitral awards that show the UNIDROIT Principles of International Commercial Contracts are applied for the interpretations of domestic law.[207] For example, in *Chevron v. Ecuador*[208] and *AHC v. the Democratic Republic of Congo*[209] , the tribunals used the UNIDROIT Principles and alleged the *force majeure* clause to confirm that their interpretation of a relevant domestic law conforms to international expectations.[210]

4.4.3. The International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) issued the Force Majeure and Hardship Clauses in March 2020 with "Long Form" and "Short Term". As such, a Comprehensive Model Force Majeure Clause Has Been Developed by the ICC, a model clause that represents the growing agreement on the conditions necessary to establish a *force majeure* defence.

The ICC Force Majeure and Hardship clauses of March 2020 in its long term defined and listed out presumed events of *force majeure* as follows:

[205] UNDROIT PRINCIPLES of International Commercial Contracts 2016, Article 7.1.7 at 240.
[206] Dessie T *A Comparative Legal Analysis of the Application of Force Majeure and Hardship Clauses in Ethiopia and China in Light of International Law in Situations of COVID-19 Pandemic: The Law and Practice* (2020) 12
[207] Jarrod H 'The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration' (2016) 64 *International and Comparative Law Quarterly* 905
[208] *Chevron Corporation v. Ecuador* (UNCITRAL), Partial Award on the Merits, 30 March 2010 [270], [375]
[209] *African Holding Company of America, Inc v. Democratic Republic of Congo* (ICSID Case No ARB/05/21)
[210] Jarrod H (2015) 905.

(1) 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.[211]

The ICC Force Majeure and Hardship Clause of 2020 stipulated presumed events of *force majeure* that can strengthen the above definitional provision of the clause. The ICC Force Majeure and Hardship Clause of 2020 under Article 3[212], while proclaiming the presumed events of *force majeure* listed out as:

> "In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil the conditions (a) and (b) of Paragraph 1 of the clause, and the affected party only needs to prove the condition (c) of paragraph 1 is satisfied:
>
> a) war (whether declared or not), hostilities, invasion, the act of foreign enemies, extensive military mobilizations;
>
> b) civil war, riot, rebellion, and revolution, military or usurped power, insurrection, the act of terrorism, sabotage or piracy;
>
> c) currency and trade restrictions, embargo, sanction;
>
> d) act of authority, whether lawful or unlawful; compliance with any law or government order, expropriation, seizure of works, requisition, nationalizations;
>
> *e) plague, epidemic, natural disaster or extreme natural event;*
>
> f) explosion, fire, destruction of equipment, prolonged breakdown of transport, telecommunication information system or energy; and
>
> g) general labour disturbances, such as boycott, strike, and lockout, go-slow, occupation of factories and premises."

[211] ICC Force Majeure and Hardship Clauses of 2020, March (2020) 1.

[212] Dessie T *A Comparative Legal Analysis of the Application of Force Majeure and Hardship Clauses in Ethiopia and China in Light of International Law in Situations of COVID-19 Pandemic: The Law and Practice* (2020) 12

From the above ICC *force majeure* clauses, it is possible to say that the approach adopted by ICC is quite clearer than its UNIDROIT Principle counterparts that add the above-presumed events as *force majeure*. Concerning the consequences of *force majeure*, paragraph 5 of the ICC *force majeure* clause provides that a party that successfully invokes this clause is relieved from its duty to perform its obligations under the contract and from any liability and therefore not subject to paying damages or from any other contractual remedy from breach of contract. This is the same effect in the application of UNIDROIT Principles of International Commercial Contract.[213]

Following Covid-19, Parties are more likely to examine *force majeure* clauses closely and in detail to prevent common errors in general *force majeure* provisions. Parties should specify the amount of mitigation that the party claiming *force majeure* must demonstrate, as well as a termination clause. Certain contracts demand mitigation to be demonstrated continuously before they expire, while others demand mitigation to be done in good faith before performance is withdrawn. To make sure that the standard set forth is reasonable and does not impose an undue burden on one side, it is imperative that both Parties specify these details.

