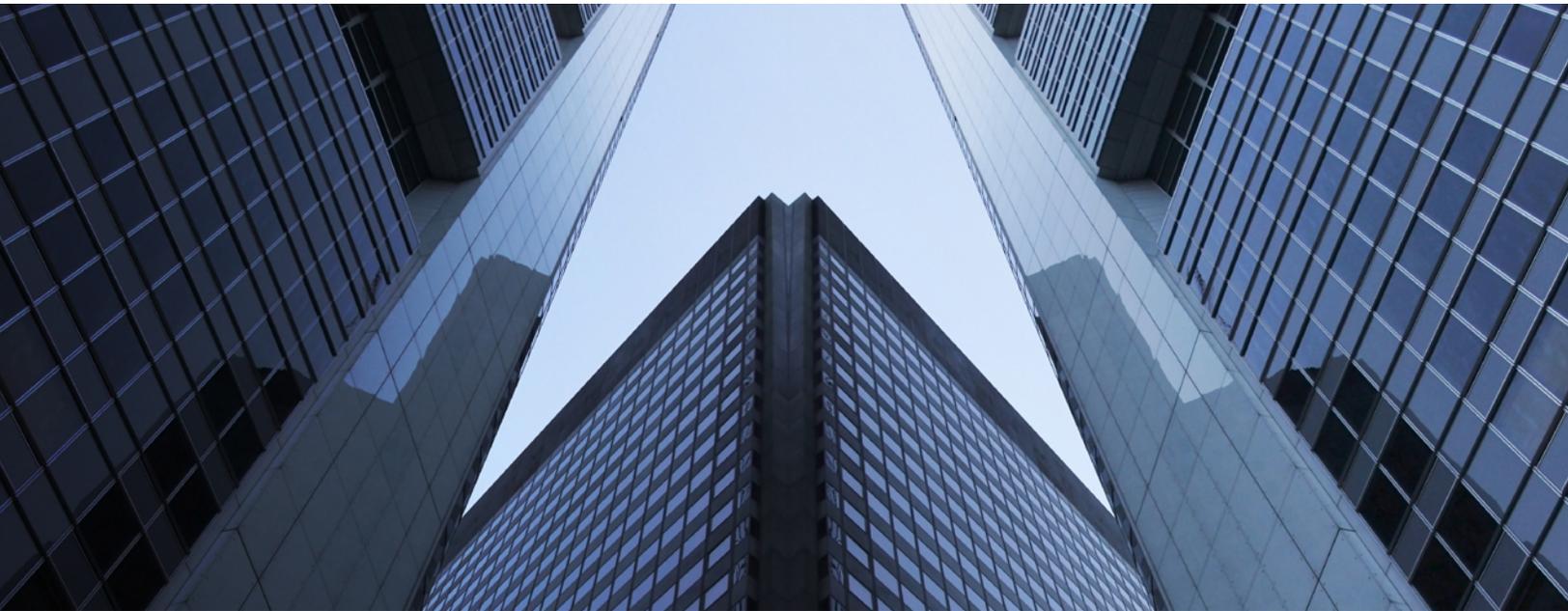


March 26, 2020

## Real Estate, Infrastructure and Hospitality Practice Group Newsletter



### Construction Projects and COVID-19. Latest Developments

As previously mentioned in our Real Estate, Infrastructure and Hospitality Practice Group Newsletter of March 17, 2020, in order to consider that the occurrence of a certain event constitutes an Act of God and/or Force Majeure, said event must be external, insurmountable, inevitable and unpredictable, thus, prima facie, it would be logical to assume that COVID-19 may be considered to be an Act of God and/or a Force Majeure event.

On March 23, 2020, the "Resolution whereby the General Health Council recognizes the epidemic of SARS-CoV2 virus (COVID-19) in Mexico as a serious disease deserving priority attention, and the activities required in order to prepare and respond to said epidemic are determined" (the "Resolution"), was published in the evening edition of the Official Gazette (the "DOF").

On March 24, 2020, the "Resolution defining the preventive measures to be implemented to mitigate and control the health risks related with the virus SARS-CoV2 (COVID-19) disease" was published in the evening edition of the DOF" (the "Resolution 2").

From the text of Resolution 2, it follows that the activities related with public, social and private sectors involving physical concentration, transit or displacement of people are temporarily suspended starting from March 24 and

up to April 19, 2020, except for companies, businesses, commercial establishments and all those sectors that are necessary to face the contingency, including, without limitation, hospitals, clinics, pharmacies, laboratories, medical, financial, telecommunications, and information media, hotel and restaurant services, gas stations, markets, supermarkets, corner shops, transportation and gas distribution services, as long as they are not closed spaces where crowds may gather.

