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Applying Force Majeure Events in Russian and South African Law: A Comparative Evaluation

Svetlana Zimneva,

University of Tyumen (Tyumen, Russian Federation)

Nazreen Shaik-Peremanov,

University of Fort Hare Nelson Mandela School of Law (East London, South Africa)

Irina Pluzhnik,

University of Tyumen (Tyumen, Russian Federation)

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Abstract. This article examines the concept of *force majeure* as a legitimate defense for contracting parties seeking to mitigate or avert contractual liability. Given recent global events, this prompts an inquiry into the implications of the COVID-19 pandemic and focuses on a comparative legal analysis of the Russian and South African legislative frameworks and doctrinal interpretations on *force majeure*. The scope of this article does not extend to the specific implications of the COVID-19 pandemic. The analysis outlines the salient and distinctive characteristics of the governing common law and civil law regulations applicable to *force majeure* events. Notably, the authors scrutinize the definition of *force majeure* and the resultant consequences arising from *force majeure* clauses in commercial contracts. This includes a detailed examination of the relevant provisions of the Civil Code of the Russian Federation concerning *force majeure*, along with the judicial interpretations rendered by the Supreme Court of the Russian Federation. Following this, the article investigates *force majeure* as

established within the South African legal paradigm. The present study meticulously examines the *force majeure* defense from contractual liability. The authors underscore the parallels observed in both doctrinal principles and case law findings across the Russian and South African jurisdictions that establishes a comprehensive repository of research to instances where parties invoke a force majeure clause within their contracts. This inquiry particularly pertains to commercial interactions among BRICS nations. Furthermore, the article explores the legal concept of impossibility regarding fulfilling obligations, given that force majeure is a legally recognized ground for the non-performance of contractual commitments. The present study analyzes current legislation and prevailing scientific doctrines, employing a comparative legal methodology. The authors assert that the *force majeure* provisions and the impossibility of contract performance within the legal frameworks of Russia and South Africa exhibit notable similarities. For commercial legal transactions, the authors advocate adopting the force majeure definitional clause articulated by the International Chamber of Commerce (ICC) because it deems the most judicious and balanced approach. Furthermore, they propose a standard clause incorporating the essential force majeure clauses. In formulating their recommendations, the authors also consider the principles of the margin of appreciation doctrine, thereby ensuring a nuanced understanding of its implications.

Keywords: force majeure; exemption from liability; coronavirus infection COVID-19; Russia; South Africa; BRICS.

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Introduction

Diplomatic relations between the Russian Federation and the Republic of South Africa have been established for over 30 years. Throughout this period, both parties have concluded more than 80 bilateral agreements that enhance cooperation across various commercial areas.

It is noteworthy that Russia, as the successor state to the former Soviet Union, did not historically participate in the colonial partitioning of the African continent. This distinctive historical perspective has ostensibly enabled a strategic partnership between Russia and South Africa. This partnership is demonstrated through their collaborative participation in the BRICS regional entity, highlighting shared interests in a global context.

Both South Africa and Russia are BRICS members. The participation of both countries in the BRICS regional organization allows for collaboration against the BRICS Economic Partnership Strategies 2025.[1] One of the principal domains of collaborative engagement in contemporary international relations is enhancing trade relations between the two nations. The trade turnover exhibits a positive upward trend, as evidenced by the rising number of foreign-executed economic contracts. This phenomenon underscores the enhanced international economic engagement and suggests a strengthening of market confidence, warranting further scholarly examination of its implications for global trade dynamics. Importantly, South Africa ranks is one of Russia's foremost trading partners on the African continent. In light of the prevailing complexities in the international landscape, it is noteworthy that the bilateral trade between these countries experienced a commendable increase of 15% during the first eleven months of 2022.[2] *Force majeure* clauses in Russia and

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[1] Ministry of Economic Development of the Russian Federation. (n.d.). *BRICS*. https://www.economy.gov.ru/material/directions/vneshneekonomicheskaya_deyatelnost/mnogostoronnee_ekonomicheskoe_sotrudnichestvo/briks/. (In Russian).

[2] TASS. (2023, January 24). *MAYOR: Russia and South Africa will hold a meeting on cooperation within the framework of BRICS by the end of the first quarter*. https://tass.ru/ekonomika/16871629.%20. (In Russian).

South Africa significantly enhance their bilateral trade and economic cooperation, especially in key sectors such as the chemical industry and the commerce of precious metals and stones. Prominent Russian enterprises, including Stock Company "Transmashholding," public joint-stock company "Severstal," Group of Companies "Renova," and Stock Company "Rosgeologia," are actively engaged in the South African marketplace.

In the context of the evolving trade relations between the two nations, a thorough examination of South African private legal institutions emerges as a matter of considerable importance. The fulfillment of contractual obligations and the associated liabilities in instances of potential or actual breaches of contract are intrinsic to fostering effective and sustainable trade relations.

Moreover, the legal implications surrounding civil contractual liability, particularly regarding non-fulfillment or improper fulfillment of obligations, and the criteria for exemptions from such liability, are critical to ensuring robust trade interactions. Among these grounds for exemption, *force majeure* represents a significant doctrine that may absolve a party from civil contractual liability if they fail to fulfill or improperly fulfill their contractual obligations due to unforeseen and uncontrollable circumstances.

Scholars and practitioners across the globe are increasingly scrutinizing the legal construct of *force majeure* in the context of the COVID-19 pandemic, which arose in 2020, and other extraordinary events that disrupt conventional societal norms. The interpretative frameworks surrounding *force majeure* differ markedly among various legal jurisdictions. While some countries abstain from employing the term "*force majeure*," others rigorously define its parameters through specific statutory provisions.