4.5. TREATIES AND EMERGENCY OR PUBLIC HEALTH CLAUSES

A treaty can be said to be an agreement formally signed, ratified or adhered to between two nations or sovereigns, it is an international agreement concluded between two or more States in written form and governed by international law. It is also termed as an accord, convention, covenant, declaration, and pact.[214] A treaty represents the willingness by the Parties to abide by agreed obligations contained in an international agreement which could either be a bilateral treaty or multilateral treaty depending on the number of countries involved.[215]

4.5.1. Notable Bilateral Investment Treaties

Given the unprecedented situation, it remains to be seen whether *force majeure* claims would in fact satisfy the international law standards that tribunals will apply. Many BITs include a provision that relates to compensation or reparation in time of war or conflict. Some of these

[213] Dessie T A (2020) 12
[214] Garner B *Black's Law Dictionary* 9th Edition (2009) 1640
[215] Martin E *Oxford Dictionary of Law* 6th Ed. (2006) 545

clauses are in fact drafted more broadly to encompass the more general concept of national emergency and could provide an additional basis for claims.[216]

4.5.1.1 The Mexico - UK BIT

A notable treaty worth considering is the Mexico - UK BIT[217] which provides that;

> Investors of one contracting party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a State of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any their State.

States commonly have little in the way of defences or exceptions that are spelled out in the treaties. In recent years, however, new investment treaties have started to include provisions that have sought to redress this perceived imbalance between the rights afforded to investors and the obligations placed on host States.

4.5.1.2 Netherlands Model BIT

It is worth noting that the Model BIT of the Netherlands[218] expressly seeks to prevent claims for indirect expropriation when measures have been taken to protect, among other things, public health:

> 'Except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Constructing Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of legitimate public interest, such as the protection of public health, safety, environment or public morals, social consumers protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.'[219]

---

[216] Ostrove M Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?'(2020) available at *https://www.dlapiper.com/en/spain/insights/publications/2020/04/Covid-19-a-legitimate-basis-for-investment-claims/* (accessed on 11th December 2021)

[217] See Mexico – UK BIT, 2006 and Ostrove M Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?'(2020) available at *https://www.dlapiper.com/en/spain/insights/publications/ 2020/04/ Covid-19-a-legitimate-basis-for-investment-claims/* (accessed on 11th December 2021)

[218] Netherlands Model BIT dated 22 March 2019.

[219] Article 12(8) of the Netherlands Model BIT.

4.5.1.3 United States of America, the United Mexican States and Canada Treaty

Similarly, the new Agreement between the United States of America, the United Mexican States and Canada (USMCA) provides that, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.[220] Certain treaties also contain a general exception in respect of measures taken to maintain public order.

4.5.1.4 Japan-Korea BIT

For instance, the Japan-Korea BIT[221] does not afford investors protections where a State takes any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.[222]

Given the foregoing, it therefore, remains to be seen whether tribunals will conclude that the outbreak of Covid-19 in any particular country constitutes a national emergency within the meaning of the above cited provisions. For many years, investment treaties and codes have tended to adopt a similar format under which investors are granted rights and host States have assumed obligation in respect of foreign investments.[223]

4.6. CONCLUSION

Based on the foregoing, it can be noted that different clauses in treaties are couched to accommodate various stipulated events, some are more specific than others. What remains prevalent is the notion that the clearly specified events are easily proven on occurrence as opposed to the non-specified.[224] Thus, it is crucial to list explicitly the circumstances in the *force majeure* clause, as the wording of the clause has a significant impact on the viability of

---

[220] Annes 14-B Expropriation Paragraph 3(b) of the Agreement between the United States of America, the United Mexican States, and Canada

[221] Article 16(1)(d), Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, signed on 22 March 2002.

[222]Ostrove M Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?' available at *https://www.dlapiper.com/en/spain/insights/publications/2020/04/Covid-19-a-legitimate-basis-for-investment-claims/* (accessed on 11th December 2021)

[223] Ostrove M Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?' available at *https://www.dlapiper.com/en/spain/insights/publications/2020/04/Covid-19-a-legitimate-basis-for-investment-claims/* (accessed on 11th December 2021)

[224] Ostrove M Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?' available at *https://www.dlapiper.com/en/spain/insights/publications/2020/04/Covid-19-a-legitimate-basis-for-investment-claims/* (accessed on 11th December 2021)

force majeure claims. This position was demonstrated in the case of *Re Cinemex*[225] demonstrates the many approaches Courts have adopted in reading alternative contract defences and *force majeure* clauses, which emphasizes the significance of precise, succinct, and well-written contract writing.

