

General considerations regarding Coronavirus (COVID-19) consequences on contracts under Mexican legislation.

Due to the crisis caused by COVID-19 and the different decrees and resolutions issued in connection thereto by the Mexican Federal Government, many doubts and questions have emerged regarding the effects this will have on contractual relationships among individuals.

Listed below are some relevant legal considerations regarding the enforceability of contractual obligations:

Acts of God or Force Majeure.

Concept. Mexican civil doctrine has identified the acts of God (or acts of nature) or force majeure as acts arising from the forces of nature or of man which, being or not foreseeable, are inevitable and unavoidable. The importance of such concept is that, if it occurs, it constitutes a general exception or justification to the debtor's responsibilities in the event of a breach, since

such breach was caused due to an event beyond the control of such party, who could not foresee it or that, even foreseeing it, was not able to avoid it.

In this regard, the relevant doctrine and our Federal Courts have distinguished the next categories of events which may constitute acts of God or force majeure: (i) events arising from nature; and (ii) acts of man, including acts of government / authority.

Effects. An act of God or force majeure results in the inability of a debtor to comply with some of its obligations. Under such impossibility, the debtor is released of its obligations or, where appropriate, they may be reduced, since such events have as consequence the exception or justification to avoid liability of whomever breached an obligation. Therefore, despite such breach, it is considered that the liability may not be

attributable to the party in default, as the individual is not obliged to comply with the assumed obligations.

It is important to mention that the breach may be total or partial, definitive or temporary, which will depend on the nature of each agreement and the specific conditions of each case.

Requirements. It is a common practice in Mexico that contracts expressly contemplate acts of God or force majeure as a justification to avoid liability, as well as the requirements that must be met in order to be invoked. In case of such event, it is important to evaluate the individual aspects agreed upon (for example, deadlines for notice, specific formalities to invoke an exception of this nature, special conditions that may have been agreed, etc.).

Even if the contract does not expressly include a clause regarding acts of God or force majeure, it is possible to summon such concept as long as the elements identified by our Federal Courts are duly met, which are the following:

Unpredictable or Irresistible. The acts of God or force majeure must be unpredictable or even if foreseeable, they must be "irresistible" or "unavoidable". Such standard suggests that, even if the acts of God or force majeure could be foreseeable, it is possible that the debtor may justify its breach, as long as it has taken, without success, the necessary precautions to avoid it.

Generality. This generality nature implies that the performance must be impossible to be carried out by any person under the same conditions as the debtor's. It shall not be considered that an impossibility exists if performance cannot be carried out by the obligor, but it could be complied by another person instead if her/him.

Absolute and definitive impossibility. Doctrine suggests that acts of God or force majeure must result in a complete and definitive impossibility and not just cause that may increase the difficulty or a delay in the performance.

Such elements shall be analyzed in each particular case, considering the possibility that the non-compliance could be total or partial, in terms of the above.

Burden of proof

Events arising from nature or man. In case of default, our Federal Courts have considered that the debtor in default bears the burden of proof to demonstrate that each of the aforementioned elements was met –that the act of God or force majeure was unpredictable or irresistible, general and that the fulfillment of the related obligations was absolutely and definitely impossible–.

Acts of government / authority. It is relevant to distinguish the acts of government or authority as acts of God or force majeure, which are known as "*... all those restrictions arising from an order or a prohibition emanating from public authority...*". In such case, it would be enough that the act of authority exists in order to have the act of God or force majeure proven in those cases in which said act establishes a prohibition or obstacle, being these the direct cause of the breach.

Exceptions. The Mexican civil legislation considers that acts of God or force majeure release the debtor from its responsibilities, unless the debtor: (i) has caused it or contributed to it; (ii) has expressly accepted such liability

–by virtue of contractual provision–; or (iii) when the law imposes such liability.

COVID-19. Does it constitute an act of God or force majeure? On March 11, 2020, the World Health Organization declared the outbreak of the virus identified as COVID-19 as a pandemic; additionally, several local and federal authorities have taken measures to prevent the spread of the virus.

The most relevant provisions that to date have been issued by the Mexican federal authorities are the following:

1.- Decree published in the Federal Official Gazette (*Diario Oficial de la Federación*) on March 27, 2020, issued by the President, through which extraordinary measures were declared in order to combat the pandemic caused by SARS-CoV2 virus (COVID -19), which established the foundation for subsequent health declarations, by granting the Ministry of Health (*Secretaría de Salud*) and the General Health Council (*Consejo de Salubridad General*) the necessary authority and powers to issue the pertinent measures to combat the aforementioned pandemic.

2.- The Resolution issued by the General Health Council (*Consejo de Salubridad General*), published in the Federal Official Gazette (*Diario Oficial de la Federación*) on March 30, 2020, through which the pandemic caused by SARS-CoV2 virus (COVID-19) was declared as a “Health Emergency due to Force Majeure”, which legally recognized the aforementioned epidemic precisely as a health emergency due to force majeure and, therefore, ordered its treatment as a priority.