In commercial transactions, it is customary for contracting parties to integrate *force majeure* clauses that accommodate these disparate legal interpretations. For example, the inclusion of the "ICC force majeure clause (long form) 2020" or the "ICC force majeure clause (short form)" is often facilitated within contractual agreements through explicit inclusion or by reference. The fundamental purpose of such clauses is to elucidate the rights and remedies available to an aggrieved party in seeking relief from unforeseen circumstances that impede contractual performance. As astutely observed by Pedro Ferreira Malaquias, the term "*force majeure*" constitutes an open-ended concept, subject to variability depending upon the particular area of law or business.[3] The doctrine of *force majeure*, as a basis for exemption from liability has been unevenly interpreted across different legal jurisdictions. It is imperative to form a comprehensive legal understanding and clear guidelines to identifying a *force majeure* event as a legitimate defense, especially in the context of unforeseen circumstances.

[3] Malaquias, P. F. (2012). Revisiting force majeure clauses. *Butterworths Journal of International Banking and Financial Law*, *6*, 361.

Considering this premise, this article undertakes a comparative legal analysis of the *force majeure* concept, including its essential requirements, definitions, and recognition as a legal defense within Russia and South Africa's frameworks. The objective is to propose enhancements to the existing legal framework and to bolster the effective application of *force majeure* clauses in contractual agreements.

The article is structured as follows: the first section provides an overview of *force majeure* events that constitute grounds for exemption from liability for non-performance or improper performance of contractual obligations. The second section scrutinizes the *force majeure* clauses within contract law. The third section engages in a comparative legal analysis of *force majeure* provisions within the two jurisdictions. The concluding section synthesizes the principal findings of this study. To conduct this research, a variety of methodological approaches were employed, notably the method of comparative jurisprudence.

1. *Force Majeure* in Russian Law

1.1. Legal Definition of Force Majeure in the Civil Law

In contemporary legal discourse, the terms "*force majeure*" and "*irresistible force*" function as synonyms within the framework of contractual obligations. The term "*force majeure*," of French provenance, has been integrated into Russian jurisprudence from the French Civil Code (commonly referred to as the Napoleonic Code of 1804), which traces its origins to the Roman legal principle of "vis major." The phrase "irresistible force" serves as a literal translation of the original French terminology, embodying the concept's inherent legal significance in the context of excusable non-performance due to uncontrollable circumstances.[4] Commonly, man knows the force majeure doctrine as an "Act of God," unintended.

The definition of *force majeure* is contained in the Regulation on the Procedure for the Certification by the Chamber of Commerce and Industry of the Russian Federation of Force Majeure Circumstances of December 23, 2015 No. 173-14. This law defines the defense as "extraordinary, unforeseen and unavoidable circumstances that arose during the implementation of contractual obligations that could not be reasonably foreseen at the time of concluding the contract, either to avoid or overcome, and beyond the contracting parties' control."[5] Indeed, the definition is detailed in Russian legislation because the Russian Chamber of Commerce and Industry (CCI) issues documents to business entities – conclusions on *force majeure* circumstances that occurred on Russian territory, and certificates for foreign trade contracts, particularly.

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[4] Lipen, S. V. (2015). Domestic civil law of the early twentieth century and the Code of Napoleon. *Journal of Russian Law*, *1*, 74–81. (In Russian).

[5] Appendix to the Resolution of the Board of the CCI of Russia of December 23, 2015 No. 173-14. "Consultant Plus" Legal Database. https://www.consultant.ru. (In Russian).

The CCI is a non-governmental non-profit organization established to represent and protect the entrepreneur's legitimate interests.

The Russian Civil Code (hereinafter the CCRF) is the normative legal framework, which does not contain the concept of *force majeure*. However, the CCRF hints at the main requirements of *force majeure* – extreme and unavoidable. Article 401, paragraph 3 of the Civil Code "Grounds for liability for breach of an obligation" firmly embed these requirements. This Article establishes a general rule that holds a person responsible for their actions if they cannot prove that the contractual obligation was impossible due to unforeseeable and unavoidable circumstances, known as *force majeure*. Article 401 applies unless otherwise provided by law or the contractual terms. In other words, the defense is applicable in the absence of a specific clause determined by the contracting Parties.

1.2. Interpretation of Qualifying Signs of Force Majeure

The Russian Supreme Court clarified the *force majeure* requirements in civil legislation, as follows:

> an emergency is the exclusivity of the circumstance in question, the occurrence of which is not usual in specific conditions; unavoidability is a circumstance in which any participant in civil turnover engaged in similar activities with the debtor could not avoid the occurrence of this circumstance or its consequences [Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations"[6]].

Legal scholars ambiguously consider the *force majeure* requirements. The requirement of "extreme" is interpreted by Russian academics as "events having an unusually large power of their manifestation," "atypical, uncharacteristic nature of either the phenomenon itself or its consequences" and other explanations. All these definitions contain the common requirement of "extraordinary" which is unique and unusual. This definition draws a to the fact that the probability of such circumstances is extremely low in the normal course of life.

Regarding the requirement of "unavoidability" in *force majeure* events, the characteristics, for example, are "the inability to prevent the harmful action of force majeure, considering the options available to the person," "the debtor's opposition to the negative influence of force majeure by all possible measures," "the unavoidability of the phenomenon for any person, taking into account the level of development of science and technology of the whole society" *inter alia*. The requirement that a circumstance is unavoidable and acts such as an irresistible force implies that it

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[6] Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations." Bulletin of the Supreme Court of the Russian Federation, 2016, No. 5. (In Russian)

is inevitable and unpreventable. To understand the inevitability of an unexpected event, it is crucial to take various measures to avoid *force majeure* events and prevent their occurrence. However, it is impossible to avoid the most extraordinary events. Simply put: a contracting party must do all things reasonably possible to prevent the event from materializing.