The next chapter will summarise the findings from this study, draw conclusions and make recommendations.

[225] *RE Cinemex USA Real Estate Holdings, Inc*. Case No. 20-14695-BKC-LMI Jointly Administered decided on January 27, 2021

CHAPTER FIVE
CONCLUSION

5.1. INTRODUCTION

International Investment Agreements (IIAs) have been concerned with investment protection. Governmental approaches to investment protection have raised significant concerns on investment governance. This concern is derived from their failure to achieve purported objectives. This has led governments to undertake substantive and procedural reform of the international investment regime. The Covid-19 pandemic has brought to the fore the need to revisit the excuse or defence clauses of the IIAs. The measures adopted by governments may potentially affect the interests of foreign investors and bring to the limelight various national security and general exception provisions of the IIAs. There is a high likelihood that host States might find themselves grappling with investor-State claims challenging their adopted measures in curbing the virus.

This chapter provides a summary and general conclusion on the of what was discussed in each chapter. Thereafter the chapter will provide recommendations based on the findings of this research.

5.2. SUMMARY OF FINDINGS

The Covid-19 pandemic has caused an upsurge of potential conflicts between the State and investors with regard to the protection of their respective interests. On the strength of the four preceding chapters this study has made visible the need to rethink the *force majeure* defence in international investment law. It has been established that the existing investment agreements need to be revisited and reformed in order to incorporate *force majeure* clauses, so that both the States and foreign investors can have a comprehensive understanding of their rights and obligations. It has further delineated the different types of *force majeure* clauses constructed in various soft law instruments, such as the International Chamber of Commerce template, UNIDROIT principles and the FIDIC soft law. A splendid example is provided for under the ICC has in an intelligible way, artfully assembled various circumstances which would qualify as a *force majeure* upon occurrence.

Chapter one gives an overview of the study. It starts by examining the background of the study particularly the coming of the novel Covid-19 pandemic and its impact on IIAs. In reviewing the background study, the chapter carves out the problem statement. In achieving the objectives

of the study this paper further provides for the potential research questions. The chapter also endeavoured to lay out the methodology that the author used in obtaining the necessary information for the study.

Chapter two of the research established that the *force majeure doctrine* emanated from the french civil law. The first inroad of the plea was in the 19th century which States used as an excuse from liability advanced by foreign investors for losses suffered during wars and other internal strife. Notably the defence did not gain much recognition in the 21st century under international investment law. The reason might be that the defence has a high standard of requirements that need to be met for one to succeed. The chapter has equally established that there is no universally agreed upon definition of *force majeure*, therefore there is no universal law that has advanced the application of force majeure. The mere fact the plea is known by different connotations in various legal systems brings about complexities in international investment law in adducing what events constitute a *force majeure*.

Further the chapter has brought to the fore that the codification of the doctrine under the ARS gave it a better standing in establishing the States' exoneration from liability. However, it does not comprehensively cater for the clear and precise requirements for one to satisfy what constitutes force majeure under international investment law. It has also established that force majeure is a defence that is case and jurisdiction specific. There is no 'one size fits all' approach in its application.

Chapter three of the research uncovered that the World Health Organization has declared Covid-19 a pandemic, marking it the latest in a list of public health crises, which includes SARS, the H1N1 influenza virus, MERS, Ebola, and the Zika virus. In view of the pandemic, we might see a rise in foreign investors ultimately bringing claims against the State and the State will most likely have to rely on the defences available in the IIAs. The chapter further established that *force majeure* is a clause commonly found in commercial and contractual agreements, which states that one or both Parties will not be liable for damages occasioned by any delay in performance or non-performance of its obligations, upon the occurrence of certain extraordinary events.

Furthermore, it discussed whether Covid-19 amounts to *force majeure* and the finding of the research was that there is no clear-cut answer as to whether Covid-19 outrightly falls within the ambit of a *force majeure* clause. The chapter also brought into focus the approach taken by the USA and China in dealing with force majeure claims considering the Covid pandemic. It

was established that Courts mainly rely on how a particular contract or IIA is drafted, for instance the International Chamber of Commerce succinctly captures Covid-19 as *force majeure.* Therefore, the onus is on the parties to the agreement to ensure that it has a well drafted *force majeure* clause one that is not vague.

