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Real Estate, Infrastructure and Hospitality Practice Group Newsletter



Coronavirus and its impact in Real Estate transactions in Mexico

As per the latest report issued by the General Director of the World Health Organization ("WHO") on March 16, 2020, there are now a total of 167,515 globally reported cases of coronavirus (COVID-19), and 6,606 deaths. COVID-19 is currently affecting 100+ countries, and has been declared a global pandemic by said organization.

In Mexico's case, it is estimated that the infectious outbreak (exponential increase in infections) will occur between March 20 and March 30, 2020.

At *Sánchez Devanny* we consider it essential to provide a set of guidelines and relevant considerations to our clients and provide them with the necessary tools to respond to the different impacts and consequences COVID-19 could have on their business and commercial relationships, specifically in the real estate industry.

Key considerations for the real estate industry:

The parties may limit their exposure to COVID-19 depending on: **(i)** the terms of the agreement; and **(ii)** the preventive actions adopted in accordance with the respective contract.

Generally speaking, agreements do not contemplate pandemics, such as COVID-19, in their provisions, as a cause for termination or suspension of the effects thereunder.

Whether you are a landlord or a tenant or a party under

a construction agreement, promise to sell and/or buy and/or a purchase and sale Agreement of real estate in installments, among others, we would like to draw your attention to the following recommendations, legal considerations and actions, in light of the COVID-19:

Legal considerations. -

Pay attention to the language in the contract regarding the occurrence of Acts of God and/or Force Majeure events. -

Acts of God and/or Force Majeure are effective contractual exception mechanisms; thus, the affected party could argue either of them to avoid fulfilling certain obligations under the Contract.

The implications of Acts of God and/or Force Majeure happening are, in the event of breach of contract by one of the parties, if the breaching party is capable of evidencing that the breach was a consequence of the COVID-19, such party will not be liable for applicable damages or penalties in connection therewith.

There are different judicial precedents that require the party requesting to be exempted from paying a given penalty to evidence the following:

- » **External** – cause of default must be external or unrelated to defaulting party's will;
- » **Insurmountable** – cause of default must be

impossible to overcome;

- » **Inevitable** – cause of default cannot be avoided by the defaulting party;
- » **Unpredictable** – cause of default could have not been anticipated by defaulting party upon execution of the contract;
- » Shall completely impede fulfillment of the obligation;
- » There should be a causal link between the cause that generated the default and the party's inability to perform its obligations;
- » Confirm if your contract includes a specific clause for Acts of God and/or Force Majeure events. Check terms for notice periods and comply strictly with obligations in relation to how and when to notify.

As may seem obvious, COVID-19 meets most of the requirements above, maybe the toughest to surpass will be to evidence that it is a cause for the default which "is impossible to overcome". Therefore, it is relevant to gather evidence and official reports as published by the World Health Organization, Health Ministry in Mexico, travel warnings issued by the Ministry of Foreign Affairs, etc.

Construction Contracts. –

The terms of the respective contract must be considered particularly with respect to:

- » Validity of permits and licenses. Consider requesting extensions and, where appropriate, renewing the same, to avoid suspension of works;
- » Have a clear and constant communication between the parties, and determine jointly how the progress and delivery of the work will be affected including, if the case, relationship with workers, unions and provisions under collective labor contracts;
- » Review if your agreement provides for a clause of Acts of God and/or Force Majeure. Check terms for notice periods and comply strictly with obligations in relation to how and when to notify. In any case, the abovementioned judicial precedents should be considered.

Promise for Purchase and Sale and/or Purchase and Sale Agreements of Real Estate in installments.-

In these type of transactions, which have been entered into by the parties but have not yet closed and/or are still subject to installment payments, in addition to the abovementioned considerations, specific clauses and/or conditions precedent in the contract should be considered, especially those which may allow any of the parties to terminate and/or renegotiate the contract, such as material adverse effect and/or material adverse change clauses.

Review the language of the insurance policy of the property. –

In any case, we also recommend to review the text of the insurance policy which may include coverage for business interruption.

Additionally, existing coverage may provide for "loss of use" of premises or payment protection in the event that a debtor becomes insolvent and unable to pay.

Check terms for notice periods and other formal requirements. Comply strictly with obligations in relation to how and when to notify.

Discuss with insurance brokers any need for coverage on specific new exposures.

Data privacy obligations. –

Any information related to medical conditions is considered "sensitive and confidential data" as per the Federal Law on the Protection of Personal Data Held by Individuals, and its regulations.

Consequently, any company and/or individual that collects and uses sensitive personal information of its employees and/or visitors regarding health situation or symptoms, must ensure that they obtained express consent from the individual to use their sensitive personal information and limit the use of the same in accordance with the privacy notice and the legal provisions.

Also, processing of the relevant data sets must be done according to the general principles established by law (confidentiality, transparency, restricted access, etc.).

Please consider that, when dealing with sensitive personal information, the fines currently provided by law shall be doubled.

Operational actions and recommendations. –

Stay Informed. – Consult your State and Federal health authorities for the latest information on COVID-19 and guidelines for controlling transmission.

Maintain clear and frequent communication with tenants, building vendors and visitors to your property. –

Consider having ongoing communications with tenants and providers to inform them of the steps you are taking to clean and sanitize the property and, likewise, learn how they are addressing the COVID-19 outbreak with their employees and customers.

Offer pamphlets to employees, visitors, vendors, delivery personnel and staff about proper hand hygiene and cough etiquette.

Keep Common Areas Clean. –

Clean routinely and frequently touched surfaces and objects, including but not limited to, bathrooms, reception areas, elevator banks, turnstiles, escalators, door handles, communal kitchens or pantries, bathrooms and the like.

It is also advisable to install hand sanitizer stations in high-traffic areas of the building.

Meetings and Events. –

It is recommended to limit to a maximum or outright cancel and later re-schedule public events as well as meetings to avoid the mass concentration of people

and therefore the spread of the virus.

Implement Safety Measures: for Employees and IT considerations. -

When possible, allow your employees to work remotely. For this, your IT department needs to prepare for potential additional remote-access usage and capacity enhancement. Also, employees should be allowed to take laptops home for this purpose.

Conclusions. -

Our advice to our clients in the real estate sector is to be prepared for disruption of operations.

Start by checking the terms and provisions of relevant clauses in contracts in relation to the terms of the agreement, guarantees, insurance and contractual exemptions, as well as in connection with existing construction permits and licenses, among others.

Communicate with tenants, landlords, counterparts, suppliers and customers to determine what type of business continuity plans they are implementing and anticipate if the other party might seek to re-negotiate, terminate early or suspend any payment under the same.

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Real Estate, Infrastructure and Hospitality Practice Group

Our Real Estate, Infrastructure and Hospitality practice provides legal advice to Mexican and international developers, hospitality groups, and investors in general in several areas, including real estate acquisition, sale, lease and financing, both public (including CKD's, FIBRAS and other investment vehicles and public companies) and private, through financial institutions, and in connection with the development, construction, administration and operation of real estate through diverse legal structures, including the legal set-up of investment vehicles for said purposes and all legal and regulatory aspects related to investment and strategic transactions in the real estate, commercial, hospitality and industrial sector.

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