

# ***Force Majeure* of COVID-19 under Mexican Law?**

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The present alert offers an analysis of the possible legal implications of coronavirus (“COVID-19”) in civil and commercial commitments, under Mexican Law. The coronavirus was first notified on December 31, 2019, in Wuhan, China. On Wednesday, March 11, 2020, the World Health Organization (“WHO”) declared COVID-19 as a pandemic; i.e. a disease that, simultaneously, extends in numerous countries all over the world. The reported cases of COVID-19 in Mexico, and globally, continue to increase. Consequently, the international community has reinforced prevention and control measures against COVID-19. These measures, as well as the spread of the outbreak, in general, have affected international markets, and is reasonable to expect these impacts to continue in light of the virus’ aggravation.<sup>1</sup> The foregoing carries impacts on legal relationships. Especially, in a globalized market where commercial entities from different regions make business through contractual commitments. In this brief note, we specifically discuss the concept of force majeure, and related concepts, that will be relevant in the implications that COVID-19 will have in the legal relations of our clients in Mexico and the world.

## **Contractual force majeure**

The prevention and control measures against COVID-19 can have different effects on the fulfilment of contractual obligations. A natural impact would be the impossibility of the fulfilment of such commitments. For example, the closure of cities and ports, as has been established by certain States like China, Italy and the United States, could lead to the impossibility of producing goods, delivering them on time (or at all), or delivering contracted services, such as goods’ distribution. The measures taken against COVID-19 can also result in economic unforeseen hardships that make the performance of legal obligations extremely onerous, or even make such performance impossible. For example, the cut or decrease of material supplies can turn the production of goods and delivery of services more expensive, or even inefficient, which has the natural effect of not generating income, therefore causing insufficient funds to meet monetary payment obligations.

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<sup>1</sup> Yen Nee Lee, *6 charts show the coronavirus impact on the global economy and markets so far*, CNBC, <https://www.cnbc.com/2020/03/12/coronavirus-impact-on-global-economy-financial-markets-in-6-charts.html>.

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Under Mexican Law, in some cases, contracts can exempt entities from liability if they are under the aforementioned circumstances.<sup>2</sup> Events beyond the parties' control, which make the performance of a contractual obligation impossible, as those that could result from the measures related to the COVID-19, are commonly included in these provisions. Similarly, contracts may include price adjustment provisions for cases when the performance of the contract is not necessarily impossible, but it is extremely onerous, given the unforeseen circumstances. Hence, it is advisable to make an exhaustive review of the contractual provisions under which the performance of a legal obligation, and the contractual liability that could arise from it, are justified, exempted, or subject to adjustment.

This same hypothesis can occur in contracts of international sale of goods. In these, the United Nations Convention on Contracts for the International Sale of Goods ("the Convention") is applicable if the parties are nationals of a contracting state, and have not expressly agreed on the exclusion of it. Among other 87 countries, Mexico is a contracting state of the Convention, so its application is common in these kind of international contracts. Under the Convention, as in the common contractual practice in Mexico, unforeseeable circumstances that make the performance of the contract impossible are exempted from legal liability. Again, the measures related to the control of COVID-19 contagion, and of the virus *per se*, are relevant, as they can justify the failure to perform contractual obligations, and exempt the legal liability that could arise from it.

## Force Majeure under Mexican Law

Even in the absence of contractual rules regarding circumstances that justify the failure to comply with its dispositions, general Mexican Law exempts legal liability to entities that fail to perform its legal and contractual obligations, due to *force majeure* events that render this impossible. Precedents have interpreted that *force majeure* supposes an event beyond the individual's control, foreseeability or prevention.<sup>3</sup> The main legal consequence of a *force majeure* event is that it exempts a party from performing a legal obligation (for example, the fulfilment of a contractual duty) and, especially, in the event of failure, excludes the application of penalties, including those agreed by the parties to a contract (such as conventional penalties, liquidated damages, or LDs).<sup>4</sup> For this to happen, the *force majeure* event must be (i) beyond the control of the party who failed to perform an obligation; (ii) impossible to resist; (iii) unforeseeable at the time of acquiring the relevant obligation (for example, at the time of the conclusion of the contract); and (iv) render the performance of the relevant obligation impossible.<sup>5</sup> In addition, according to judicial precedents, *force majeure* can be caused by acts of nature, acts of humans or acts of governmental authorities.<sup>6</sup>

