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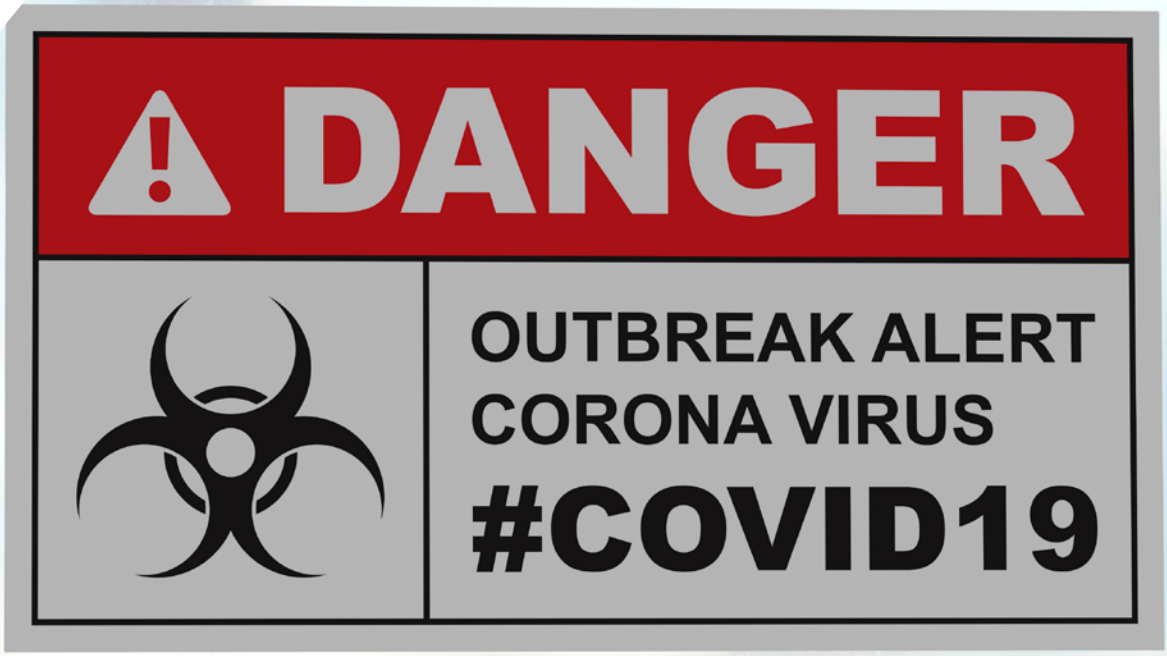
How can we help your business address and reduce the effects of the COVID-19 outbreak?



How can we help your business address and reduce the effects of the COVID-19 outbreak?

The World Health Organization ("WHO") declared, on January 30th, 2020, the SARS-CoV2 outbreak a Public Health Emergency of International Concern and issued a series of recommendations for its control. The WHO's last situation report indicates that by April 30, 2020, more than three million cases of the new coronavirus have been reported, from almost every country of the world, including Mexico.

Considering the above, on March 19, 2020, the General Health Council in an extraordinary session, recognized the epidemic of disease caused by the virus SARS-CoV2 in México as a severe illness requiring priority attention.

On March 24th, 2020, the National Official Gazette ("DOF" per its Spanish acronym) published the Ministry of Health's executive order (sanctioned by the president on the same date) that provides the preventive measures to be implemented for mitigation and control of the health risks that the disease caused by the virus SARS-CoV2 poses. As per the ordinance, it is in full force and effect from the date of its publication to April 19, 2020. This ordinance focuses mainly on suspending activity of the public, social and private sectors that involve physical gathering, transit or movement of people, amongst other items. It also identifies certain businesses and commercial establishments as "necessary" to meet the challenges posed by the contingency that will continue to operate.

On March 30, 2020, the General Health Council published in the DOF an executive order by which it declared that the pandemic caused by the SARS-CoV2 virus was a "health emergency due to force majeure".

The order was followed by publication on March 31, 2020, in the evening edition of the DOF, of another executive order by the Ministry of Health detailing the extraordinary measures to be taken in response to the health emergency caused by SARS-CoV2. This last order primarily provides as extraordinary measure to be taken the immediate suspension of non-essential activities from March 30 to April 30, 2020. The order does not provide the meaning of "non-essential activity"; however, it does list a series of activities considered essential.

Recently, on April 21, 2020, the Ministry of Health published in the DOF an executive order modifying the previous order dated March 31, where the extraordinary measures to face the health emergency were modified. The amendment consisted mainly in extending the application of extraordinary measures to include the period from March 30 to May 30, 2020, among the measures, the suspension of non-essential activities remains.

The above being said, at *Sánchez Devanny*, we are aware that the incessant flow of information from our news and the daily publications of ordinances at municipal, state and federal level can feel overwhelming and may impact our clients' businesses. We consider it is 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.

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Subject Index

More about the Executive Orders of the Ministry of Health

Under the orders published by the competent authorities to this date, which activities are considered "non-essential"?

On March 31, 2020, the Ministry of Health published in the National Official Gazette the executive order by which the extraordinary measures to tackle the health emergency created by the SARS-CoV2 virus were established, effective immediately.

Among the extraordinary measures adopted, from March 30 to April 30, the suspension of all "non-essential" activities was ordered.

The order does not define what a "non-essential" activity is. It rather provides a list of activities considered essential that are permitted to continue their regular operations, as long as they comply with the security measures provided in that same order.

Each activity must be analyzed with this order in mind, as well as several subsequent orders to verify if suspension is mandated.

