

## Force Majeure in Latin America: Survey of Implications from COVID-19

06 April 2020

Adding to our [real-time analysis](#) of the sprawling impact of the COVID-19 crisis in the energy and infrastructure sector, we are taking a look at the topic of force majeure in one of our key practice regions, Latin America. Below, we have gathered some high-level perspectives on the legal underpinnings of force majeure declarations from local firms in the key markets of Mexico, Colombia, Brazil and Chile. We are grateful for the firms in these jurisdictions who contributed generously to this report.

- **Mexico** (Mijares Angoitia Cortés Y Fuente, S.C.: Horacio de Uriarte, Aisha Calderón): Unusual among Latin American nations, Mexico does not have a statutory definition of force majeure. In Mexican commercial contracts, however, force majeure clauses commonly cover epidemics or pandemics and also frequently cover (either expressly or impliedly) force majeure invoked by contractors or subcontractors of the project under their respective contracts. In the absence of contractual terms to the contrary, Mexican law does provide that force majeure impacts must directly affect a party's ability to perform, which is interpreted to mean that failures to make payments (other than where, for instance, payment systems fail) or economic hardship are not grounds for relief. Additionally, in the absence of explicit contractual rights to force majeure, Mexican court precedents have held that any unforeseeable or unavoidable circumstance that absolutely prevents performance of an obligation qualifies as grounds for seeking force majeure relief. However, this judicial remedy offers a noticeably high bar to relief that is uncertain in its application. More information can be found on the [Mijares, Angoitia, Cortés y Fuentes website](#).
- **Colombia** (Posse, Herrera & Ruiz: Carolina Posada, Alvaro José Rodríguez): Colombian law codifies a general definition of force majeure applicable to all contracts, which sets the high bar that an event must be both unforeseeable and unavoidable and render performance by a party absolutely impossible. The statutory definition of force majeure includes acts exercised by a public authority but does not

specifically include occurrences of epidemic or pandemic; therefore, the ability to obtain force majeure relief under the statute will depend on the other provisions of the contract, the specific obligations under consideration and the nature of the circumstances facing the parties. Parties may contractually agree to broaden the narrow scope of the statutory definition of force majeure to include epidemics and/or pandemics or other events that need not be unforeseeable or absolutely unavoidable. Parties to Colombian law contracts may also be able to tap the theory of unforeseen circumstances, or *Teoría de la Impevisión*. Pursuant to this doctrine, a party may request from a court the review or termination of executory contracts upon the occurrence of unforeseeable circumstances that alter or aggravate future performance of an obligation to an excessively onerous level. Still, under this theory Colombian courts are reluctant to excuse performance except in very exceptional circumstances.

Colombian counsel also reports that in response to the COVID-19 crisis the Colombian government has implemented mobility measures restricting exploration, but not production activities. In response, the National Hydrocarbons Agency of Colombia has [published for comment a draft regulation](#) allowing E&P companies to request extensions for the performance of their obligations, including exploration and evaluation activities. Further legal and regulatory updates in response to the current crisis can be found on [Posse Herrera's website](#).

- **Brazil** (Veirano Advogados: Lior Pinsky, Ana Carolina Barretto, Felipe Graca Bastos Esteves, Amanda Leal): Brazil has a very broad codified definition of force majeure as “necessary” events preventing performance that are impossible to avoid or prevent. The breadth of this definition combined with the lack of objective standards to help the parties determine whether a given situation amounts to force majeure has led to the common practice in sophisticated transactions of defining force majeure more precisely and flexibly, often including instances of epidemic or pandemic. In the absence of contractual or statutory relief, certain ancillary contract doctrines may be claimed in court to seek relief from performance and revision of the underlying contract. These include doctrines of *factum principis*, unforeseeability (*Teoria de Imprevisão*), and excessive burdens (*Teoria da Onerosidade Excessiva*). The standard of proof for each of these doctrines is very high and they are infrequently relied upon.
- **Chile** (Morales y Besa: Carlos Silva, James Channing, Orlando Palominos): Force majeure is defined by statute in the Chilean Civil Code and parties do not need to include force majeure provisions in a contract to make it applicable. Contracting parties are free to modify or use a different concept of force majeure in Chilean-law

governed contracts, reduce the scope of its effects and even reallocate the risks resulting from force majeure in a manner other than that established by law. The statute sets forth a test requiring the event or circumstance to be both unforeseeable and unavoidable and outside the control of the party seeking relief. In order to excuse compliance with contractual obligations, force majeure events must make performance impossible. If the event or circumstance makes performance only temporarily impossible, timely compliance with contractual obligations will be relieved (such as by excusing liability from delay liquidated damages payments under a construction contract) but not a party's cost of compliance with its obligations during the force majeure period. In general, Chilean contracts do not refer specifically to pandemics and mostly rely on the Civil Code definition and the test therein. Doctrines such as frustration, hardship or *rebus sic stantibus* are generally not recognized under Chilean law. Further information on the effects of the COVID-19 crisis on the projects sector and the mechanics of force majeure in Chile can be found on the [Morales y Besa website](#).

*Contributing authors:*

**Colombia** – *Posse, Herrera & Ruiz*: Carolina Posada, partner in the Arbitration Practice Group; Alvaro José Rodríguez, partner in the Energy and Natural Resources Group

**Mexico** – *Mijares Angoitia Cortés Y Fuente, S.C.*: Horacio de Uriarte, Aisha Calderón

**Brazil** – *Veirano Advogados*: Lior Pinsky, Ana Carolina Barretto, Felipe Graca Bastos Esteves, Amanda Leal

**Chile** – *Morales y Besa*: Carlos Silva, James Channing, Orlando Palominos

---

[Read more insights from Kirkland's Energy & Infrastructure blog.](#)

## Authors

[Nathan Santamaria](#)

Partner / [New York](#)

## Related Services

## Practices

- [Transactional](#)
- [Energy & Infrastructure](#)

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

This publication may cite to published materials from third parties that have already been placed on the public record. The citation to such previously published material, including by use of "hyperlinks," is not, in any way, an endorsement or adoption of these third-party statements by Kirkland & Ellis LLP.