

COVID-19 impact on companies, performance of contracts and other obligations in Mexico

As the World Health Organization cataloged COVID-19 as a pandemic with a sustained risk of further spread worldwide and declared it not only a public health crisis, but a crisis in all sectors, questions automatically arise about the impact that COVID-19 will have on companies and businesses, as well as on the performance of contracts and other obligations in our country.

Although a Presidential Decree similar to that issued in 2009 during the outbreak of the H1N1 influenza virus (which suspended work and established various general restrictions) has not been issued to this date, the economic effects caused by COVID-19 and the various measures that have been adopted to date by government authorities and the private sector in Mexico direct attention to the actions that companies and businesses must take in the face of this generalized crisis and to the legal mechanisms provided in our law to deal with the problem around the performance of contracts and other obligations.

Regarding the impact at the corporate and business level, the directors and officers of public and private companies will have to make decisions and implement fast and well-informed actions to face the crisis caused by COVID-19 and its possible future ramifications. The priority should be to ensure the survival of companies in the short and medium term, the well-being of employees, business partners and the general public, as well as understanding the risks for their companies and seeking solutions that tend to mitigate them. Companies must evaluate their viability in the short and long term to generate solutions and changes in their corporate strategy that ensure their viability, as well as the business opportunities presented to them in this changing environment.

Regarding the performance of contracts and other obligations before the effects of the COVID-19, it will be necessary to analyze the cases in which our law allows either to (i) exempt compliance of the contractual obligations due to the occurrence of an act of God or force majeure; or (ii) request that the balance between the obligations of the parties to a contract be restored due to the existence of extraordinary and unforeseeable events that make the obligations borne by one of the parties more onerous (theory of unpredictability or *rebus sic stantibus* clause).

Both cases are briefly described below:

(i) Release from the fulfillment of the obligations by an act of God or force majeure.

In general terms, an act of God or force majeure is an unpredictable or inevitable event that makes it impossible to comply with an obligation. Thus, the release from an obligation for this cause is based on the principle that nobody is obligated to the impossible (unless they have expressly assumed liability for the act of God or force majeure) and also implies the release from the liability for the breach of the obligation.

In Mexican law, the parties to an agreement can validly define what should be understood as an act of God or force majeure, as well as the other requirements that must be met for it to be applicable, to what extent the performance of the obligations is released and even the events in which the existence of an act of God or force majeure may trigger the termination of the agreement. The parties to an agreement usually include certain specific formalities and terms to notify the occurrence of an act of God or force majeure, which compliance of formalities and terms are of utmost importance to partially or totally release the compliance of an obligation.

If the agreement does not provide for a definition of act of God or force majeure, to determine whether or not there is an act of God or force majeure and if it can totally or partially release the performance of an obligation, it is necessary to abide by the provisions of the applicable law (in civil matters it is regulated in the local civil codes, while in commercial matters it is regulated in substitution in the Federal Civil Code) and judicial precedents.

Under Mexican law, for an event to constitute an act of God or force majeure, it must comply with the following requirements: (a) it must be an event that comes from nature, from human acts or from acts of authority; (b) that the event is not attributable to the debtor; (c) that the event causes the *absolute* physical or legal impossibility for the debtor to comply with the obligation; (d) that the event is unpredictable and inevitable, i.e., that it cannot be anticipated or prevented; and (e) that the impossibility for the fulfillment of the obligation is general, that is, that the execution of the act (that is, the fulfillment of the obligation) is *impossible* for any person and not simply more difficult or onerous.

(ii) Applicability of the theory of unpredictability or *rebus sic stantibus* clause.

If an event does not meet the requirements to qualify as an act of God or force majeure and to release the debtor, in whole or in part, from the fulfillment of an obligation, it is possible to analyze the cases in which the affected party may demand the application of the *rebus sic stantibus* clause to restore the balance between the obligations of the parties or the termination of the agreement.

In general terms, the *rebus sic stantibus* clause or also called contractual unpredictability, which is based in the good faith principle to which the parties to an agreement must abide and in the principle of equity that must underlie all agreements, is applicable: (a) in agreements of continuous performance (such as the lease and other agreements which term extends over time); (b) when extraordinary and unforeseeable events arise during the term of the agreement and (c) when the events result in the obligations of one of the parties being more onerous than originally considered. This theory of unpredictability is provided in some local civil codes, so in order to determine if it is applicable to a specific case it will be necessary to analyze each agreement in light of its applicable law.

In conclusion, it is unquestionable that the effects of COVID-19 will impact to a lesser or greater extent the course of business of companies both globally and in Mexico, so it will be necessary to analyze the specific situation of each company, as well as those of the different obligations contracted which performance could be affected by this situation. The foregoing, in order to find the best solutions and mechanisms available that bring business continuity and the least possible impact in all sectors.

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Mexico City, March 23, 2020.

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