Said Resolutions will have multiple effects on the national economy, including but not limited to the financial situation of companies and individuals, labor relationships, civil and commercial and real estate agreements, bankruptcy, and tax matters, among others.

The Resolutions will make it more feasible to use the concepts of Act of God and/or Force Majeure as exceptions for contractual compliance.

Considering that there is no universal definition of what constitutes an Act of God and/or Force Majeure in the Mexican legislation and/or judicial precedents, the contractual language is of utmost importance in Mexico, and will need to be made on a case by case basis.

## **Relevant Legal considerations for Construction Contracts. –**

- » **Act of God and / or Force Majeure.** Pay attention if your contract contains an Act of God and / or Force Majeure event clause. Identify which events constitute an Act of God and / or Force Majeure, and which do not fall under such definition, since, generally speaking, agreements do not contemplate pandemics, such as COVID-19, as a cause for termination or suspension of the effects thereunder.

Some contracts do not define the concept of Act of God and / or Force Majeure event. In said scenario, the judicial precedents referred to in our Newsletter dated March 17, 2020, should be considered. In the current context, there is a very high possibility but not the certainty that COVID-19 will be considered as Act of God and / or Force Majeure by Mexican courts.

The protection offered by an Act of God and/ or Force Majeure clause usually applies when the affected party under the contract is unable to perform in their entirety its obligations as a consequence of such event, which is very different from those cases when performance of the respective obligation suddenly becomes more difficult or expensive. In addition, the affected party will usually need to take steps to mitigate the effects of thereof, and must prove that said event prevented it from complying with its contractual obligations.

Some contractual definitions of Act of God and / or Force Majeure will expressly exclude certain events. For example, lack of economic resources, or an increase in the cost of labor or materials as a consequence of the occurrence of the respective event. These exclusions may become meaningful, which is why we highly recommend a thorough review of them.

Check terms for notice periods and comply strictly with obligations in relation to how and when to notify. Check the other provisions of your force majeure clause carefully. One of the primary reasons courts could decide that the force majeure argument is ill-based is in those cases when the party arguing it did not comply with the formal notice requirements related therewith.

- » **Supply chains.** Identify the origin of your supply chain, identify which of your projects depend on labor, equipment, materials and supplies that may come from affected or quarantined areas. Clearly identify how the progress and delivery of the work could be affected.
- » **Validity of permits and licenses.** Consider requesting extensions of existing permits and,

where appropriate, renewing the same, to avoid suspension of works; be aware of possible suspension of services from government authorities.

With respect to Mexico City, consider that on March 23, 2020, it was published in the Official Gazette of Mexico City, an urban development resolution whereby administrative grace periods are granted for the fulfillment of certain tax obligations, in order to prevent the spread of the COVID-19 virus. Pursuant to such resolution, where several construction formalities and procedures are excepted from the suspension of terms and deadlines.

On March 24, 2020, the "Notice of the Protocol for construction works in process during the health contingency COVID-19" was published in the Official Gazette of Mexico City, where a health protocol for the continuance of ongoing-constructions works is established.

- » **Payment of loans.** Lenders will be interested in assessing the developer's ability to repay debt and to determine if it will be affected by delays in the construction. So far, certain banks announced deferred loans payment programs for companies and individuals being affected by the COVID-19 pandemic, including PYME loans, among others.
- » **Safety in the construction site.** Health and safety on the construction site is always of great importance. In the pandemic context, we recommend the parties to revisit and update their health and safety policies to ensure that adequate and timely procedures are in place that can be quickly deployed in case the pandemic affects the construction site. Special attention should be given to maintaining a friendly relationship with workers and unions.
- » **New construction contracts.** For the rest of the year, and as the global economy stabilizes, tender processes may try to prevent supply chain operation for its construction originating from regions affected by COVID-19, or from places where there are interruptions or travel restrictions. Tender process procedures may also be extended in order to avoid any perceived risk of delay and price fluctuations.
- » **Insurance.** Check the language of your insurance policy. In some cases, the policies may cover "business interruption", "loss of use of the property" or "payment protection" in the event that a debtor goes bankrupt. Be sure to strictly comply with obligations related to how and when to report. Discuss with insurance brokers any need for coverage on specific new exposures.

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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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