What are the essential activities provided in the March 31st executive order?

a. Those that are directly necessary to face the health emergency, such as medical work activities, paramedic activity, and administrative and support areas throughout the National Health System. Also, those activities involved in the sale, services and supply, as well as those involved in the manufacture of medical supplies and equipment and those involved in the proper disposal of hazardous waste, sanitation, and others.

b. Those of public security and citizen protection; in the defense of national integrity and sovereignty; the procurement and delivery of justice, as well as legislative activity at the federal and state levels.

c. The fundamental sectors of the economy such as: financial services, tax collection, distribution and sale of energy, gas stations, gas, generation and distribution of drinking water, food and non-alcoholic beverages industry, food markets, supermarkets, self-service stores, grocery and prepared food sales; transportation services, agricultural, fishing and livestock production, chemical agribusiness, cleaning products; hardware stores, courier services, and other fundamental sectors2, as well as activities whose suspension may have irreversible effects for business continuation.

d. Those directly related to the operation of government social programs, and

e. Those necessary for the conservation, maintenance and repair of the critical infrastructure that ensures the production and distribution of essential services including drinking water, electricity, gas, oil, gasoline, jet fuel, basic sanitation, public transportation, hospital and medical infrastructure, and others that could be listed in this category.

What would be considered an activity that could cause "irreversible effects for its continuation" if suspended, and could therefore be considered an essential activity under the 31st of March order?

Article First section II subsection c) of the order dated March 31st establishes that essential sectors of the economy are essential activities.

Obviously, the reader who does not want to suspend its activity will consider its activity as part of a fundamental sector of the economy. However, that same subsection c) lists a series of activities that seem to limit the scope of what is considered a "fundamental sector of the economy". This, however, does not eliminate the confusion that this subsection generated with its publication, since its last sentence indicates that, in addition to the activities listed, "activities whose suspension may have irreversible effects for its continuation" will be considered essential.

To facilitate the interpretation of this last sentence, the Ministry of Health published on April 6 in the DOF an additional order establishing the "*Technical Guidelines related to the activities described in subsections c) and e) of section II of Article 1 of the order establishing extraordinary actions to attend to the health emergency generated by the SARS-CoV2 virus*".

The solution proposed in the Guidelines published on April 6, 2020, was to identify the following as activities whose suspension may have irreversible effects on their continuation:

» Steel, cement and glass production companies; and

» Information Technology Services that guarantee

1 We invite to review in more detail the list in the following link: http://dof.gob.mx/nota_detalle.php?codigo=5590914&fecha=31/03/2020

the continuity of computer services in the public, private and social sectors.

From March 31st to this date, has the definition of "essential activity" varied in any way?

Additional to the "Executive Order establishing extraordinary actions to address the health emergency caused by the virus SARS-CoV2" dated March 20, 2020, **two** additional Orders must be taken into account:

- The "*Order establishing the Technical Guidelines related to the activities described in subsections c) and e) of section II of Article 1 of the Order establishing extraordinary actions to address the health emergency caused by the virus SARS-CoV2*", published on April 6 in the DOF.

- The "*Order by which the previous order establishing extraordinary actions to address the health emergency caused by the SARS-CoV2 virus is modified*", posted on April 21.

The first one was already analyzed in the previous question, while the second of them extended the suspension of "non-essential" activities until May 30, 2020.

It must be considered that said Order, in addition to extending the term, added several articles that, among other things:

- Establish the gradual way in which non-essential activities may be reinstated as of May 18th in the municipalities of the national territory that, on that date, have low or no transmission; and

- Reiterates responsibilities for the governments of the different States in terms of implementing pertinent prevention measures, guaranteeing the implementation of the measures, among others.

Now, this last point about the measures that the different States must adopt and implement is of great relevance, since from the publication of the Order on March 31 by the Ministry of Health there has been great activity on the part of the governments of the different States, such as their own local declarations of emergency, and the implementation of extraordinary security and prevention measures.

Therefore, it is essential to also review the orders published by the different States that may be applicable to your activity (generally according to domicile), since they may vary and be more specific in certain aspects in relation to the Order by the Ministry of Health.

Finally, it should not be ignored that there have also been industry-specific publications, such as, for example, the "*Order that specifies the essential activities under the responsibility of the Ministry of Communications and Transport, in the context of attending to the health emergency generated by the SARS-CoV2 virus*", published in the DOF on April 8.

In case of an activity considered essential: Are there any measures that must be observed in the operation or activity?

Yes, the general preventive measures established by the Order of March 31st are the following:

- No meetings or congregations of more than 50 people may be held;

- People should wash their hands frequently;

- People should sneeze or cough following the proper etiquette;

- Avoid greeting with a kiss, a hand shake or a hug; and

- All other healthy distance measures issued by the Ministry of Health.

Companies that make the decision to continue operating during the temporary suspension period referred to in the executive order must implement the preventive measures indicated in the Social Distancing National Campaign, by the Ministry of Health, the different States (as applicable) and by the different Ministries when the activity corresponds to a specifically regulated industry.

Questions related to Regulatory Matters

What effects are expected in terms of General Health derived from COVID-19?

In addition to the several issues raised on legal matters, we must not forget that the current health emergency situation will have specific effects on general health.

The main provisions that regulate the legal framework applicable to the type of health emergency that we are experiencing are the General Health Law and a number of regulations derived from it.

The General Health Law is, precisely, the basis of the Executive Order published on March 31, 2020, by which the Ministry of Health **establishes extraordinary actions to attend the health emergency generated by the SARS-CoV2** virus and the establishment of extraordinary measures to be implemented to address such health emergency.

How do I know if my business is an essential activity or if I should suspend activities?

It is the General Health Law that provides the basis for the suspension of non-essential activities.

However, neither the General Health Law nor any other specific provision clearly provides the framework on which the nature of an activity can be determined as essential.

