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Corporate and M&A Practice Group Newsletter



Compliance with Contractual Legal Obligations During the Pandemic in Mexico.

The normal flow of business and commerce around the globe is currently being negatively and significantly impacted. The pandemic declared by the World Health Organization due to coronavirus disease (COVID-19) on March 11, 2020¹ has forced various countries to take unprecedented measures to mitigate health risks. Consequently, the capacity of the productive sectors to continue operating and fulfilling their contractual obligations has been likely compromised. Consequently, companies may be subject to adverse legal consequences such as the payment of contractual penalties, damages, agreement terminations or specific performance of those contracts that are not fulfilled in due time and form.

Notwithstanding the foregoing, companies in situations of non-compliance may be exempted from their obligations when such non-compliance is a direct (and immediate) consequence of an event considered as a force majeure event.

» What is a force majeure event?

Under Mexican law, it is widely defined as a phenomenon of nature, or an incident of people with public authority, temporary or permanent, general, insurmountable,

unforeseeable, or that, when foreseeable, cannot be avoided, and that causes a person to carry out harmful conduct, or fail to act a legal duty or a contractual obligation².

Note that the event has to be something insurmountable; the fact the contract becomes more onerous or difficult to fulfill does not necessarily entail that we are facing a force majeure event.

» Is the COVID-19 pandemic a force majeure event?

The answer has to be carefully analyzed and depends on various factors. On one hand, there is the declaration of the World Health Organization as a global pandemic. Also, in Mexico there are already cases of COVID-19 infection. In addition, the Mexican government instituted the General Health Council (GHC), which (i) recognized the COVID-19 disease epidemic in Mexico as a serious disease requiring priority attention; (ii) decreed the suspension of legal time terms in the Public Administration Ministry; (iii) granted the Ministry of Health the authority to establish the necessary measures for the prevention and control of the COVID-19 pandemic; and (iv) on March 24, 2020, the Ministry of Health decreed a series

¹ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

² Gutiérrez y González, Ernesto. "Derecho de las Obligaciones". México, Editorial Cájica, 1976. Págs. 519 y 520.

of preventive measures defined in the “National Day of Healthy Distance”, with the purpose of social distancing to mitigate population transmission of COVID-19 . On the other hand, up to today, the restrictive measures that the GHC has enacted probably do not imply a forced suspension of the productive activity in Mexico per se.

It is worth mentioning that, in the event of “serious epidemics or the danger of invasion by exotic diseases”, the GHC has the constitutional duty to immediately issue the necessary preventive measures, which could make it impossible for certain companies to operate. Furthermore, there are several municipal and state governments that have begun to take more restrictive measures to deal with the current situation and that have decreed the closure of various businesses and activities in their locations to protect the population, such is the case of Mexico City, the municipality of San Pedro Garza Garcia, and many others in the country.

Notwithstanding the above, depending on the availability of certain goods or the specific characteristics of each industry, it is possible that some companies may already be unable to fulfill their contractual obligations even without the declaration by the competent authorities. For instance, some other federal, state, or municipal governments are drawing attention to the announcement of the suspension of work and procedural deadlines for the Federal Judicial Branch, Federal Court of Administrative Justice (Tax Court), as well as the courts of some entities such as Mexico City and Nuevo León, and the suspension of work for Notaries Public in Nuevo León. Likewise, some other administrative resolutions include those that decreed temporary closures of certain types of businesses, companies or specific lines of business that are part of a supply chain, contracts with parties in jurisdictions such as China and Italy, shortages of commodities, among others.

» Meanwhile ... what do we do?

Companies should carry out the following actions, generally and proactively:

- a. Consider the impact that the global pandemic can cause in its operations (both national and international).
- b. Reviewing in detail commercial contracts and operations executed with companies in Mexico and abroad.
- c. Take concrete actions to mitigate the risks in the impact to its operations and the breach of its obligations. An example is the specific treatment given to company vendors, who tend to travel frequently and find themselves more exposed to contagion, which may result in more people infected at the company and therefore less

personnel to provide service.

- d. Review the coverage of your insurance policies in connection with events of force majeure, specifically, pandemics or national health crises, in order to determine if there is the possibility of making claims in this regard, in particular to determine if there is a loss of earnings coverage.
- e. Review that the business relationships of the company with its suppliers and customers are duly supported, documented, and signed by the contracting parties. In particular, it is necessary to document the agreements that modify the original conditions of the contract, such as accepting delays, breaches, and other agreements that recognize the emergency situation and the impact that it has on the parties.
- f. Inform suppliers and customers, in good faith, if you are now experiencing any situation that may cause you to default on your obligations under any agreement with them. For example, lack of raw materials to continue with production, less personnel to work, etc.
- g. Keep informed and aware of official communications from the Mexican government, both at the federal and local levels.

» Conclusion

The full impact of COVID-19 will be expansive and its effects will increasingly be felt in the following months, and its probable expansion to various regions of the country and globally will affect our economy significantly and those other economies in the world that are intimately linked to ours, such as the United States of America and Canada. Therefore, companies must evaluate their possibility of overcoming this situation on a daily basis, so that they can continue to determine if they are in a position to fulfill their legal obligations and assess the risks they will face for their business decision-making.

If you wish to consult or get advice on any of the problems raised in this note, please do not hesitate to contact us.

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