Chapter four dissected the jurisprudence of *force majeure vis-à-vis* Covid-19 particularly in soft law instruments namely, the FIDIC Standard Form, UNDROIT Principles and ICC. In executing this objective, the chapter began by providing the existing general health defences under IIAs and a general understanding of Covid-19 and its impact on Businesses. It then proceeded to canvass the concept of *force majeure* in the soft law instruments. It was established that *force majeure* doctrine is one of the circumstances that preclude the wrongfulness of a State's conduct. In other words, it is one of the circumstances that exonerate a State from responsibility for not performing a particular international obligation. As such, *force majeure* constitutes a defence against a claim of State responsibility and could potentially be used as a host State's defence against claims of foreign investors for the alleged breach of investment treaty obligations.

Under review also were some notable BITs such as the UK- Mexico BIT, United States of America, the United Mexican States and Canada, Netherlands Model BIT and Japan-Korea BIT. It was therefore noted that the rapid diffusion of BITs is one of the most remarkable recent developments in modern international law and developing countries which have now signed numerous treaties, the vast majority since the early 1950s. the afore mentioned BITs contain a common suite of core substantive and procedural provisions designed to promote and protect foreign investment. These core provisions typically include promises of highly vague but clearly pro-investor standards of treatment, such as promises that investors will be treated fairly and equitably or treated on a most-favoured-nation basis or treated as well as domestic investors.

These BITs provide for measures that preclude certain actions taken by the State from being declared wrong in specified circumstances, emergency and national security clauses are one such instance. From the foregoing, it can be noted that BITs do not have the *force majeure* clauses embedded in them. However, a further study into Construction FIDIC soft law instrument, the instrument specifies an event which can amount to a *force majeure* while others choose to provide a broad definition. What remains prevalent is the understanding that, the clearly specified events are easily proven on occurrence as opposed to the non-specified. Thus,

it is crucial to list explicitly the events which amount to *force majeure*. Hence, the success of reliance on a force majeure clause is very dependent on how it is drafted.

In summation chapter four provided a comprehensive analysis on the international investment treaties and jurisprudence on *force majeure*, this was achieved by presenting a keen fragmented outlook on the Soft Law Instruments and international treaties.

The chapter also discussed that a well drafted *force majeure* provision is best thought of as nothing other than a risk allocation tool. It is an endeavour by contracting Parties to peer into the fog of the future, anticipate possible events and circumstances and then allocate the risks associated with those potential future events and circumstances, and the cost of preparing for such events, between the contracting Parties.

As the world's recent experience with Covid-19 may have shown out of the blue events which affect contractual performance do occur. In drafting the *force majeure* clause, the challenge lies in maintaining brevity while at the same time capturing a wide enough array of possible eventualities so as to provide the contracting Parties with some degree of certainty. Legislative drafters might elect to use the recently developed International Chamber of Commerce long-form *force majeure* clause as a starting point.

5.3. RECOMMENDATIONS

In light of the aforementioned findings, the study makes the following recommendations towards the incorporation of *force majeure* clause in IIAs:

5.3.1. The Need to Adopt the Appropriate Language on What Constitutes a Force Majeure Event

The first recommendation is for IIAs to adopt the language captured under the Construction FIDIC Treaty and ICC template as regards to what amounts to a *force majeure* event. The proposed *force majeure* language in the ICC template is meant to be a general-purpose clause that attempts to capture typical extreme events that may affect Parties in most industries. In view of the foregoing, this paper recommends putting a great deal of thought toward customizing it to meet the particular expectations of Parties in different situations. For instance, instead of declaring any acts of certain named government authority as *force majeure* events, Parties can choose to specify only the acts agreed upon by both Parties as qualifying events. This may be a particularly useful approach for investors that wish to expressly include or exclude actions of certain governments from *force majeure* applicability.

5.3.2. Incorporation of Long-Lasting Pandemics such as Covid-19 Pandemic

The *force majeure* provision under the IIAs should also seek to address the temporal element of largescale events like Covid-19. The longer these events persist, the more one should be prepared for them. However, in some extreme cases, an extended period of *force majeure* may cause even the most prepared Parties to be locked in contractual limbo. In order to avoid this and to add more certainty, Parties should consider defining when they can terminate the contract in the event of prolonged *force majeure*.