Therefore, the essential activities listed in the Order, which are "Those necessary to directly attend the health emergency; those of the fundamental sectors required for the proper operation of the economy...; those necessary for the conservation, maintenance and repair of the critical infrastructure that ensures the production and distribution of indispensable services... must be determined based on the various available regulations.

In order to determine whether an activity or service is essential or not, as well as the viability of continuing the operation of an enterprise during this period, it will be necessary to analyze the regulations, Official Mexican Standard, Mexican Standards, Orders and any other provisions that may provide elements for such determination.

How do I anticipate if new Health Regulations or other Rules will be published?

As a result of COVID-19, the publication of orders and communications on both health and regulatory matters has increased exponentially. However, it is possible that some of the measures that the health authorities plan to implement during this pandemic may be published as pre-projects and projects through the National Council for Regulatory Improvement.

Unlike other projects, their approval and publication is much more rapid, so it is important to consider implementing the measures outlined in these documents as soon as possible.

The imposition of any sanction, such as closures or fines, must adhere to the general rules for the imposition of these. Likewise, any type of procedure or determination by the health authorities, even in the case of health emergency care, must adhere to the constitutional and legal principles that regulate any act of authority.

How far could the powers of the health authorities go with regard to this health emergency?

The health authorities may even be empowered, if necessary, to make available means of transport, means of communication, private hospital and medical infrastructure, hotel infrastructure and in general any property where medical care services may be provided in case public health needs so require.

In this respect, the imposition of any sanction, such as closures or fines, must adhere to the general rules for their imposition. Likewise, any type of procedure or determination by the health authorities, even in the case of health emergency care, must adhere to the constitutional and legal principles that regulate any act of authority.

If I am unable to comply with the new compliance requirements, how can I act against the sanctions imposed?

It is important to mention that there are exceptions to the fulfillment of health requirements and to the fulfillment of conditions of operation and quality of products, establishment of procedures of control of prices, limitation of mobility, limitation of activities, etc.

It is advisable to carry out an analysis to determine

whether you are subject to compliance or whether you fall within an exception.

In any event, the individuals affected by the authorities' decisions may, at any given time, file the means of defense that may be necessary, as well as the procedures for damage compensation by such authorities as a result of an action not in accordance with the corresponding legal order.

Final Remarks

At *Sanchez Devanny*, our Life Sciences practice has been following closely the development of the health contingency in Mexico and its legal implications for companies. Thus, we are ready and able to assist you in the analysis of possible essential or critic activity and to assemble the corresponding evidence files. These are essential preparations for potential verification visits and to avoid sanctions as provided by the applicable law.

Labor law considerations

From March 24 to this date, have the measures to be implemented in the workplace changed, based on the executive orders published in the National Official Gazette?

Yes. According to the executive order establishing the preventive measures to mitigate and contain the health risks of the COVID-19 outbreak, published on March 24, 2020, the measures consisted of:

1. Prevent people over 65 years from working in the workplace.

2. Prevent people from at-risk groups to attend the workplace (a person will be deemed part of the group at risk if he falls into one of the following: pregnant women or women breastfeeding, people with disabilities, people with non-transmissible chronic diseases or with chronic ailments that cause immune suppression).

3. The abovementioned groups shall always enjoy their salary and benefits provided by law, being considered as being on leave.

However, on March 30, 2020, the Ministry of Health published in the National Official Gazette the executive order by which it declared that the pandemic caused by the SARS-CoV2 (COVID-19) virus is a "health emergency due to force majeure".

As a result of said order, on March 31, 2020, the Ministry of Health published in the National Official Gazette the executive order establishing extraordinary measures to face the health emergency generated by SARS-CoV2 virus, providing additional measures and actions:

1. Suspension of non-essential activities from March 30 to April 30, 2020.

2. Established as essential activities those that are necessary to face the health emergency, including medical services, hospitals, financial services, gas stations, supermarkets, and pharmacies.

3. Ordered that workplaces conducting essential activities can not hold meetings of more than 50 people, and must implement additional health measures regarding health risks.

On April 21, 2020, an executive order extended the suspension of non-essential activities, as well as the implementation of the measures, until May 30, 2020.

Due to the current situation, could I suspend labor activities and only pay employees the indemnity provided in article 429 paragraph IV of the Federal Labor Law ("FLL")?

In accordance with article 181 of the General Health Law, in the event of a serious pandemic or danger of pandemic spread, the Ministry of Health is obliged to immediately issue the necessary measures to prevent and fight against the health risks.

Among the measures that can be taken by the Ministry of Health is issuing the declaration of health contingency and ordering the suspension of work activities for a certain period, by publishing the corresponding executive order in the National Official Gazette.

Currently, the Ministry of Health declared that the pandemic caused by SARS-CoV2 virus is a "health emergency due to force majeure", which is different from the declaration provided in the FLL.

If the health contingency and suspension of work activities had been declared, we would be subject to the provisions of the FLL and the employer would be obligated to pay to employees an indemnity equivalent to a daily minimum wage, for up to a maximum of one month.

Is there a specific procedure to determine if a company is considered an essential activity?

There is no specific procedure to confirm whether a company is considered essential or non-essential. In order to determine if a company could continue operating, it is advisable to review the company's corporate purpose and analyze the activities developed in the workplace.

If the company considers that they conduct essential activities indicated in the executive order that establishes the extraordinary measures to face the health emergency generated by the virus SARS-CoV2, published on March 31, 2020, the Company will be able to continue to operate.

The company must have all the elements to demonstrate that its activities are essential in case of a verification visit.

In case of modification of employees' salary, should I notify the labor authority?

Yes. In accordance with Social Security Law, employers are obliged to notify the modification of employees' salary within 5 business days.