Therefore, to minimize damage from *force majeure* events, an important condition is that the contracting party takes all available measures to fulfil the contractual obligation. The contracting parties must act in good faith, exercise due care and prudence, try to fulfil the contractual terms, and avoid those circumstances that may lead to non-performance or improper performance which may result in the aggrieved party suffering damages. For example, in the Ruling of the First Arbitration Court of Appeal of July 27, 2017 in case No. A11-1803/2016, the court did not recognize the ingress of atmospheric moisture into the building as a ground for exemption from damages, since the defendant did not take measures to establish special shelters before opening the roof and windows to protect the building in which the work was carried out.[7] In this case, the defaulting contracting Party could not raise the *force majeure* defense. The Court rejected the defense. The rule that the debtor is obliged to take all reasonable measures to reduce or prevent the occurrence of the damage caused to the creditor by *force majeure* is contained in paragraph 10 of the of the Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations."

Recently, Russian scholars have recognized another requirement that is inherent in the force majeure defense; however, the CCRF does not state this requirement. This is the "unpredictability" requirement. Its essence is that if the occurrence of any circumstances could have been foreseen and avoided, then they are not circumstances of *force majeure*. At the same time, it is still possible to foresee certain extraordinary phenomena. Therefore; the unpredictability requirement does not always work.[8] In our opinion, it is possible to foresee only some phenomena of an irresistible force of nature, for example, a typhoon. Was it possible to foresee the emergence and such a large-scale spread of coronavirus infection (COVID-19) around the world? It is precisely its suddenness that allows courts to attribute COVID-19 to *force majeure* events under certain conditions (Ruling of the Amur Region Arbitration Court of May 14, 2020 in case No. A04-8137/2019).[9]

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[7] Resolution of the First Arbitration Court of Appeal of July 27, 2017 in case No. A11-1803/2016. "Consultant Plus" Legal Database. https://www.consultant.ru. (In Russian).

[8] Shmatenko, A. (2020). *The concept and signs of irresistible force*. Zakon.ru. https://zakon.ru/blog/2020/04/01/ponyatie_i_priznaki_nepreodolimoj_sily. (In Russian).

[9] Resolution of the First Arbitration Court of Appeal of July 27, 2017 in case No. A11-1803/2016.

1.3. Force Majeure as a Ground for Exemption from Liability

It should be noted that the coronavirus pandemic (COVID-19) has affected businesses the world over. For many entrepreneurs, the priority was to take urgent measures to avoid serious financial consequences because of the difficult economic times. In most cases, the business community took action to adapt its enterprises to new realities to increase their economic efficiency for long-term survival. The application of *force majeure* events in respect of concluded contracts may lead to an exemption of liability for the offending party. At the same time, on the issue of attributing coronavirus infection (COVID-19) to *force majeure* circumstances, the official position of the judicial authorities is that coronavirus infection is not a universal category of defense for all debtors. The Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7 establishes *force majeure* events by considering the circumstances of a particular case, that is, the nature, duration of the obligation and other conditions are considered.[10] Consequently, whether the circumstances qualify as a *force majeure* event, to the courts will embark on casuistic interpretation. In addition, the recognition of circumstances as extraordinary for a party in a certain situation will not be the same in every situation.

In practice, *force majeure* events include natural disasters such as earthquakes, floods, hurricanes, fire, mass diseases, strikes, military actions, terrorist acts, sabotage, transportation restrictions, prohibitive measures of States, prohibition of trade operations, including with individual countries, due to the adoption of international sanctions and others, circumstances that do not depend on the will of the parties to the contract. The recent global pandemic, a special military operation and international sanctions, such as an export ban, a ban on the provision of services in Russia, restrictions on the transportation of goods and, in general, are all affecting the supply of goods and services and may make the fulfilment of obligations by a party more burdensome or even impossible. All these measures have one thing in common – they should not depend on the will or actions of the obliging party.

Consequently, circumstances, the occurrence of which depended on the will or actions of the obliging party, particularly the violation of obligations on the part of the debtor's counterparties, the absence of goods necessary for execution on the market, the debtor's lack of necessary funds, cannot be recognized as *force majeure* (para. 3 of Art. 401 of the Civil Code of the Russian Federation). *Force majeure* events must be the cause of a situation of material impossibility. The material impossibility of performing an obligation may arise as a result of fortuitous occurrences, such as natural phenomena exemplified by a lightning strike impacting the aerial conveyance of cargo. Alternatively, such impossibility may be instigated by anthropogenic

[10] Letter of the Supreme Court of the Russian Federation of April 21, 2020 No. 7-VS-2188/20 "On approval of the Review of certain issues of judicial practice related to the application of legislation and measures to counter the spread of the new coronavirus infection (COVID-19) in the territory of the Russian Federation No. 1." "Consultant Plus" Legal Database. https://www.consultant.ru. (In Russian).

activities, including, but not limited to, mass demonstrations by residents opposing the construction of a specified facility. It is imperative to note that the doctrine of *force majeure* does not pertain to scenarios wherein the fulfillment of an obligation has merely become onerous, such as during instances of political or economic upheaval. Furthermore, this principle similarly excludes circumstances precipitated by negligence or the inaction of the relevant governmental authority.

1.4. Inability to Fulfil Obligations Due to Force Majeure

When extraordinary, unavoidable, and unforeseen circumstances arise, the parties should consider whether it remains possible to fulfil their contractual obligations. The current civil law regulating liability, generally, arises from the fact that a person who has not fulfilled an obligation or has performed it improperly is liable if the fault requirement is established (para. 1 of Art. 401 of the Civil Code of the Russian Federation). In business relations, a person who has not fulfilled or improperly fulfilled an obligation due to *force majeure* is not liable, unless otherwise provided by law or contract (para. 3 of Art. 401 of the Civil Code of the Russian Federation). A party that relies on the *force majeure* clause for exemption from liability bears the burden of proving that the event occurred outside the offending party's control. In this case, the party to the contract must provide sufficient evidence that the circumstances related to *force majeure* are extraordinary and unavoidable, and this leads to the release of the parties from liability.