The new ICC *force majeure* amendments suggest a default period of 120 days of substantial *force majeure* related impediment before Parties have a right to terminate the agreement. This detail not only adds more certainty to the agreement, but it is also gives, Parties a relief period where they are protected from unilateral termination. Depending on the agreement, this default period may be increased or decreased so that industry-specific commercial realities are properly reflected.

5.3.3. Incorporation of Choice of Law Clause Alongside a Force Majeure Clause

It is imperative to incorporate a choice of law clause alongside a *force majeure* clause to unambiguously specify the nation's legal system in case of disagreement and the court of law that will have jurisdiction over future disputes. A choice of law clause's exclusion can cause a lot of long-term issues and may prevent a party from immediately obtaining relief from its contractual obligations. Moreover, if a certain country's laws change while the contract is being fulfilled, it can have an impact on the contractual arrangement and make it harder for the force majeure provision to be applicable.

5.3.4. Reconstruction of Emergency and National Security Clauses in the Old IIAs

As earlier alluded to, most Treaties created before the Covid-19 pandemic, do not take such events as the Covid-19 crisis in to account other than via references to epidemic, pandemic or plague. Taking a cue from the Covid-19 pandemic close, this study recommends that IIAs should consider adding wording to effect that both Parties acknowledge the existence and growing worldwide commercial impact unforeseen health and economic crises or events that will impede the performance of Parties to an agreement. In the event of litigation, provided that there is proof of consideration, this express acknowledgement should provide the court with evidence of the Parties' contractual intention to accept the risks that come the impact of such a crisis.

5.3.5. Incorporation of Renegotiation Clause in IIAs

There is a paramount need to incorporate a renegotiation clause in the IIAs, which is another way in which Parties can ensure that their contracts remain relevant to ever changing business landscape. Upon a triggering event, Parties can contract to renegotiate certain terms of an executed contract through renegotiation clauses. This means that Parties can use Covid-19 related events such as new government orders to trigger optional or mandatory updating of contracts. Alternatively, the passing of a fixed period can be set as trigger to renegotiate in the future. However, Parties should be particularly careful in drafting renegotiation clauses as they may increase uncertainty if left too open-ended. If any material disagreements arise while relying on such clauses, it may create additional friction in business relationships and allow for an unintended termination of the contract.

5.4. CONCLUSION

In summation, with the state of business operations constantly in flux in light of unforeseen crises such as the ended Covid-19. The answer to the question posed in this study is that yes there is need for a reconsideration by Parties to adopt and incorporate a *force majeure* clause in their IIAs. Parties must be adaptable in their approach to drafting treaties now more than ever. Crafting carefully considered *force majeure* clauses is one way that investors can mitigate uncertainty. The new ICC clause referred to above provides Parties with a solid base to prepare for modern extreme events. However, before adopting it in IIAs, Parties must adjust the language based on the degree of risk that they are comfortable with. This can be achieved by defining the scope of *force majeure* through carve-outs and addressing prolonged events through conditional termination rights.

Parties can also use mechanisms such as express acknowledgement or renegotiation clauses to ensure that expectations are in check both during and after the Covid-19 lockdown. Ultimately the power is in the hands of the Parties to protect themselves as much as possible from potential future failures of performance more effort spent in drafting through contracts now will materially reduce time spent resolving disputes in the future.

BIBLIOGRAPHY

BOOKS

Alina K *Public International Law* 3 ed (2008) New York: Routledge Press.

Annie T *International Investment Agreements and Their Impact on Foreign Direct Investment: Evidence from Four Emerging Central European Countries. Economics and Finance* (2007) Paris: Université Panthéon-Sorbonne.

Garner B *Black's Law Dictionary* 9 ed (2009) United States: West Publishing Co.

Dadomo C & Farran S *French Substantive Law: Key Elements* (1997) London: Sweet & Maxwell.

Dessie T *A Comparative Legal Analysis of the Application of Force Majeure and Hardship Clauses in Ethiopia and China in Light of International Law in Situations of COVID-19 Pandemic: The Law and Practice* (2020) South Africa: University of South Africa.

Elliott C & Quinn F *Contract Law* (2009) London: Pearson Longman.

Harris D & Tallon D *Contract Law Today: Anglo-French Comparisons* (1989) Oxford: Clarendon Press.

Martin E. "*Oxford Dictionary of Law*" 6 ed (2006) London: Oxford University Press.