If the modification of employees' salary is due the reduction of the working hours or another element of the so-called technical stoppages, the agreement must be filed before the Conciliation and Arbitration Board; however, due to the executive order which suspends legal terms and activities of the Ministry of Labor and Social Welfare, Conciliation and Arbitration Boards remain mostly closed for filing purposes in relation to the abovementioned agreement.

May I be subject to a verification visit?

Yes. The Federal Inspection Agency issued the criteria for the labor audits that the authority will conduct, due to COVID-19 in Mexico.

Labor audits will be conducted for companies of which it is known that there may be a lack of compliance with labor rules, especially failing to pay salary or to pay full salary.

If the authority becomes aware of the omission of payment or the decrease in employees' salary, the authority will inform the Attorney's General Office. Non-complying companies could be sanctioned with a fine.

Final Remarks

At *Sanchez Devanny*, our Labor, Social Security and Immigration practice has extensive experience in these matters, so please do not hesitate to contact us in case of any comment or question.

Trade considerations

Will COVID-19 affect the entry into force of the USMCA?

The entry into force of the USMCA will not be delayed. It shall apply from 1 July 2020 and therefore the compliance measures to which this Treaty is subject must be prepared.

It is a reality that the COVID-19 could affect the country's economy in three main ways: directly affecting production, creating supply chain disruptions, and disruptions in distribution.

However, it is important to mention that the current situation opens an extraordinary opportunity for Mexico to provide the United States with products and services that China has stopped supplying. In other words, small and medium-sized companies could take advantage of the supply gap currently faced by the United States, without neglecting the measures that will have to be complied with when the USMCA comes into force.

Are there specific import and export restrictions derived from COVID-19?

So far, no specific restrictions have been issued for the import of goods and merchandise that are directly related to the health care situation in Mexico.

Likewise, no restrictions have been issued on the export of goods from national territory to other countries, as has happened in other countries, where the possibility of exporting goods that have been considered indispensable for attending to the health situation has been limited.

There is a risk that both the import and export of goods may be restricted as a result of the current health situation in the country.

Also, the authorities may eliminate or reduce import requirements for goods that may be necessary to address the health situation in Mexico, such as textiles for protective clothing, medical devices, diagnostic agents, medicines, and other similar products.

Are there effects on the importation of supplies or goods for the productive processes that are carried out in Mexico?

These operations have been extremely affected, since these are imported from various countries, such as Asian, European or American, many of which also face problems and restrictions with the processes of importing and exporting goods.

These affectations will have severe effects on the logistic chains, it being necessary in some cases to look for new suppliers in other jurisdictions, many of which may be subject to particular import requirements such as compensatory duties, import permits, health verifications at points of entry, etc.

Changing or modifying the suppliers or origin of the imported goods into the national territory may be extremely complex, especially when these are subject to non-tariff regulations and requirements.

What will happen to the customs clearance to which my products are subject? Will my operations be affected or delayed?

At this moment, there is no restriction that affects Foreign Trade matters, so the service in the operations of foreign trade established according to Article 10 of the Customs Law and Annex 4 of the General Rules of Foreign Trade should be respected.

This means that the country's customs should continue to operate "normally", at least until otherwise provided. However, many of them do so with 50 percent of their regular staff.

This results in the delay of the customs clearance of various products at the entry of the country so that the operations of individuals are very likely to be affected in this respect.

In the event that these delays affect you directly by having an obligation to a third party, we suggest an in-depth analysis to provide different arguments or means of defense derived from the current situation of COVID-19.

Can I continue to request the necessary permits and authorizations for my operations as usual?

Obtaining the corresponding permits and authorizations may be a challenge, since the authorities will be in an extremely complex situation for them to be able to resolve, within the necessary time frames, the import authorizations and permits requested.

Therefore, it is essential that those companies that import and market products subject to registration or

authorization, immediately identify the requirements and conditions to which their products are subject for importation.

Derived from COVID-19, have facilities been implemented for import operations in Mexico?

The Ministry of Economy has determined through orders and communications, facilities for importation. The publication of communications that continue modifying the regime to which these operations are obliged to comply with are expected. Some examples are as follows:

Mexican Official Standards:

1. As of March 27, 2020, the importation of goods subject to NOMs will be allowed, to show only a copy of the Acknowledgement with a receipt number, of the requests that have been filed before a Certification Organization or Verification Unit.

Certificates of origin:

1. The Certificates of Origin of the FTA Peru, FTA Panama and Economic Complementation Agreements will not be physically delivered, but will be sent via e-mail.

2. The process of requesting an authorized exporter is expedited by reducing the time to obtain them to 24/48 hours in order to help exporters benefit from preferential regimes without the need to show the originals of the certificates of origin.

Final Remarks

At *Sanchez Devanny*, our International Trade and Customs practice has been following closely the development of the health contingency in Mexico and its legal implications in import/export matters, and we are ready to assist you.

Tax considerations

Does the Tax Administration Service continue exercising its verification powers and carrying out collection activities?

The Tax Administration Service ("SAT") has anticipated granting a suspension of activities related to certain tax compliance obligations and specific investigation and collection activities. Note that the Ministry of Health has included tax collection as an essential activity, resulting in the continued obligation of Taxpayers to file tax returns and pay their tax liabilities.

According to a press release published at the beginning of the year by SAT, mentioning the "Operation Master Plan 2020", it will be carrying out the following actions:

- The scheduling of expedited audits and the reinforcement of income tax inspection, for payments abroad, corporate restructures, preferential tax regimes, investment deductions, losses, tax deferral and tax registration accounts, among others, as well as the incorrect application of the 0% rate of value added tax and in the northern border region stimulus.

- Verification reinforcement on the application of positive balances on the value added tax, in order to corroborate their origin and disposition through tax credits, refunds and compensations.

