

Dealing with COVID-19 (Coronavirus) outbreak: Unforeseeable circumstances and force majeure under Mexican Law

This document is divided into four parts. The first one contains a brief introduction. The second one, addresses the legal treatment of force majeure under Mexican legislation. The third one, explains the concept of hardship, and the fourth one, with conclusions thereon.

I. Introduction

Starting in Wuhan, China, in December 2019, during the last few weeks the coronavirus crisis has increased exponentially. Coronaviruses are a family of viruses that cause diseases that, at first sighting, could be confused with a common cold; however, in case of not being properly treated, it can become a Severe Acute Respiratory Syndrome.

The World Health Organization has already stated that the world needs to be prepared for the coronavirus pandemic. Currently, China is one of the largest producers in several industry sectors and is highly involved in diverse supply chains worldwide. On the other hand, China is one of the main contributors of the Global Gross Domestic Product.

The coronavirus crisis is affecting international trade relationships through the supply chains, since many have been disrupted to this date. In consequence, it is generating a *domino effect* in the breaching of contractual obligations. Hence, the concept of force majeure becomes a key legal instrument to be taken into account in times of crisis and uncertainty.

II. Force majeure

a) Contractual regulation of force majeure

In case a force majeure clause is established under the contract, it will be necessary to determine whether or not the coronavirus outbreak and its effects are covered within the scope of said clause.

It is recommended to **give notice of the force majeure case** to the other contracting party.

If a force majeure clause was not incorporated to the agreement, then, the subject matter shall rely upon the treatment set forth in Mexican law.



b) Force majeure under Mexican laws (civil and commercial matters)

Pursuant to doctrine and legal precedents, unforeseeable circumstances and force majeure are classified as follows:

- Acts of nature, which covers natural disasters, such as fires, floods, earthquakes, storms, among others.
- Human deeds, such as crimes, wars, invasions, among others.
- Acts of authority, including all those impediments deriving from an order or prohibition issued by an authority, provided that the debtor has not given rise to such determination.

The distinction (merely doctrinal) between **unforeseeable circumstances and force majeure** is that **the first one refers to those acts of nature**, while **the second one refers to acts of man**.

In order to exercise the exceptional release from liability for breaching contractual obligations due to unforeseeable circumstances of force majeure, **two essential requirements** must be met:

- -Unpredictability, understood as the impossibility of the debtor to be able to anticipate the situation, in order to prevent it.
- Generality, which means that no person, under the same circumstances, could have prevented the event(s) considered as unforeseeable circumstances or force majeure.

The **Civil Code** for Mexico City and the Federal Civil Code state that no one is obligated in unforeseeable circumstances or force majeure except when i) it has contributed to it; ii) when it has expressly accepted that liability; iii) or in case of mandate of the law.

On the other hand, the **Commercial Code** states that: in the absence of provisions of such Code and other commercial laws, those of common law contained in the Federal Civil Code shall be applicable.

A systematic interpretation of these laws leads to conclude that there are grounds to assert that unforeseeable circumstances or force majeure cases can also be invoked in commercial matters.

c) International Law

In the United Nations Convention on Contracts for the International Sale of Goods, specifically in its section on exemption from liability for non-compliance,



establishes a series of requirements and steps to be met and taken, to evidence the applicability of the exemption:

Requirements:

- Unpredictability, if the event could not have been foreseen by the affected people.
- Uncontrollability, when there is no possibility of controlling the results.
- Impossibility of avoiding or remedying the consequences, referring to the fact that the consequences of said act or event cannot be avoided.

Steps to follow to invoke the non-compliance exemption:

- Communicating the impediment to the other contracting parties.
- In the event that the non-compliance is due to a third party breach, the obliged party will only be exempted from liability if the “second third party¹”, also evidences that its non-compliance is due to the same force majeure cause.

III. Legal treatment of hardship

The legal treatment of hardship finds its basis in the General Principle of Law: "rebus sic stantibus" which establishes that as long as the circumstances remain the same, the conditions of the contract will continue the same.

The concept of hardship is defined under the law as extraordinary events of national nature that, being impossible to foresee, cause the obligations of one of the parties to become more onerous. Said party may attempt a **legal action aimed at recovering the balance between obligations**.

The procedure established to request the modification of the contract, is as follows:

- The request must be made within 30 days of the extraordinary event.
- In case that the parties thereto do not reach an agreement within 30 days of receiving the request, the applicant may request judicial assistance to solve the dispute.

¹ In this case, the second third party is in a multilateral relationship, in which the non-compliance of one of them produces the default of another.



- The defendant in its case, may choose between the amendment of the agreement, in order to restore the balance of the obligations between the parties, or the termination of the contract.

IV. Conclusion

The COVID 19 (coronavirus) outbreak constitutes a very serious health, economic, legal and social problem. Although it has not reached its maximum degree of infection and effects in all sectors of Mexico, the contractual relationships in the businesses and operations of the parties must be analyzed to evaluate the possibility of falling within the scope of unforeseeable circumstances, force majeure or hardship, in order to minimize exposure to liabilities that may derive from the breach of obligations, thereby avoiding jeopardizing the business continuity.

We consider that there could be grounds to argue that the situation the country is currently facing is a situation of unforeseeable circumstances or force majeure. However, it shall be taken into consideration: a) the moment in which such situation generated and b) when a modification of the obligations of the parties could be justified, if applicable.

To determine the aforementioned, it is necessary to review the details of each legal relationship, the conduct of the parties, governmental notices or decrees, among other relevant legal acts and facts.