Mvunga M P & Ng'ambi P S *Mvunga, Malila & Ng'ambi on Contracts* (2010) Lusaka: UNZA Press.

Richards P *Law of Contrac*t 13 ed (2017) UK: Pearson Education Limited.

Rudolf D *Principles of International Investment Law* 2 *ed* (2012) London: Oxford University Press.

Schmidt S J F *International Encyclopaedia of Laws: Contracts* (1999) The Hague/London/ New York: Kluwer Law International

Treitel G *Law of Contract* 11 ed (2003) London: Sweet & Maxwell.

CHAPTERS IN BOOKS

Paddeu F *Force Majeure*. (ed.) *In Justification and Excuse in International Law: Concept and Theory of General Defences Cambridge Studies in International and Comparative Law* (2018) Cambridge: Cambridge University Press.

CASES

African Holding Company of America, Inc v. Democratic Republic of Congo (ICSID Case No ARB/05/21)

Brauer & Co (Great Britain), Ltd v James Clark (Brush Materials) [1952] 2 All ER 497.

Bush v. Protravel International Inc. (2002) 192 Misc.2d 743

Canal de Craponne (1876) 1 Cass Civ

Chandler v Webster [1904] 1 KB 493

Chevron Corporation v. Ecuador (UNCITRAL), Partial Award on the Merits, 30 March 2010 [270], [375]

Continental Casualty Company v. The Argentine Republic (ICSID Case No. ARB/03/9), Award, 5 September 2008, para. 227.

Davis Contractors v Fareham UDC [1956] AC 696 para. 729

Himpurna v. Indonesia (2000) 25 YCA 13.

Jackson v Union Marine Insurance [1874] LR 10 CP

JN Contemporary Art LLC v Phillips Auctioneers, LLC, No. 1:20-cv-04370-DLC (S.D.N.Y. 2020)

Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F Supp 2d 283 (SDNY, 2006).

LAFICO v Burundi (1991) 96 ILR 279

Lena Goldfields v. USSR (1950-51) 36 Cornell law Quarterly 42

Mathes v. City of Long Beach [1953] 121 Cal. App. 2d para. 473, 477, 263

Mike Campbell (Pvt) Ltd v Republic of Zimbabwe SADC (T) Case No. 2/2007 (Judgment of November 28, 2008).

National Oil Corporation v Libyan Sun Oil Company 733 F. Supp. 800 U.S. District Court D. Del March 15, 1990.

Pankaj Transport PVT Limited v SDV Transami Kenya Limited [2017] eKLR

Paradine v Jane [1647] EWHC. KB. J5

Philip Morris Brand Srl (Switzerland), Philip Morris Products S.A (Switzerland) and Abal Hermanos S.A (Uruguay) v. Oriental Republic of Uruguay (ICSID Case ARB/10/7)

RE Cinemex USA Real Estate Holdings, Inc. Case No. 20-14695-BKC-LMI Jointly Administered decided on January 27, 2021.

Sapphire International Petroleum Ltd. v National Iranian Oil Co (1963) 35 I.L.R. 136.

Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm)

Taylor v Caldwell [1863] 3 B&S 826.

Tennents v Earl of Glasgow (1864) 2 Macph HL 22.

JOURNAL ARTICLES

Baranauskas E & Zapolskis P 'The Effect of Change in Circumstances on the Performance of Contract' (2009) *Journal* 197 - 216

Dellinger M 'Rethinking Force Majeure in Public International Law' (2017) 37 (2) *Pace Law Review* 455-506.

Klaus P B & Daniel B 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2019-2020) 6 (4) 77-130

Jarrod H 'The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration' (2016) 64 *International and Comparative Law Quarterly* 1-34

Kabir D, Rekha R & Kanika G 'Consequences of Crisis and The Great Re-think: COVID-19's Impact on Energy Investment, Sustainability, and the Future of International Investment Agreements' (2021) 4 *Journal of World Energy law and Business* 1-14.

Laurent P H 'State Responsibility: A Possible Historic Precedent to the Calvo Clause' (1966) 15 (2) *The International and Comparative Law Quarterly* 395-421.

Lazarevic S 'Is There Force in Force Majeure After Covid-19 or The Freedom to Negotiate Risk?' (2023) 54 *University of Miami Inter-American Law Review* 83-121

Laurent P H 'Anglo- American Diplomacy and the Belgian Indemnities Controversy 1836–42' (1967) 10 *Historical Journal* 197-217.