Likewise, it is important to point out that currently SAT has implemented as a collection practice, an invitation to identified taxpayers with certain debts or observed ones to correct their tax situation. In the event that a taxpayer is in this situation, having an integrated defense file is essential to attend to such invitations and to challenge the statement of the tax authority.

Based on the above, we consider it appropriate for companies to stay alert to any notification that may be made to them through traditional means or through the tax mailbox and, in the event of being notified of any act of authority in the use of verification powers, to initiate the corresponding actions for the defense of any observation or tax credit.

Is there any defense strategy?

As an alternative to the integration of the file and the initiation of the defense against observations issued by SAT during the verification procedure until the issuance of a tax liability, it is possible to present a **conclusive agreement** before the Taxpayer Defense Office ("PRODECON"), which, even though there is a declaration of suspension of on-site activities, has provided virtual tools to request a conclusive agreement.

Likewise, in the event that a tax liability is determined to the detriment of a taxpayer, an **appeal** may be attempted and filed before the competent authority of SAT itself. This means of defense gives the taxpayer the opportunity to integrate an adequate defense file, provide evidence and present arguments, in addition to the fact that it is not necessary to guarantee the Federation's tax interest, so it is not necessary to incur additional expenses for executing a guarantee such as a bond.

Also, it is important to specify that, if it is necessary to file a **nullity claim**, especially in those cases where a suspension or precautionary measure is required, it is possible to do so.

Although the Federal Tax Court issued an order extending their activities' suspension period from April 20 to May 29, 2020, they still take urgent cases, suspensions and precautionary measures matters.

Can the Tax Administration Service restrict Digital Seals?

As a result of the 2020 tax reform, the Federal Tax Code established several situations by which it temporarily or permanently restricts the use of taxpayer's digital seal certificates. Such situations refer to the taxpayers' failure to comply with their tax obligations, generally speaking.

Is there any defense strategy?

If companies are subject to temporary or definitive restrictions on digital seal use, the filing of a complaint before PRODECON could be attempted, through which the clarification of facts that motivated the cancellation could be made and the seal reinstated immediately.

It should be noted that PRODECON issued an Order announcing that it will continue to provide its advisory, complaint, inquiry and conclusive agreement services, whenever urgent or necessary. The cancellation of digital seals can be classified as an urgent matter.

In the event that the aforementioned restriction is final, **the appeal and nullity claim** mentioned earlier could be filed, additional to the availability of the complaint process before PRODECON.

During the health emergency, can Tax Returns be filed?

The competent administrations of SAT continue the analysis of taxpayers' tax return requests, issuing requirements and settling requests.

We consider the integration of an adequate file with the tax return request's supporting evidence essential. The lack of an adequate file that supports the request is one of the main causes of rejection.

Is there any defense strategy?

In the case of requirements issued in relation to the taxpayer's tax return requests, in most cases they are excessive and ungrounded. This is why filing a complaint before PRODECON helps to evidence the excessiveness of the requirements imposed and have PRODECON act as witness to the behavior of the authority within such procedures.

Although the complaints that may be filed before PRODECON are not urgent due to the health emergency, they can be filed, depending on the justification of the urgency so as to ensure the proceeding following the complaint is regular.

On the other hand, it should be pointed out that in the case of unfavorable decisions on tax return requests, due to the health emergency, an **appeal** may be filed for the purpose of ensuring that the supporting evidence is on file, and thus, in the event that a trial has to be initiated in response to an unfavorable decision on the appeal, the taxpayer will have a complete and solid file for the **nullity claim**.

Final remarks

At *Sanchez Devanny*, our Tax practice has been closely following the development of the health contingency in Mexico and its legal implications for taxpayers. Thus, we are able to assist you in the analysis of any observation issued by the tax authorities or tax credit determinations, cancellation of digital seal certificates and filing and follow-ups on tax return requests, as well as for the defense strategy that suits your interests.

Impediments to performance of contractual obligations

Is there a situation under which a party can "excuse" its default on a contractual obligation?

Mexican legislation provides that contracts must be performed by the parties as expressly agreed. This obligation also includes fulfillment of any consequences applicable under good faith and the law.

Therefore, parties are compelled to perform their obligations precisely as agreed.

Regardless of the above, the applicable law also provides certain scenarios where the parties can "excuse" default on a contractual obligation due to an event of *force majeure* or an act of god.

When Mexican legislation is referred to, what are the actual provisions that are applicable?

Under Mexican law, commercial agreements and contracts are governed by the Commerce Code, to which the Federal Civil Code is applied secondarily.

On the other hand, contracts of civil nature (e.g., Real Estate Sale Agreements, Lease Agreements, etc.) are governed by the Civil Code of the State where the property is located or where the obligations ought to be performed by the parties.

Regardless, generally the provisions of the different Mexican States are compatible with those in the Federal Civil Code, which is why hereinafter we will refer to the provisions in the Federal Civil Code.

What is considered an "act of god"? What is *force majeure*?

There is legal doctrine that distinguishes the concepts referred above, specifically:

- Acts of God – unpredictable event caused by nature
- Force Majeure – unpredictable event caused by men

In truth it is only in legal theory that this distinction is made, and what is relevant is that the event actually meets several **requirements** that will constitute an impediment and an excuse to performance of the contractual obligations by the parties.

The above being said, case briefs issued by Mexican Courts have agreed to establish the existence of three different situations by which an event can be identified as force majeure, depending on the source from which it comes; consisting of: (i) events of nature, (ii) human events, and (iii) acts of authority[2].

What are the requirements for an event to be considered an act of god or force majeure?

The main characteristics of force majeure, so a non-performing party is not considered in default and does not incur civil liability, consist of:

- Impossibility to perform the contractual obligations;
- Unpredictability;
- Generality, in other words, the event must affect any person subject to an identical obligation in the same manner;
- Even must not be under the reasonable control of the non-performing party, in other words, no precaution adopted would change the circumstances;
- There must be no negligence from non-performing party; and
- Event must be insurmountable.