Hypothetically, and in general, not necessarily in Mexico, measures related to COVID-19 could provide elements to claim *force majeure* since: (i) they are measures potentially beyond the control of the parties, since they are mainly imposed by the States; (ii) they constitute legal obligations that, in principle, cannot be resisted; (iii) at least a few days ago, the measures were unforeseeable; and (iv) as discussed, it is reasonable to assume scenarios where these measures, such as quarantines and closure of ports, could make the performance of contractual obligations impossible. Therefore, there are elements that could lead an entity to justify the failure to comply with an obligation due to a *force majeure* event caused by COVID-19, which must be analyzed case by case.

## The theory of imprevision in relation with economic hardships

On one hand, as we observe, when the parties to a contract have not agreed on the consequences of the impossibility to comply with contractual obligations, the above-mentioned concept of *force majeure*, can fill the

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<sup>2</sup> Amparo directo 295/2006. Patricia Ponce Meléndez. 24 de agosto de 2006. Unanimidad de votos. Ponente: Neófito López Ramos. Secretaria: Lizette Arroyo Delgadillo ("En los contratos civiles cada una de las partes se obliga en la forma y términos que aparezca que quiso obligarse, con plena libertad para hacerlo, siempre y cuando no se contravengan disposiciones legales ni se afecte el interés público").

<sup>3</sup> Amparo civil en revisión. Arias Antonio. 3 de julio de 1926. Mayoría de siete votos. Ausente: Francisco Modesto Ramírez. Disidentes: Ricardo B. Castro, Teófilo H. Orantes y Jesús Guzmán Vaca.

<sup>4</sup> Art. 1847 del Código Civil Federal; véase Amparo directo 295/2006. Patricia Ponce Meléndez. 24 de agosto de 2006. Unanimidad de votos. Ponente: Neófito López Ramos. Secretaria: Lizette Arroyo Delgadillo.

<sup>5</sup> Amparo directo 487/97. U.S.A. English Institute, A.C. 9 de octubre de 1997. Unanimidad de votos. Ponente: Ricardo Romero Vázquez. Secretaria: Elizabeth Serrato Guisa.

<sup>6</sup> Amparo directo 487/97. U.S.A. English Institute, A.C. 9 de octubre de 1997. Unanimidad de votos. Ponente: Ricardo Romero Vázquez. Secretaria: Elizabeth Serrato Guisa.

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gap. On the other hand, in the case of economic hardships to comply with obligations that, as we noted, could also result from COVID-19, the theory of imprevision or *rebus sic stantibus* could be relevant. In general, according to this theory, contracts of continued performance, or subject to a term, could be adjusted or terminated when its performance is impossible, due to events that does not qualify as *force majeure*, in case of circumstances that are (i) extraordinary; (ii) general; (iii) unforeseeable at the time of concluding the relevant obligation; and (iv) make the performance of the contract more onerous than it originally was.

This theory only applies in those legal systems that have expressly recognized it.<sup>7</sup> In Mexico, only some states such as Aguascalientes (articles 1733 and 1734 of the Civil Code); Chihuahua (articles 1691.a-f of the Civil Code); Mexico City (articles 1796 and 1797 of the Civil Code); Coahuila (articles 2147-2159); State of Mexico (articles 7.35 and 7.36 of the Civil code); Guanajuato (article 1351.III of the Civil Code); Jalisco (articles 1787 and 1788 of the Civil Code); Sinaloa (articles 1735 Bis y Bis B of the Civil Code); San Luis Potosí (articles 1633.2-.3 of the Civil Code), and Tamaulipas (articles 1261 of the Civil Code) have codified similar institutions to the theory of imprevision. As a reference, article 1796 of Mexico City's Civil Code provides that when in contracts subject to term, condition or continued performance, unforeseeable extraordinary national circumstances arise, which make the obligations of one of the parties more onerous, such party may seek an action in order to restore the balance between the obligations, according to the proceeding established in the next article.