Lee J 'The Coronavirus Pandemic and International Investment Arbitration- Application of 'Security Exceptions' Clauses in Investment Agreements' (2020) 13 (1) *Contemporary Asia Arbitration Journal* 185-204.

Mazzacano J P 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2012) 2 (2011) *Nordic Journal of Commercial Law.* 1-55

Mutubwa W A & Mohamed F 'Covid-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift*'* (2020) 4 *Journal of CMSD Volume* 1-25.

Newcombe A 'Sustainable Development and Investment Treaty Law' (2007) 8 *Journal of World Investment & Trade* 1-12.

Nwedu N C 'The Rise of Force Majeure Amid Coronavirus Virus Pandemic: Legitimacy and Implications for Energy Laws and Contracts' (2021) 16 (1) *Natural Resources Journal* 1-18.

Paddeu F 'A Genealogy of Force Majeure in International Law' (2012) 82 (1) *British Yearbook of International Law* 381–494.

Polkinghorne M & Rosenberg B C, 'The Ebola Epidemic and Force Majeure: Expecting the Unexpected, Alternatives to the High Cost of Litigation' (2014) 11 International Journal 78 - 165

Sarah H J ‘Exemptions for Non-Performance: CISG, UNIDROIT Principles – A Comparative Assessment’ Tulane Law Review (1998) 72 (6) 2015-2030

Seng H ‘Does the COVID-19 Outbreak Constitute a Force Majeure Event? A Pandemic Impact on Construction Contracts’ (2020) 8 *Journal of Civil Engineering Forum* 201-214

Tessema H Y Force Majeure and the Doctrine of Frustration under the UNIDROIT Principles, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis. *Journal of Law, Policy and Globalization* Vol. 58 (2017) 33

Trenor A J & Lim S H ‘Navigating Force Majeure Clauses and Related Doctrines in Light of The Covid-19 Pandemic’ (2020) *Young Arbitration Review* 13-22.

Tsang K F ‘From Coronation to Coronavirus: Covid-19, Force Majeure and Private International Law’ (2020) *FORDHAM INT'L L.J.* 187-232.

UNCTAD ‘The Changing IIA Landscape: New Treaties and Recent Policy Developments’ *Special Issue No.1 (2020) New York and Geneva: United Nations.* 1-11.

Zrilic J ‘Armed Conflict as Force Majeure in International Investment Law’ (2019) 16 (1) *Manchester Journal of International Economic Law* 28-56.

LAWS AND OTHER LEGAL INSTRUMENTS

Soft Law International Instruments

Federation Interanationale des Ingenieurs-Conseli (2011)

French Civil Code, 2016.

ICC Force Majeure and Hardship Clauses of 2020, March (2020)

International Law Commission Articles on the Responsibility of States for International Wrongful Acts with Commentaries, U.N. G.A. Doc. A/56/10. Chapter V (2001)

UNIDROIT Principles of International Commercial Contracts (2016)

WHO Framework Convention on Tobacco Control, 2005

Treaties and Conventions

Japan Korea BIT, 2002

Mexico – United Kingdom BIT 2006

Netherlands Model Bilateral Investment Treaty, 2019

SADC Finance & Investment Protocol, 2016

SADC Model Bilateral Investment Treaty, 2012

TAIWAN-INDIA IIA of 2018

United States of America, the United Mexican States and Canada Treaty, 2020

Vienna Convention on the Law of Treaties, 1969

REPORTS REVIEWS AND PAPERS

Clearly G 'COVID-19 Public Health Emergency Measures and State Defence in International Investment Law' (2020) 8 Alert Memorandum.

Groom A Force Majeure Clauses (2004) *AMPLA Yearbook Paper.*

Guven B. 'Modern Provisions in Investment Treaties' ed. Guven B in AfCFTA Investment Negotiations (2020)

Jarrod Hepburn, "The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration", (2015) *International and Comparative Law Quarterly* 905.

Newcombe A *General Exceptions in International Investment Agreements Eighth Annual WTO Conference 13th and 14th May 2008, Discussion Paper*: University of Victoria, Canada.