However, over time, *force majeure* events may disappear, and the obligation will be fulfilled, except in cases when the obligation cannot be fulfilled in principle. For such situations, the Plenum of the Russian Supreme Court provided the following definition: "The occurrence of force majeure circumstances by itself does not terminate the debtor's obligation if execution remains possible after they have disappeared" (para. 9 of the Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7). One of the grounds for terminating contracts is a party's inability to fulfill obligations. The legal doctrine distinguishes between the permanent and temporary impossibility of performance.[11] Consequently, upon the occurrence of a force majeure event, the performance of the contract may be suspended. This means that it is a temporary impossibility to fulfil obligations, and if it is permanently impossible to fulfil an obligation, the performance of the obligation is not suspended, but terminated. Article 416 of the Civil Code of the Russian Federation contains a section that the impossibility of performance terminates an obligation if it causes an event that occurred after the occurrence of the obligation, for which neither party is responsible. Thus, the impossibility of performance automatically terminates the obligation without consequences for the parties.

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[11] Chukreev, A. A. (2016). The doctrine of the impossibility of fulfilling obligations and improving the civil legislation of Russia. *Lex russica*, *10*(119), 173, 177. (In Russian).

1.5. Application of Force Majeure Clauses in Russian Contracts

It must be said that should the contracting parties seek to mitigate exposure to the risks stemming from unforeseen contingencies that are beyond their control, the contractual instrument must state the precise parameters that will constitute a *force majeure* event. As articulated by Susan M. Grieshop Corrado, the interpretative latitude inherent in *force majeure* provisions often hinges upon the specific lexical choices and intrinsic ambiguities contained within the written instrument.[12] It is essential to include a well-defined *force majeure* clause in all business contracts.[13] Failure to do so may result in disagreements, particularly when the clause is open-ended and ambiguous, leaving it open to various interpretations. Litigation may ensue because of uncertainty and ambiguity. According to Susan M. Grieshop Corrado, in many cases, an extensive list of potential *force majeure* events is the best defense of the party against claims of ambiguity.[14] The *force majeure* clause must be specific, contain clear conditions under which qualify the event hindering a party from fulling its obligations, and stating the consequences of contractual breaches. Considering the above, the *force majeure* clause should be meticulously crafted. The term "contractual force majeure" pertains to the situations outlined in the contracting clauses. *Force majeure* clauses, for example, may include a strike at the seller's company, difficulties in obtaining transport for cargo transportation, interruptions in water and electricity supply, and more.[15]

Depending on the application of *force majeure* clauses in contractual breaches, certain requirements must be met: 1) taking all reasonable measures to reduce the damage caused to the creditor by *force majeure*; 2) notifying the creditor of the occurrence of *force majeure*. Notification of the occurrence of *force majeure* is crucial because if a contracting party fails to timeously inform of the breach relying on force majeure, the offending party will be liable for compensation to the aggrieved party (para. 10 of the Decree of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016 No. 7).

In summary, we can draw some conclusions. In Russian law, the requirements of *force majeure* are emergency and unavoidability. The criterion for attributing circumstances to *force majeure* is that it should not depend on the will or actions of the contracting party. The Russian CCI has developed the definition of "irresistible force (*force majeure*). In addition, scholars provide various definitions of this concept. There is no exhaustive list of *force majeure* events in Russian law. The presence of *force*

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[12] Grieshop Corrada, S. M. (2007). The best laid plans: Force majeure clauses in travel and event contracts. *Nova Law Review*, *31*(3), 409–421.

[13] Silber, N. I. (2010). Debts, disasters, and delinquencies: A case for placing a mandatory force majuere provision into consumer credit agreements. *New York University Review of Law & Social Change*, *34*(1), 760–792.

[14] Grieshop Corrada, 2007.

[15] Belov, A. (2001). *International business law: Practice manual* (p. 68). Yurait. (In Russian).

majeure events is the basis for releasing the debtor from liability for non-performance or improper performance by a contracting party.

2. *Force Majeure* in South African Law

2.1. Background to Force Majeure – The Origins and the Common Law

The jurisprudential foundation of South African contract law derives directly from the Roman-Dutch-English common law doctrines. This established the doctrinal framework through judicial precedent and the progressive evolution of common law as articulated in Section 39 of the South African Constitution.[16]

The application of the *force majeure* doctrine within the South African legal paradigm has three principal sources: common law authority, the evolution of that common law, and the overarching doctrine of legal precedent. The legal basis for contractual obligations is grounded in the principles of "*pacta sunt servanda*" and consensus, contingent upon the specific nature of the contract. The legal recognition of the *force majeure* defense facilitates exemption from contractual liability in instances where the cause of breach is attributable to events beyond the control of the contracting parties.[17]

In essence, *force majeure* clause constitutes a contractual provision, which the South African legal system recognizes. The invocation of the *force majeure* defense may extricate a party from legal liability for failure to perform its contractual duties, generally characterized as an unavoidable, irresistibly compelling, and unforeseen event that precludes the parties from fulfilling their contractual obligations.[18] Within the ambit of South African jurisprudence, *force majeure* is a legally cognizable and enforceable doctrine that permits a party absolution from liability arising from non-performance.[19]

Furthermore, in scenarios where the sovereignty and safety of the nation are jeopardized by exigent circumstances – such as war, invasion, civil insurrection, tumult, acts of God, or other extraordinary occurrences – the Parliament is vested with the authority to declare a state of emergency in accordance with Article 37 of the Constitution of the Republic of South Africa. In this context, the Parliament may promulgate directives, regulations, and statutory provisions imposing restrictions and concomitant penalties, potentially culminating in the impossibility of contractual

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[16] Constitution of the Republic of South Africa, 1996 – Chapter 2: Bill of Rights. South African Government. https://www.gov.za/documents/constitution/chapter-2-bill-rights#39

[17] Maskow, D. (1992). Hardship and force majeure. *American Journal of Comparative Law*, *40*(3), 657–669.