3.- The Resolutions issued by the Ministry of Health (*Secretaría de Salud*), published in the Federal Official Gazette (*Diario Oficial de la Federación*) on March 31 and April 21, 2020, which expanded the effects of the Resolution above and, as a consequence thereto, regarding the private sector: (i) ordered the immediate suspension of activities considered as “non-essential” from March 30 to May 30, 2020; and (ii) allowed the “essential activities” listed therein to continue.

Notwithstanding the above, we consider relevant to point out that, in our opinion, neither the consequences associated with the outbreak of the COVID-19 virus nor the aforementioned government resolutions automatically and immediately generate an act of God

or force majeure event susceptible to immediately allow debtors, at least in a general manner, to breach or stop complying with their obligations, but it should rather be evaluated on a case-by-case basis if this does take place, that is, in each contractual relationship the debtor invoking such concept must demonstrate that each of the following elements are met: (i) that the act of God or force majeure was unpredictable or irresistible, which in this specific case in our opinion it is; (ii) that it is general, which could also validly be demonstrated; and (iii) that the performance of the obligations is absolutely and definitively impossible, which in our concept constitutes the element that must be analyzed in each particular case in order to determine its existence.

The Unforeseeable Theory

Concept. The unforeseeable theory –or the “*rebus sic stantibus*” clause– authorizes the non-compliance or alteration of an agreement when the existing conditions at the moment of performance are considerably different from those that prevailed when executed. Although this concept was expressly introduced in the Civil Code for Mexico City (*Código Civil para la Ciudad de México*) in 2010 through the amendment of its

articles 1796, 1796-Bis and 1796-Ter, previously there were other provisions –as the case of article 2455 of such code– that contemplated cases considered as extraordinary (unusual events that the parties could not reasonably have foreseen). It is important to point out that other civil legislations at state level also contain such theory; however, their specific analysis is not part of this work.

It should also be considered that Mexico City's civil regulation only applies to civil contracts subject to term, condition or of continued duration (*tracto sucesivo*), and as long as they are not deemed "aleatory"; in this regard, the relevant doctrine considers that the unforeseeable theory only applies to civil legal acts, as well as to those acts where the Civil Code for Mexico City supplies any deficiency or, given the case, the civil legislations of the Mexican states that also contemplate this theory.

Effects. The referred regulations grant the parties the right to request the "...amendment of the contract...", for the purpose of recovering the balance between their obligations.

In the event that the parties do not reach an agreement in connection thereto, it is possible to go before a judicial authority in order to settle such dispute; if the action is appropriate, the defendant may choose: (i) to modify the obligations in order to restore the contract's original balance, as determined by the judge; or (ii) the contract termination. It is important to mention that the request for the contract's amendment does not suspend the performance of its obligations.

Requirements. The unforeseeable theory applies in cases where the following requirements are met:

Extraordinary national events. Doctrine considers that the *rebus sic stantibus* clause is only applicable in cases of "national events", that is, that affect the entire country, as happens in an economic crisis, epidemics, wars, etc.

Increase of an economic consideration. One of the requirements for applying the theory is an increase of the economic burden of the obligation compared to what is received in exchange as consideration, which, as a general rule, is understood to be "excessive" or "notoriously unfair".

COVID-19. Is the unforeseeable theory applicable?

As explained above, the outbreak of the virus identified as COVID-19 could have the necessary characteristics to be considered as a “extraordinary national event”, considering the measures adopted by several local and federal authorities in such regard. An essential element that must be considered to prove said requirement, is the Decree and the Resolutions issued by the President, the General Health Council (*Consejo de Salubridad General*) and the Secretary of Health (*Secretaría de Salud*) referred above, and, in general, any other measure adopted by the federal and local authorities in the days to follow.

On the other hand, the requirement of an “increase on the economic burden” must be evaluated on a case-by-case basis, in order to determine if it meets the features outlined by the doctrine. It must be considered that the amendment of the obligations may be agreed between the parties and only in the event of a disagreement will a jurisdictional authority intervene, who, if applicable, may decide if the requirement above –increase of economic burden– is met through an analysis of the specific circumstances.

Opportunity to request the amendment of a contract due to the Unforeseeable Theory.

Pursuant to article 1796 Bis of the Civil Code for Mexico City, the request must be made within 30 calendar days following the extraordinary event and, in absence of an agreement between the parties within 30 natural days following receipt of the request, the applicant will have the right to request a Judge to settle the corresponding controversy, for which it must exercise the respective action within the following 30 calendar days.

In this case, due to the specific circumstances, the way in which the authorities have taken and will continue to take the corresponding measures and given the uncertainty of the final impact, it will not be easy to determine the starting moment to count the 30 calendar days term to request the amendment of contracts, determination to be made on a case-by-case basis, depending on the specific circumstances of the contractual relationships and the manner in which the obligations thereunder are affected by these extraordinary events justifying the correspondent modification or termination.

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