MIJARES ANGOITIA CORTES Y FUENTES

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

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 rebuc 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.**

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