[18] Katsievela, M. (2007). Contracts: Force majeure concept or force majeure clauses? *Uniform Law Review*, *12*(1), 101–119.

[19] Hutchison, D., & Pretorius, C. (Eds.). (2018). *The Law of Contract in South Africa*. Oxford University Press.

performance. Affected parties may then seek refuge under the *force majeure* clause embedded within their contracts. Notably, during the global pandemic declaration by the World Health Organization (WHO) concerning COVID-19,[20] the President of South Africa proactively urged enterprises to refrain from invoking *force majeure* clauses, advocating compliance with contractual obligations over an extended period to mitigate the economic repercussions of the pandemic.

English legal principles considerably influence the South African common law, wherein English courts and tribunals have posited that the evidentiary burden to establish that *force majeure* has thwarted or delayed contractual performance is formidable. Recent judicial pronouncements, including *Triple Point Technology v. PPT* (2017) and *Seadrill Ghana v. Tullow Ghana* (2018), exemplify this judicial stance. Conversely, in the notable ruling of *Sucden Middle-East v. Yagci Denizcilik Ticaret Ltd.* (commonly referred to as the *M v. Muammer Yagci* case)[21] in 2020, the court upheld a strict and narrow interpretation of *force majeure*, affirming that its applicability to the inquiry yielded a narrowly circumscribed affirmative response. Although this judgment is relatively rare, it provides critical elucidation and guidance concerning the interpretation of *force majeure* clauses in standard-form contracts.[22] The allowance for reliance on the *force majeure* defense upon appeal does not signal a departure from the historically stringent and narrow construction adopted by the judiciary.[23]

The construct of *force majeure* is a salient aspect of the South African legal framework, particularly within the realm of contract law. Thus, when analyzing the principle of *force majeure*, it is imperative to cognize the unique characteristics of the South African legal system, which eschews a comprehensive, codified legal structure in favor of judicial rulings and the development of common law.[24] While the notion of *force majeure* within South African contract law remains, it is devoid of a definitive legal formulation.[25] In contrast, jurisdictions that recognize this doctrine typically interpret it as a superior force or event external to the contracting parties, resulting

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[20] Kiraz, E., & Yıldız, Ü. E. (2020). COVID-19 and force majeure clauses: An examination of arbitral tribunal's awards. *Uniform Law Review*, *25*(4), 437–465.

[21] *Sucden Middle-East v. Yagci Denizcilik ve Ticaret Ltd. Sirketi* (The "Muammer Yagci") – QBD (Comm Ct) (Robin Knowles J) [2018] EWHC 3873 (Comm) (November 2, 2018).

[22] Booley, A., & Potberg, C. (2020). *COVID-19 Contract Law*. Without Prejudice. https://www.withoutprejudice.co.za/free/article/7065/view

[23] Berger, K. P., & Behn, D. (2019–2020). Force majeure and hardship in the age of corona: A historical and comparative study. *McGill Journal of Dispute Resolution*, *6*(4), 79–130.

[24] Daniel, L. (2020, April 10). *Understanding force majeure and its connection to the lockdown*. The South African. https://www.thesouthafrican.com/lifestyle/what-is-force-majeure-in-south-africa/

[25] Rodel, C. (2023–2024). *Force majeure and vis major*. LexisNexis. https://www.studocu.com/en-za/document/university-of-south-africa/commercial-law-specific-contracts/case-extracts-on-force-majeure-and-vis-major-1880-to-2019/44386334

in the impossibility of contract performance.[26] As articulated in Wille's *Principles of South African Law*, "vis major, or superior force, is defined as a force, power, or agency that cannot be resisted or controlled by an ordinary individual."[27] The term is now utilized to encompass not only natural phenomena or acts of God but also various extraordinary events.[28]

Like Russia, the events that bring about *force majeure* usually include war, hostilities, invasion; unrest: civil war, riot, insurrection and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; strikes, lockouts; currency and trade restrictions, embargo, sanction; acts of the state; plague, epidemic; natural disasters: explosion, fire, storm, earthquake, flood, hurricane, lightning, earthquake and others.[29] Contracting parties may stipulate the *force majeure* events in the contract.[30] For example, excluding acts of authority or export restrictions, or including labor disturbances affecting only their economic concerns.[31]

2.2. The Nature of Force Majeure Clauses in South African Contracts

Force majeure clauses govern the relationship between the parties and the consequences arising from South African contract law. Particularly, it has become customary in contracts to stipulate *force majeure* clauses. When *force majeure* clauses are inserted into contracts, those clauses must be comprehensive and stipulate a list of events that the counterparties agree will suspend their obligations or performance. For instance, in the context of the COVID-19 pandemic in South Africa, the *force majeure* defense was recognized by governmental directives mandating the closure of commercial enterprises or the suspension of public transportation services, or any analogous occurrences that render the fulfillment of contractual obligations impossible, as an "Act of State." This phenomenon is subsumed under the common law doctrine of *force majeure*. The ramifications of this doctrine encompass a suite of regulatory mechanisms designed to safeguard property rights and promote public welfare, in addition to alleviating the adverse effects attributable to the disaster, as articulated in Plate Number 1 of 2020. The nomenclature utilized within this legislative framework is inherently expansive, thereby necessitating meticulous scrutiny by corporate entities regarding subsequent statutory provisions that may impact the operational continuity of their business practices. Ultimately, the competent judiciary of South Africa shall adjudicate the adjudication of whether a particular circumstance

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[26] Kessedjian, C. (2005). Competing approaches to force majeure and hardship. *International Review of Law and Economics*, *25*(3), 415–433.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

constitutes force majeure. As Luke Daniel notes, when considering a *force majeure* breach, the court usually evaluates the type of contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility referred to by the defendant.[32] At the same time, the party invoking *force majeure*, in any case, must prove the existence of the *force majeure* for its application in that the consequences of the event could not reasonably be prevented or overcome.