Are there any exceptions to applicability of "act of god" or *force majeure* provisions?

An event will not be considered an "act of god" or *force majeure* if:

- Non-performing party contributed or caused the event of force majeure;
- Non-performing party has accepted liability for said event;
- Applicable law imposes the liability for said event to a given party.

Can the COVID-19 outbreak be considered a force majeure event and a release from performing contractual obligations, without liability?

[2] Tesis II.1o.C.158 C, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo VII, enero de 1998, P. 1069.

The COVID-19 outbreak by itself does not automatically free the parties from their contractual obligations, as detailed above. However, an analysis must be made of the applicable contractual clauses agreed to by the parties, the applicable legislation and the concrete events that have resulted from the COVID-19 outbreak that might result in impossibility to perform any given obligations under a contract, event that shall meet the abovementioned requirements (e.g., border closing, official decrees, supply chain interruption).

What must be considered if the contract includes a clause on acts of god or force majeure?

It is important to consider that most agreements or applicable terms and conditions in a given commercial relationship include a provision concerning force majeure, especially in long-term agreements.

This provision usually reflects the parties' definition of force majeure and their intent on allocation of risks outside their control, usually detailing the effects on rights or obligations in a scenario where the definition of force majeure is met.

Understanding the contractual provision where it exists is fundamental, as it can include a broad definition of force majeure, a non-exhaustive list or contrary-wise a very detailed list of events that the parties agreed would constitute force majeure. Also, it can establish a duty to notify that must be given due attention, such as "immediate written notice" in an event of force majeure.

Takeaways:

- Have your Agreement or applicable Terms & Conditions in hand.
- Review to verify if any provision addresses the matter of force majeure.
- Understand your provision.
- If the COVID-19 outbreak meets the definition, make sure the operative aspect is taken care of (e.g., notices).
- If you have any doubt as to the interpretation of the force majeure definition or need assistance in drafting relevant operative documents, we are here to help.

What happens if the agreement or the terms & conditions applicable do not provide anything regarding *force majeure*?

To answer this question, it is important to return to the analysis above on the applicable legislation. While the agreement might fail to establish a *force majeure* clause, it will likely include a clause providing for the applicable law.

When the applicable law is Mexican law, the Civil Federal Code, applicable with the Commerce Code[3], provides the effects of force majeure for different obligations (e.g., performance that involves delivery or payment), and jurisprudence has also provided further detail on the definition of force majeure and its elements.

The above being said, case briefs issued by Mexican Courts have agreed to establish the existence of three different situations by which an event can be identified as force majeure, depending on the source from which it comes; consisting of: (i) events of nature, (ii) human events, and (iii) acts of authority[4].

If derived from any of the abovementioned events, it is **impossible** to perform any obligation, the consequence would be that the party who fails to perform is not considered in default, under the principle that nobody is obliged to perform the impossible.

The main characteristics of force majeure, so a non-performing party is not considered in default or incurs civil liability, consist of unpredictability and generality. When an event can be foreseen, it is assumed that debtor should have taken the necessary precautions to avoid it, while generality refers to performance being impossible for everyone in equal circumstances, not only the debtor.

Takeaways:

- Review if the situation created by COVID-19, considering the contractual obligations of the parties, can be considered a case of force majeure under Mexican law.

[3] Esta precisión es importante puesto que en general se está abordando el tema desde una perspectiva de obligaciones entre comerciantes y sujetas a las disposiciones del Código de Comercio; por lo que aplica supletoriamente el Código Civil Federal y no los Códigos Civiles de las Entidades Federativas. La precisión se hace considerando que los Códigos Estatales pueden variar un poco en el clausulado aplicable al caso fortuito o fuerza mayor e inclusive, en algunos estados, prever la teoría de la imprevisión para asuntos de carácter civil.

[4] Tesis II.1o.C.158 C, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo VII, enero de 1998, P. 1069.

- Gather and prepare evidence necessary for each type of obligation that might support the force majeure event argument and the starting date of such event.

- If there is any doubt as to the interpretation of force majeure as detailed by Mexican legislation and the failure to perform any agreed obligations, we are here to assist you.

Are there any formal requirements that must be met if we conclude that there is an actual event of force majeure?

Once a party concludes that non-performance is justified by an event of force majeure, the non-performing party will generally be required to:

- Give notice to the other party;

- Notices must be served as agreed to by the parties, generally in writing;

- The notice shall be served in a reasonable period of time (unless contract specifies a specific term for serving notice); and

- Carry out any reasonable mitigation efforts.

Is it possible that my contract is governed by legislation other than Mexican law?

Sure, the parties can expressly agree that their contract be governed by law other that Mexican law. Also, it is possible that when there is no agreement on the applicable law in the contract, the contract is governed by law from a country other than Mexico in consideration of the obligations, the place to fulfill those obligations or the parties' domiciles.

One of the possibilities is that in commercial sales agreements between international parties, the Convention on Contracts for the International Sale of Goods applies, to give an example of other legislation applicable.

What is the Convention on Contracts for the International Sale of Goods ("CISG")[5]?

The Convention applies to international contracts for the sale of goods (if the parties have not expressly rejected its application) when the States where the parties have their places of business, are in different States party to the Convention, or the rules of private international law lead to the application of the law of a Contracting State.

Are there any provisions regarding force majeure in the Convention?

Article 79, paragraph (1) of the Convention sets out the conditions under which a party is not liable for a failure to perform any of its obligations.

As per the Convention, three elements must be evidenced by a non-performing party who seeks to establish that it is not liable for failure to perform:

a. The failure was due to an impediment beyond his control;

b. the impediment was reasonably unforeseeable at the time of the conclusion of the contract; and

c. the impediment was reasonably impossible to overcome.

