Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND COLUMBIA CLIMATE SCHOOL

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Matthew Conte (msc2236@columbia.edu)

No. 358 May 29, 2023

Mind the *force majeure* clauses in investment contracts

by
Lu Wang and Wenhua Shan*

Force majeure clauses are often included in investment contracts to excuse a party from liability for non-performance of obligations where an unforeseen external event renders performance impossible. In the current context, a party might invoke *force majeure* in investment contracts if, for example, its obligation to make certain payments was hindered by pandemic-related restrictions, or its delivery to Europe was disrupted by sanctions imposed following the Russia-Ukraine war. Whether there is a valid declaration of *force majeure*, however, is up for debate if contractual definitions were absent or vague. Further, as contractual claims might be made in combination with investment treaty claims, problems of parallel proceedings and conflicts of contractual and international standards might occur. Parties to investment contracts should therefore pay close attention to contractual language, especially with respect to the definition of *force majeure* and the national and international law governing contracts.

First, parties should carefully consider and define in their contracts what is, and is not, an event or circumstance constituting *force majeure*. In relation to the general definition, the parties may make the *force majeure* clause more flexible by excluding common conditions such as "unforeseeability" or using the criterion of "reasonableness" and "impracticability" instead of "impossibility" to lower the threshold. Moreover, the parties may specify *force majeure* events or circumstances in contracts. For example, the majority in *Rutas de Lima v. Lima* noted that the parties had expressly excluded social revolts from the definition of *force majeure* and therefore rejected that defense. Furthermore, the *Gujarat v. Yemen* tribunal found no need to read the domestic law requirements of unforeseeability and impossibility into *force majeure* since the investment contract provided a self-contained definition that did not mention these requirements.

It should be noted that *force majeure* situations might not obviate all obligations under an investment contract. In *Niko Resources v. Bangladesh*, for instance, the tribunal held that *force majeure* did not suspend the party's obligation to take "reasonable" action to overcome the impediment and minimize

its consequences as is "practicable." In *RSM v. Central Africa*, arbitrators held that RSM had to fulfil the requirement to renew its exploration license even though it had invoked *force majeure*.

Second, parties should provide explicit choice of law clauses in investment contracts and clarify the hierarchy between national and international law to avoid difficulties in the interpretation of *force majeure*. Parties should stipulate which national law applies, as different jurisdictions have developed different approaches to *force majeure*. For example, when English law is applied, the applicability of *force majeure* will critically depend on the contractual language, while some civil law jurisdictions have clear statutory provisions on *force majeure* that might include mandatory rules.

In the absence of such a choice-of-law provision, investment tribunals might have to apply host state law together with applicable international law. The interplay and hierarchy of the two legal systems then becomes an issue. The *Enron* and *Sempra* tribunals stated that *force majeure* as an excuse precluding the wrongfulness of an act of state required stricter conditions on the basis of Article 23 of the ILC Articles on State Responsibility, excluding increased difficulty of performance due to a political or economic crisis. In contrast, the *Autopista v. Venezuela* tribunal concluded that international law did not impose a different standard that would displace applicable national law.

Last but not least, parties should be alert to additional challenges concerning parallel proceedings for contract and treaty claims. Treaty mechanisms such as umbrella clauses might "elevate" a contractual breach to a treaty breach, resulting in international responsibility for the host state. According to *Strabag v. Libya*, it would be helpful if parties allocated risks for *force majeure* circumstances and specified their consequences in the contract, enabling the tribunal to identify and give effect to the parties' agreement.

To conclude, *force majeure* clauses are currently in the spotlight, and parties should carefully design such clauses, particularly with regards to definitions and applicable law provisions. Special attention should also be paid to the relationship between applicable national and international laws, which remains an unsettled question in arbitral practice.

---

* Lu Wang (lu.wang10@unsw.edu.au) is a Lecturer and Member of the Herbert Smith Freehills CIBEL Centre at UNSW Faculty of Law and Justice; Wenhua Shan (shan@xjtu.edu.cn) is the Ministry of Education of China Yangtze River Chair Professor of International Economic Law and the founding Dean of the Xi'an Jiaotong University Law School. The authors wish to thank James Otto, Nicola Woodroffe and an anonymous reviewer for their helpful peer reviews. Special thanks to Rebecca Dunkel for her helpful research assistance.

for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at *http://ccsi.columbia.edu*.

Most recent *Columbia FDI Perspectives*

- No. 357, Isabella Cannatà and Riccardo Loschi, "Settlement of investor-state disputes: can states avoid arbitration?" *Columbia FDI Perspectives*, May 15, 2023
- No. 356, Keer Huang, "Subsidies as a regulatory object: from trade subsidies to outward FDI subsidies," *Columbia FDI Perspectives*, May 1, 2023
- No. 355, Fabrizio Opertti and Christian Volpe Martincus, "Investment promotion in the new international context: what is the next frontier and how to get there," *Columbia FDI Perspectives*, April 17, 2023
- No. 354, Martin Wermelinger, "What can governments do to boost FDI for sustainable development?" *Columbia FDI Perspectives*, April 3, 2023
- No. 353, Mark Feldman, "An opportunity to reimagine investment arbitration in Beijing," *Columbia FDI Perspectives*, March 20, 2023

All previous *FDI Perspectives* are available at https://ccsi.columbia.edu/content/columbia-fdi-perspectives.