Oishy A & Fariha T M, *International Law and Covid-19*, Research Paper, The University of Asia Pacific (2021) 18

Report of International Contracts Working Group ('Groupe de Travail Contracts Internationaux') on hardship provisions of 1975 in: M. Fontaine 'Droit des contracts internationaux, Analyse et commentaire de clauses' Paris, FEC, 1989.

Sibert, Trait é de droit international public (1951) 1333.

Trenor A. J. & Lim HS, 'Revisiting Force Majeure and Dispute Resolution Clauses in Light of the Recent Outbreak of the Coronavirus' (2020) 1 WilmerHale Paper.

THESIS

Chidede T *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* (LLD Thesis, University of the Western Cape, 2019)

INTERNET SOURCES

Bernasconi-Osterwalder N, Brewin S & Maina N. Protecting Against Investor–State Claims Amidst COVID-19: A Call to Action for Governments (2020) 5, Commentary IISD.org also available at *https://www.iisd.org/system/files/publications /investor-state-claims-covid-19.pdf* (accessed on 20 August 2020)

Bai C & Liu Y J 'Coronavirus in the Chinese Law Context: Force Majeure and Material Adverse Change', Pillsbury Law (2020), available at *https://www.pillsburylaw.com/en/ news-*

and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html. (accessed on 17 July 2022)

Cox J C & Spoerl T J 'A U.S. litigator's perspective on force majeure'(2020) *https://www.hoganlovells.com/en/publications/coronavirus-pandemic-and-implications-of-force-majeure*. (accessed on 17 July 2022).

How Developing Countries Can Get the Most Out of Direct Investment, available at *https://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness* (accessed on 8 March 2021)

Lucas B & Jingtian C 'Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses' (2020) available at *http://arbitrationblog.kluwerarbitration.com/ 20 20/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/* (accessed on 2nd July, 2022)

Lorenzo & Partners. Comparison of commonly-used Force Majeure and Hardship Clauses in International Contracts, Newsletter No. 119 (EN) (March, 2020) 4 available at *https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf* (accessed on 16 October 2020)

Mark M 'Recent COVID-19 related force majeure decisions: what do they mean for construction contracts?' (2021) available at *http://constructionblog.practicallaw.com/recent-Covid-19-related-force-majeure-decisions-what-do-they-mean-for-construction-contracts/* (accessed on 11th December 2021)

Marmins D J, *Is the Corona Virus a Force Majeure that Excuses Performance of a Contract*? (2020) *https://www.agg.com/news-insights/publications/is-the-coronavirus-a-force-majeure-that-excuses-performance-of-a-contract/* (accessed on 12 September 2020)

Melissa S G, Mercedes F & Phillip J D 'Covid-19 and Investment: Balancing the Protection of Public Health and Economic Interests' 2020 available at *https://www.jonesday.com/en/insights/2020/05/ Covid19-and-investment-treaties* (accessed on 20 August 2020).

Moore F 'Will Covid-19 trigger a force majeure clause?' available at *https://www.pinsentmasons. com/out-law/guides/Covid-19-force-majeure-clause* (accessed on 19 August 2020)

Ostrove M, Brown D V K & Sanderson B 'COVID-19 - a legitimate basis for investment claims?' available at *https://www.lexology.com/library/detail.aspx?g=4efe5923-7117-49cf-83c2-673a44e98148* (accessed on 19 August 2020)

Pathirana D, COVID-19 'Preventative Measures and the Investment Treaty Regime' (2020)1 available at *https://www.afronomicslaw.org/2020/04/13/Covid-19-preventative-measures-and-the-investment-treaty-regime* (accessed on 13 November 2021)

Peterson B, 'COVID-19 Contractual performance – Force Majeure Clauses and Other Options: A Global Perspective', MAYER BROWN (2020), available at *https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/Covid19-contractual-performance-force-majeure-clauses-and-other-options-a-global-perspective* (accessed on 23 June, 2022)

Sornarajah M 'The Covid-19 Pandemic and Liability Under Investment Treaties' (2020) available at *https://www.southcentre.int/southviews-no-204-11august-2020/* (accessed on 20 August 2020).

World Investment Report 2020, available at *https://unctad.org/system/files/officialdocument /wir2020 en.pdf*, (accessed on 8 March 2021)

Zagel G. 'International Investment Agreements IIAs and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?' 2 available at *https://www.researchgate.net/ publication/337023200*