Paragraph (4) of the same article establishes the non-performing party's duty to notify. Please consider that, in the case of a failure of notification, damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice, and not those arising out of the non-performance.

What happens if it does not become impossible for a party to comply with a given contractual obligation, but it is in fact excessively onerous to comply with the obligations as a result from the unforeseeable event?

Other applicable jurisdictions and legal systems may have other applicable doctrines that may excuse contractual performance in the face of COVID-19 which may be relevant to your specific contract.

Only as an example of the abovementioned, please consider the Civil Codes for the States of Ciudad de México, Jalisco, Quintana Roo, Aguascalientes, Guanajuato, Estado de México, Sinaloa, Morelos, Veracruz, Chihuahua, Coahuila and Tamaulipas, which incorporate within their provisions the *rebus sic stantibus* principle, and might be applicable to certain agreements as a result of the COVID-19 outbreak and effects, with the purpose of reestablishing economic balance lost between the parties to the agreement as a result of the health emergency.

[5] States party to the Convention: Canada; China; Korea; Mexico; United States of America; among others; see: <https://uncitral.un.org/es/texts/salegoods/conventions/sale_of_goods/cisg/status>

Final remarks

Considering the evident uniqueness of every commercial relation, we strongly recommend an individual analysis for every case, as conclusions might differ from case to case. At *Sanchez Devanny*, our Litigation and Alternative Dispute Resolution practice has extensive experience in these matters, so please do not hesitate to contact us in case of any comment or question.

About insolvency proceedings

What procedure can be implemented by companies that are affected by the suspension of activities and consequently in their economic flow, affecting the viability of the business and general compliance with their obligations?

In Mexico, the Insolvency Procedure (concurso mercantil) is a formal legal procedure that aims to preserve companies and avoid the general breach of payment obligations, jeopardizing their viability, seeking to minimize the impact of all possible creditors and establishing clear rules under the principles of transcendence, procedural economy, publicity, promptness and good faith.

In other words, the Insolvency Procedure seeks, through processes contained in the Bankruptcy Law, to preserve the rights of all the parties involved with the insolvent company, in order to achieve the necessary agreements to maintain the viability of the company, that is, achieve the survival of an economically affected company that in many cases, without the implementation of this procedure, would not be able to continue its operation.

Who can be subject to an Insolvency Procedure?

It is understood that any natural or legal person of commercial nature or purpose, in accordance with the Commercial Code, can be subject to an Insolvency Procedure.

This concept includes the trust's assets when it affects the performance of business activities. Likewise, it includes the controlling or controlled commercial companies and the companies with a majority state participation, when they initiate processes of disincorporation or extinction and are administered by the Institute of Administration of Goods and Assets.

What are the legal requirements or conditions for the Insolvency Procedure?

It may be declared in commercial insolvency, if the debtor generally defaults on its payment obligations, when those defaulted obligations correspond to at least two different creditors, in addition to the following assumptions being met:

I. That, of those overdue obligations, those that are at least thirty days past due represent thirty-five percent or more of all Debtor's obligations as of the date on which the claim or request of insolvency has been filed, and

II. That Debtor does not have enough assets to meet at least eighty percent of its obligations due as of the filing date of the demand or request.

When is it understood that Debtor has generally defaulted on its payment obligations?

A general breach of payment obligations is presumed in any of the following cases:

I. Non-existence or insufficiency of assets for successful seizure and/or attachment due to default on payment obligations or for successful enforcement of a judgment against debtor with res judicata authority;

II. Default on payment obligations of two or more different creditors;

III. Concealment or absence, without leaving someone in charge of the administration or operation of the company who can fulfill its obligations;

IV. The closure of the company's premises;

V. To perform fraudulent or fictitious practices to attend to or fail to fulfill its obligations;

VI. Breach of economic obligations contained in a Creditors' agreement signed in terms of Title Five of the Bankruptcy Law;

VII. In any other cases of an analogous nature.

At what point can the Insolvency Procedure begin?

As a result of measures adopted by the government to prevent further spread of COVID-19, in particular the Supreme Court of Justice of the Nation, as well as the Federal Judicial Council, have decided to suspend activity on the vast majority of their offices and administrative units, or reduce to a minimum services to the public, only providing services related to urgent matters, at least until May 31st, 2020, which results in an impossibility to initiate, before that date, new insolvency procedures, except for the requests of provisional measures.

At least until that date, the process of the current or new Insolvency Procedures will not continue. However, in accordance with agreement 8/2020, the District Judges and Magistrates who are members of the Collegiate Circuit Courts, as of May 6, 2020, will resume the resolution of those cases already filed and that have been physically processed, in which only the issuance of the final judgment or resolution is pending. However, a limitation has been set to the jurisdictional function to attend to urgent matters, such as the precautionary measures to be granted in a Commercial Insolvency Procedure, in order to minimize the impact on companies subject to Insolvency.

Can Debtor negotiate with his creditors before starting a Insolvency procedure?

In fact, the Bankruptcy Law provides for a scenario where there is a preceding restructuring plan, which generally requires that prior to the filing of the Insolvency request an agreement has been reached with the creditors that represent at least the simple majority of the indebted amount and that filing is accompanied by a formal proposal (accepted by creditors) to restructure the outstanding debt.

It should be noted that there are very good examples of insolvency procedures that have been initiated through this mechanism, accompanied by a restructuring plan previously negotiated, and that result in an efficient and cost-effective rescuing of Debtor to the advantage of all involved parties.

General Advice

- We recommend that all entities who believe that the situation of the COVID-19 pandemic affects the viability of the business and its legal relationships, seek advice on the effects of non-compliance with their obligations in order to identify alternatives for the solution of imminent conflicts.