In contemporary South African law, any occurrence or situation beyond the control of the parties, which renders contractual performance impossible, invokes the principle of subsequent impossibility. As Hutchison writes, if performance becomes objectively impossible without any fault of the parties and because of unforeseen and irreparable events, the general rule of common law is that the obligation to perform, and the corresponding right to performance (if any available) is terminated.[33] Thus, in the absence of a *force majeure* clause, the parties can apply the common law principle – subsequent impossibility of performance to a situation of default.[34] The subsequent impossibility of the performance of the contract means that after the conclusion of the contract, its performance became objectively impossible without the debtor's fault arising from an inevitable and unforeseen event.[35]

The "objectivity" and "reasonableness" requirements are casuistically assessed as has been evidenced by a litany of court cases emanating from the COVID-19 national lockdown restrictions. Importantly, South African courts considered the nature of the contract, the relationship of the parties, the circumstances of the case and the nature of the impossibility referred to by the party, *inter alia*. A party seeking to rely on this defense must show that implementation is objectively impossible and not merely difficult or economically burdensome. This approach is, unfortunately, fraught with difficulties.

2.3. The Purpose of Force Majeure in South African Law

The primary objective of both a *force majeure* clause and the common law concept of "supervening impossibility" excuses the defaulting party from performing its obligations.[36] This results in excusing that party from the consequences of a breach of contract, which would usually allow the aggrieved party to claim damages and/or cancel the contract. The concept of "supervening impossibility" does not, however,

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32 Daniel, 2010.

33 Hutchison & Pretorius, 2018.

34 Kahle, G., & Wilson, Y. (2020, March 23). *Force majeure and contractual obligations (COVID-19)*. Financial Institutions Legal Snapshot. https://www.financialinstitutionslegalsnapshot.com/2020/03/force-majeure-and-contractual-obligations-covid-19/

35 Vurgarellis, V., & Zimu, M. (2020, April 2). *Force-majeure during COVID lockdown in South Africa*. Lawtons Africa. https://www.lawtonsafrica.com/post/force-majeure-during-covid-lockdown-in-south-africa

36 Kahle & Wilson, 2020.

regulate the consequences any further. Hence, *force majeure* clauses should be included in all contracts.

2.4. Requirements the Successful Exemption from Liability: A Hybrid of Common Law, Judicial Precedent, and Development of the Common Law

2.4.1. A Force Majeure Event: The requirements in South African Law

There are a few requirements that must be met before a defense can be constituted as a *force majeure* event. Every event that occurs must be analyzed to ensure they meet these requirements:

a. The event in question must take place after the contract has been created and signed.

b. The event must, under all circumstances, be unavoidable; thus, making the terms agreed upon impossible to fulfil.

c. A *force majeure* event must be beyond the control of the contracting party, that is, there must be an element of external influence[37].

d. If the event in question was foreseeable, then *force majeure* may not be applicable.

2.4.2. The Implementation of Force Majeure

If the event in question meets all the requirements needed to be considered for a *force majeure* event, the contractual obligations will terminate. This order consists of:

a. The contractual obligation that is impossible to perform will be extinguished and neither of the parties will be expected to adhere to the contract.

b. It must be decided whether performing the obligation is objectively or absolutely impossible. If the obligation is objectively impossible it could be because one of the parties cannot physically perform the task anymore or cannot be expected to perform the task.

c. A period in which the *force majeure* is applicable will be decided. Once this period ends, and if the parties involved can perform their obligations, the contract will be reinstated.[38]

In South Africa, if a *force majeure* clause is absent in a contract, the common law concept of "supervening impossibility" applies by default. The general rule is that an agreement will not create obligations if performance is initially objectively impossible, *impossibilium nulla obligation est* (impossibility is an excuse for the non-performance of an obligation). In the case of *Peters Flamman and Co v. Kokstad Municipality* 1919 AD 427 at 434–437, the court held that:

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[37] Eversheds Sutherland. (n.d.). *South Africa*. https://ezine.eversheds-sutherland.com/force-majeure-global-guide/choose-a-location?ovelay=South%20Africa

[38] Titmas, B. (2020, May 1). *Interpreting contracts: Determining if COVID-19 is covered by force majeure*. De Rebus. https://www.derebus.org.za/interpreting-contracts-determining-if-covid-19-is-covered-by-force-majeure/

> A contract is void if, at its inception, its performance is impossible: *impossibilium nulla obligatio*. So, also where a contract has become impossible for performance after it had been entered into, the general rule was that the position is then the same as if it had been impossible from the beginning.

This is a departure from the position of English law in this judgment. The terms *force majeure, vis major* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstance beyond the control of the parties, including a so-called "act of God."

According to Ashraf Booley, the South African common law has taken a rather strict approach in that it does not condone default in most cases of *force majeure*. For example, in *Glencore Grain Africa (Pty) Ltd. v. Du Plessis NO & Others* (2007) JOL 21043 (O) case, the court held that there were certain conditions necessary for force majeure to terminate obligations. The Court listed the following cases regarding *force majeure* or impossibility, namely:

1) The impossibility must be objectively impossible,

2) It must be absolute, as opposed to probable,

3) It must be absolute, as opposed to relative,

4) The impossibility must be unavoidable for a reasonable person,

5) It should not be the fault of the parties,

6) The mere fact that an event could be foreseen does not necessarily mean that it should have been anticipated or that a reasonable person could avoid it.

