

An aerial photograph of a desert landscape. A winding asphalt road curves through the middle of the frame. To the right of the road, there is a large telecommunications tower with a red and white lattice structure. Below the tower, there are several buildings, including one with a red roof and another with a white roof. In the background, a residential area with many small houses is visible. The overall scene is a mix of natural desert terrain and human-made infrastructure.

Impact of COVID-19 restrictions on Mexico's construction industry

The coronavirus pandemic has had, and will continue to have, profound effects on the global construction industry. There have been and will continue to be substantial delays and cost impacts as a result of labor shortages, disruption to supply chains and financial pressure.

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The coronavirus pandemic has had, and will continue to have, profound effects on the global construction industry. There have been and will continue to be substantial delays and cost impacts as a result of labor shortages, disruption to supply chains and financial pressure.

That impact has been felt in several ways in Mexico. On March 31, 2020, the Mexican Health Ministry published a decree enabling extraordinary actions to address the pandemic. The decree suspended all non-essential activities from March 30, 2020 to April 30, 2020.

With the exception of activities related to the conservation, maintenance, and repair of the critical infrastructure that ensures the production and distribution of essential services, the construction industry was included within the scope of the suspension.

The suspension period was later extended until May 30, 2020, and Mexican state governments were able to implement any prevention measures they deemed appropriate in accordance with the general criteria issued by the Health Ministry. As a result, several states tightened the federal restrictions.

On May 14, 2020, the Health Ministry published a further decree that designated the construction, mining and manufacture of transportation equipment industries as essential activities, allowing these industries to resume activities as of June 1, 2020.

In the energy sector, the Mexican Energy Regulatory Commission (CRE) issued several resolutions suspending all pending CRE proceedings including applications, issuance of permits and requests for modifications of permits from March 24, 2020 until August 17, 2020. Another resolution was issued on January 18, 2021, once again suspending all CRE proceedings until federal or local authorities in Mexico City have determined there is no epidemiological risk for the federal public administration to resume its activities.

While the CRE proceedings are suspended, delays in the issuance and modification of permits and to backlogs in processing applications for permits are inevitable. Although CRE is formally closed and proceedings have been suspended, CRE commissioners still meet occasionally to issue resolutions, which in practice has exacerbated legal uncertainty in Mexico.



The pandemic will continue to have profound effects on the construction industry: substantial delays and cost impacts as a result of labor shortages, disruption to supply chains and financial pressure

Impact on projects

The various decrees and suspensions have had a major impact on the construction and development of projects in Mexico.

For example, a generator was prevented from commencing construction of a photovoltaic project in Puebla as originally scheduled due to delays caused by COVID-19. The generator submitted a force majeure claim to CRE, but CRE has not yet responded to the claim because its activities are suspended. The uncertainty over when CRE will resume activities has had a significant financial impact on the project.

Construction of another photovoltaic project in Sonora was suspended for several weeks due to supply chain delays arising from COVID-19. As a result of these delays, the owner was not able to achieve commercial operation on the guaranteed date under the power purchase agreement (PPA) and the generation permit. The sponsors are currently negotiating with the lenders whether this delay can be considered a force majeure event under the financing documents.

The suspension period prevented a generator in a simple-cycle project in Nuevo León from conducting performance tests and other work required under the PPA, thereby delaying achievement of commercial operation on the guaranteed date. The generator presented a force majeure claim to the Mexican National Center for Energy Control (CENACE). CENACE rejected the claim based on the generator's failure to provide evidence of the impact of the suspension period on the performance of its obligations. The generator requested that CENACE reconsider the merits of the request, but CENACE's resolution is still pending.



June 1, 2020

Construction, mining and manufacture of transportation equipment industries were allowed to resume activities as of June 1, 2020 following a two-month suspension due to the pandemic.

Is COVID-19 a force majeure event?

The outstanding question in the construction industry in Mexico is whether COVID-19 will be uniformly found to constitute a force majeure event across different construction projects.

Most construction contracts related to complex energy projects contain provisions under which the performance of a legal obligation, and the related contractual liability, are exempted or subject to adjustment as a result of force majeure events. However, it is advisable to review such contractual provisions to determine whether the measures related to COVID-19 could provide elements to invoke force majeure.

Finally, it is worth noting that even in the absence of force majeure or similar provisions, Mexican law exempts liability for failure to perform legal and contractual obligations as a result of force majeure events.

Mexican courts have interpreted that force majeure constitutes an event beyond a party's control, foreseeability or ability to prevent the event. The main legal consequence of a force majeure event is that it exempts a party from performing

a legal obligation and, in particular, in the event of failure, excludes the application of liquidated damages. In addition, according to case law, force majeure can be caused by acts of nature, human action or acts of governmental authorities.

Subject to these provisions, and contract regulations, measures related to COVID-19 potentially could provide elements to claim force majeure, as the pandemic and the measures imposed by the federal and local governments are beyond the control of the parties.

As these measures constitute legal obligations that cannot be avoided and were unforeseeable prior to the pandemic, and as it is also reasonable to assume scenarios where these measures, such as quarantines and closure of ports, could make performance of contractual obligations impossible, there are elements that could justify the failure to comply with an obligation due to a force majeure event caused by COVID-19.

In practice, the impact of COVID-19 will have to be analyzed on a case-by-case basis, and it may be some time before the construction of projects in Mexico returns to normal.



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