Additionally, this theory does not apply in commercial contracts, just in civil commitments.<sup>8</sup> Therefore, in the case of unforeseeable circumstances that make the compliance of obligations more difficult or extremely onerous, and as long as these are not provided in the relevant contract, or does not qualify as a *force majeure* event, the only legal remedy, in principle, is the theory of the imprevision, in civil contracts that are governed by the laws of the states aforementioned.

Given the aforementioned, it is important to take into consideration that Mexican tribunals have established precedents upon which the general principle in contract law is that contracts must be duly complied with by the parties, notwithstanding the occurrence of extraordinary unforeseeable circumstances that could affect the fulfilment of the contracted obligation. Therefore, it is necessary to analyze, case by case, the relevant contract, its nature, the parties to it, and the applicable law, among other elements, to determine whether or not an exception to said general principle exists.

## Control of COVID-19 in Mexico

Up to this day, Mexico has not issued any drastic measures in order to control the COVID-19, such as an absolute closure of borders (either by land, air and/or sea, as other countries even in the Latin American region have done), or the restriction of transit and freedom of Mexicans through, for example, a suspension of individual constitutional rights. The Federal Government has limited itself to give *recommendations* to prevent the spread of the virus.<sup>9</sup>

Therefore, it is unlikely that an argument of *force majeure* events caused by the recommendations issued by the Federal Government in Mexico related to COVID-19 could exempt the failure to perform a contract under Mexican Law. This situation changes if measures that other governments have implemented are claimed (such as closure of orders or mandatory quarantine), since they have been more drastic and could directly affect an entity with obligations under Mexican Law. Additionally, some institutions, and even the Judicial Branch and some agencies of the Federal Executive, have indeed issued more drastic measures, such as suspension of activities. Difficulties arising from these measures could be regarded as *force majeure* events. Nevertheless, given the current situation, there is also the possibility of considering the existence of an extraordinary national event, which would constitute a *force majeure* event. However, this ought to be analyzed and determined in a thorough case-by-case study.

A similar result would be reached regarding economic hardships to comply with contractual obligations. If the relevant obligation was not commercial, and was governed by a law that provides for the theory of

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<sup>7</sup> Amparo directo 902/98. Miguel Ángel Pérez Córdoba e Irma Yolanda Navarro Tlaxcala de Pérez. 26 de junio de 1998. Unanimidad de votos. Ponente: Gerardo Domínguez. Secretario: Federico Rodríguez Celis.

<sup>8</sup> Amparo directo 902/98. Miguel Ángel Pérez Córdoba e Irma Yolanda Navarro Tlaxcala de Pérez. 26 de junio de 1998. Unanimidad de votos. Ponente: Gerardo Domínguez. Secretario: Federico Rodríguez Celis.

<sup>9</sup> Secretaría de Salud, Comunicado Técnico Diario Nuevo Coronavirus en el Mundo (COVID-19), 20 de marzo de 2020, [https://www.gob.mx/cms/uploads/attachment/file/542599/Comunicado\\_Tecnico\\_Diario\\_COVID-19\\_2020.03.20.pdf](https://www.gob.mx/cms/uploads/attachment/file/542599/Comunicado_Tecnico_Diario_COVID-19_2020.03.20.pdf).

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imprevision, the recommendations of the Mexican Federal Government could hardly justify the invocation of this theory, although not the more drastic measures taken by other countries, or other Mexican institutions.

Therefore, as the threat of the COVID-19 continues to grow, in addition to stringently follow the prevention and control governmental measures, it is diligent to conduct an exhaustive assessment of impacts in current commercial relationships, and its possible justifications under the contract that governs them, as well as under Mexican Law. It is also diligent to take any action that could mitigate the effects of COVID-19. We will continue to monitor the development of this phenomenon, and updating its possible legal implications.

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