In *Aveng (Africa) (Pty) Ltd. and Strabag International Gmbh v. South African National Roads Agency SOC Ltd. and Another* (the *SANRAL* case), the court held that *force majeure* did not apply in the following cases: (a) when the contract is entered into after the event, (b) if the event occurs after the injured party delays performance.[39] The court adopted an objective test to determine what constituted *force majeure* as contained in the contract. Furthermore, the Court found that the circumstances relied upon by the applicant could have been overcome and therefore, could not objectively be deemed to constitute *force majeure*. In conclusion, the court ruled that a party claiming the occurrence of a force majeure event or related circumstances might not unilaterally regard such an event as sufficient to preserve their rights. Rather, the party is required to undertake reasonable efforts to mitigate any damages arising from the force majeure event or circumstances.

Where a contract is silent on *force majeure*, or there is no written contract, the applicable common law principles must be followed. It is important to note that South African law maintains a stringent approach, wherein it does not universally exempt parties from the performance of contractual obligations in all scenarios classified as force majeure. Certain conditions must be fulfilled for a *force majeure* to trigger impossibility to perform.

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[39] Booley & Potberg, 2020.

2.5. Mitigation of Risks When Invoking the Force Majeure Defense

Following established South African jurisprudence, a prerequisite for the invocation of *force majeure* is the provision of timely notice to the aggrieved party. Should such notice not be timeously rendered, the consequences of the *force majeure* defense shall be suspended until the receipt of said notice. Upon receipt of such notification, the aggrieved party shall be entitled to suspend the performance of its contractual obligations.

The *force majeure* clause within the contractual agreement must delineate the specific conditions requisite for its applicability. Commonly, such a clause encompasses stipulations requiring the party asserting *force majeure* to: (i) immediately provide written notice of the *force majeure* events to the counterparty, (ii) undertake all reasonable efforts to mitigate the consequences of the *force majeure* events to the extent possible for the counterparty, and (iii) promptly resume the performance of its obligations upon the cessation of the force majeure circumstances.[40] There is a duty on the defaulting party to do all things necessary and reasonable to utilize the force majeure defense. Unlike in Russia, compliance with all requirements is necessary, but South Africa does not have a codified law for the enforceability of the doctrine apart from casuistic judicial determination.

2.6. Remedies

The general effect of a *force majeure* is that parties are excused from their obligations. This means that a party who legally fails to perform relying on *force majeure* cannot be sued for any damages suffered arising from nonperformance. While a party may be excused from its obligations under the contract while the *force majeure* continues, there is usually an obligation to exercise all reasonable efforts to the impact of the *force majeure* event and resume performance of its obligations once it can do so.

3. Comparative Legal Analysis of Russian and South African Civil Law Provisions on *Force Majeure*: A Reconciliation?

Longstanding amicable relations have characterized the bilateral relationship between the Russian Federation and the Republic of South Africa since the period of the Soviet Union, encompassing various dimensions of economic cooperation. In the context of the dynamically evolving inter-jurisdictional collaboration, a comparative legal analysis of the *force majeure* provisions under Russian and South African civil law is both timely and requisite for the effective application within the operational practices of economic entities in both jurisdictions.

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[40] Han, S. (2016). Force majeure, change of circumstances and termination of contract. *Journal of Law, Society and Development*, *3*(1), 31–44.

Concerning the legal framework of South Africa, it is noteworthy that the hybrid nature of its legal system contributes to the development of contract law in alignment with the continental (Romano-Germanic) legal tradition. This framework preserves traditional legal constructs while concurrently integrating certain elements derived from the contract law of jurisdictions in the common law (Anglo-Saxon) legal family.[41] South African scholars note that the main provisions of South African contract law emanate from Roman private law, so the principle of *pacta sunt servanda* is preserved in South African contract law.[42] Added to this, is the constitutional directive to develop the common law.

In South African and Russian contract law, the primary purpose of a *force majeure* clause is to free a party from legal responsibility for failing to fulfill its obligations or for suspending its performance when a *force majeure* event occurs. South African common law is not codified, and the concept of *force majeure* arises from various sources. Hutchison, in his book on contract law in South Africa, provides a summary of the definition of *force majeure*.[43] There is no standard definition of *force majeure* clause in South African law.[44] Contracting parties cannot simply rely on a clause stipulated as a *force majeure* clause but does not list or specify what the parties consider *force majeure* circumstances. The provisions on *force majeure* circumstances should be specifically detailed.[45] Judicial interpretation is paramount in ascertaining the presence of *force majeure* circumstances, as evidenced by research emanating from South Africa. This case-by-case approach engenders a degree of uncertainty in its adjudication, which contravenes the requisite clarity that underpins the fundamental precepts of law.

The contemporary legal framework of the Russian Federation is situated within the Romano-Germanic legal family, which is defined by a stringent hierarchy of legal sources. The principle of *pacta sunt servanda* undergirds contractual relationships within the jurisdiction of Russia. Notably, there exists no explicit statutory definition of *force majeure* within Russian civil legislation. However, Article 401 of the Civil Code of the Russian Federation delineates the primary criteria for *force majeure* as embodying "emergency" and "unavoidability." *Force majeure* is characterized by unforeseen circumstances that could not reasonably have been anticipated at the time of contract formation and are beyond the control of the contracting parties.

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41 Ifraimov, V. Y. (2013). The contract in the law of the Republic of South Africa. *Legislation and Economics*, *12*, 60–66. (In Russian).

42 Hutchison & Pretorius, 2018.

43 Christie, R. H., & McFarlane, V. (2006). *The Law of Contract in South Africa*. LexisNexis Butterworths.

44 Van Schalkwyk, A. (2018, February). *The nature and effect of force majeure clauses in the South African law of contract* (LLM thesis, University of Pretoria). https://www.mobt3ath.com/uplode/book/book-56829.pdf

45 Kahle & Wilson, 2020.

Judicial bodies in both Russia and South Africa engage in a rigorous analysis of disputes on *force majeure* by evaluating whether the event in question meets the requisite criteria. The mere inclusion of a *force majeure* clause within a contract does not ascertain its recognition by a court in specific litigations. Courts will scrutinize whether the circumstance is insurmountable or unforeseen and whether the obligor could have taken, mitigate actions to avert the resultant consequences. Accordingly, the determination of whether an event qualifies as *force majeure* is significantly contingent upon judicial interpretation of the facts vis-à-vis the established legal standards.

In South Africa, the principle of subsequent impossibility of performance is invoked in instances where the contract is devoid of a *force majeure* clause or when such a clause lacks specificity concerning unforeseen events. In these scenarios, recourse to common law may serve as an alternative legal remedy, subject to the discretion of the aggrieved party petitioning the court. It is imperative that demonstrable evidence of an objective impossibility in fulfilling contractual terms, arising from an unforeseen and unpreventable event, is established.

There exists a corollary provision within Russian civil legislation regarding the impossibility of performance, as articulated in Article 416 of the Civil Code. To effect the termination of an obligation, the party must furnish evidence substantiating the impossibility of performance. *Force majeure* constitutes merely one among various grounds for establishing such impossibility.

In contemporary commercial contracting, parties endeavor to delineate and enumerate all foreseeable *force majeure* circumstances that may exonerate them from liability for non-performance or improper execution of contractual obligations. This proactive approach is particularly salient in light of extraordinary global occurrences, such as the recent pandemic and international sanctions. Parties may avail themselves of the "ICC force majeure clause" (both long and short forms) promulgated by the International Chamber of Commerce (ICC) when drafting commercial agreements. These clauses, updated in 2020, are amenable to application across any commercial contract through explicit reference.

The salient benefit of incorporating ICC *force majeure* clauses lies in their universal applicability, transcending the confines of specific national legislative frameworks. The ICC has also provided a model clause for *force majeure* that is accompanied by an exhaustive enumeration of circumstances that may be deemed force majeure. In the event of legal disputes, this comprehensive catalogue serves as a robust defensive mechanism for parties against claims of ambiguity. It is submitted that the use of contemporary, legally defined ICC *force majeure* clause in contracts will contribute to the effective application of contractual provisions on force majeure maintaining a decent margin of appreciation for both jurisdictions.

Thus, from the above comparisons and comparisons of the category of *force majeure* in Russian and South African law, it can be concluded that, in general, the conditions for the application of *force majeure* circumstances in contracts are similar, although

there are several differences due to the historical, cultural, jurisdictional characteristics of these countries. More precisely, the absence in South African legislation of a Civil Code or other regulatory document stating *force majeure* requirements and the consequences of its application. However, it is also accepted that the South African courts have developed much jurisprudence, which serves as judicial precedent.

Conclusion

The Russian Federation and the Republic of South Africa have engaged in the progressive development of economic cooperation over an extended period. The incorporation of *force majeure* clauses within contractual frameworks between business partners of these jurisdictions serves to safeguard the contracting party against unforeseen circumstances that preclude the performance of contractual obligations.

A comparative legal analysis of *force majeure* circumstances and their implications for contractual efficacy demonstrates that both Russia and South Africa possess unique attributes within their respective legislative and doctrinal landscapes concerning force majeure. Notably, South African law lacks a codified normative provision explicitly addressing *force majeure*; however, the void is mitigated through judicial precedent and legal doctrine.

The findings indicate that the recent escalation of trade and economic agreements between Russia and South Africa has rendered *force majeure* clauses a focal point in both domestic and international adjudications. Hence, the precise formulation and evolution of these contractual provisions are essential for sound legal interpretation and enforcement.

The authors contend that the enhancement of the civil legal framework governing *force majeure* within contractual agreements, alongside harmonious efforts from legal scholars and practitioners from both nations, is imperative. This collaboration can yield practical recommendations for effectively delineating *force majeure* stipulations within contracts. Specifically, the adoption of the "ICC Force Majeure Clause (Long Form, 2020)" and the "ICC Force Majeure Clause (Short Form)" is recommended, as these clauses can facilitate clearer understandings and mutual expectations amongst contracting parties. Furthermore, the ICC reservations must be meticulously structured, clearly articulated, and amenable to legal interpretation.

The discourse further underscores the inherent unpredictability of judicial interpretations, which can lead to substantial ambiguity, as evidenced by a plethora of legal precedents. Therefore, it is of paramount importance to maintain clarity by incorporating precise clauses that delineate *force majeure* events. This necessity is particularly salient within the context of trade and contractual relations among BRICS nations. While principles of reciprocity and comity undoubtedly play a pivotal role, state parties should articulate their deliverables with the utmost clarity when

forming contracts. Such an approach not only cultivates improved trade relations but also facilitates greater understanding and predictability for the contracting parties involved.

In conclusion, the refinement of *force majeure* provisions within bilateral contracts between Russia and South Africa is not merely a procedural recommendation but an essential imperative for the sustained efficacy of their economic cooperation. Clear, comprehensively drafted *force majeure* clauses will strengthen the legal framework, bolster confidence in contractual relationships, and ultimately advance the shared goals of trade and economic development between the two nations.

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Information about the authors

Svetlana Zimneva (Tyumen, Russian Federation) – Associate Professor, Department of Civil Law Disciplines, University of Tyumen (38 Lenina St., Tyumen, 625000, Russian Federation; e-mail: swk1@yandex.ru) – **corresponding author**.

Nazreen Shaik-Peremanov (East London, South Africa) – Advocate, High Court of South Africa, Supervisor, University of South Africa: Doctoral Programme (50 Church St., East London, Eastern Cape, South Africa; e-mail: nsnazreen19@gmail.com).

Irina Pluzhnik (Tyumen, Russian Federation) – Professor, Deputy Director for International Relations, Institute of State and Law, University of Tyumen (38 Lenina St., Tyumen, 625000, Russian Federation; e-mail: i.l.pluzhnik@utmn.ru).