- Advance conflict resolution is recommended, and Alternative Dispute Resolution mechanisms could be an effective tool to avoid rushing into procedures that could lead to bankruptcy and liquidation of the company.

Surely the global situation generated by the COVID-19 pandemic will affect the financial health not only of companies in insolvency, but also of all companies in general. The world economic situation will bring as a consequence generalized breaches of obligations, as well as companies in situations so complicated that they will be forced to seek a restructuring to avoid bankruptcy.

While in theory Commercial Insolvency Procedures in Mexico could be a tool for all companies seeking a jurisdictional financial restructuring, the truth is that in practice there is a general mistrust and some examples of unsuccessful proceedings that have led many companies to consider Commercial Insolvency Procedures as a prelude to bankruptcy (liquidation), rather than as a restructuring tool, which has led to a historical underutilization of the procedure in our country.

Probably the global financial situation will lead many companies to insolvency and consequently to explore a Commercial Insolvency Procedure, as a restructuring tool.

Final remarks

At *Sanchez Devanny*, our Litigation and Alternative Dispute Resolution practice has extensive experience in these matters, so please do not hesitate to contact us in case of any comment or question.

Key considerations for the Real Estate Industry

If you are a landlord or a tenant or a party under a construction agreement, promissory purchase and sale agreement, or a party to a real estate transaction, surely you have asked yourself the following questions in relation to the COVID-19 and the real estate industry.

How is the real estate industry being affected by the COVID-19 pandemic?

In our experience, we consider that in the near term, developers and construction companies are concerned with preserving value and liquidity and landlords are concerned with keeping tenants and visitors safe, and with complying with governmental requirements.

Some tenants are facing liquidity pressures that result in deferring or ceasing/suspending contractual lease payments as well as future adjustments to the economic conditions under the respective contract. Certain subsectors, such as hospitality, retail and developers, are facing more immediate impacts while other subsectors, such as multifamily projects, will likely feel less immediate impact.

In the long term, office and industrial subsectors will be impacted by changes in where people work and supply chain changes, among others.

In the context of the COVID-19 pandemic, how can I limit my legal exposure?

You may limit your legal exposure to COVID-19 depending on: **(i)** the terms of your agreement and the applicable legal provisions; and **(ii)** the preventive actions adopted in accordance with the respective contract.

Consider:

a. Reducing costs;

b. Optimizing resources;

c. Reevaluating your industry space necessities; and

d. Adding flexibility to your transactions.

Several orders / decrees have been published in the Federation Official Gazette and the State Official Gazette of Mexico City that mention a Health Emergency due to Force Majeure, suspension of non-essential activities until May 30, 2020, and other issues.

In general, what impact do these orders have on real estate-contractual matters?

At the Federal and State level, each government has published the order for the temporary suspension of all non-essential activities until May 31, 2020.

In general, only the activities considered "essential", that is, that are necessary to face the contingency, may continue to operate. These activities include 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.

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

My real estate contract DOES contain an Act of God and/or Force Majeure clause, what does this mean?

If your contract does contain a clause in this regard, 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.

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-founded is in those cases when the party arguing it did not comply with the formal notice requirements related therewith.

My real estate contract does NOT contain an "Act of God" and / or Force Majeure clause, what does this mean?

If your real estate agreement does not contain such a clause, do not worry. The concepts of "Acts of God" and/or Force Majeure are regulated in most Civil Codes of Mexico. Thus, the affected party could argue either of them before the competent Judge 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 emergency, such party will not be liable for 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, the event completely impedes fulfillment of the obligation;
- **Inevitable** – 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;
- **Causal Link** - There should be a causal link between the cause that generated the default and the party's inability to perform its obligations.

In the current context, there is a very high possibility, but not the certainty, that COVID-19 will be considered an "Act of God" and / or Force Majeure by the Mexican courts.

How can the COVID-19 pandemic affect my lease agreement?

Commercial tenants are faced with a situation in which they could, in principle, continue to use the rented property, but such use may make little business sense. Contractually speaking, some commercial tenants are also subject to a duty to operate, which in principle obliges them to maintain operations. However, in some jurisdictions, such as Mexico, we have seen how Federal and State governments have issued official resolutions listing what trades constitute essential activities for the national economy, and what trades are non-essential activities, ordering the immediate suspension of non-essential operations at least until May 30, 2020.

Landlords see themselves exposed to suspension or cessation of payment obligations.

As a result of the COVID-19 pandemic, can I lawfully stop paying rent on my lease agreement?

It will depend on a case by case analysis.

The following needs to be analyzed: (i) lease agreement, (ii) the use or activity carried out on the leased property, (iii) the degree or level of impossibility of use of the leased property by tenant, and (iv) the duration of the force majeure event.

We consider that there may be certain exceptions, but the rule is still to pay the rent under the terms of each contract.

How can the COVID-19 pandemic affect my promissory purchase and sale agreement?

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, 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 including, among others, definitions thereof related with material adverse effect and/or material adverse change.

In the wake of the COVID-19 pandemic, parties to real estate agreements may want to address certain closing concerns that may be relevant during the course of the pandemic, such as: extending closing for a certain amount of time, changes on the economic circumstances post-COVID-19 and until the resumption of bank or public registry services.

Regarding construction contracts, what legal considerations should we keep in mind?

Construction contracts are one of the most complex real estate contracts as there are many parties involved.

It is important to keep the following in mind:

- **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.

- **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 loan 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 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.

What is next for the real estate industry Post COVID-19?

Restructuring of a real estate transaction will involve, most probably: (i) renegotiation of contracts due to change of economic circumstances (lease, promissory sales, construction agreements, among others); (ii) representation in the early termination and/or renegotiations of contractual terms due to force majeure events; and (iii) analysis of conditions precedent and Material Adverse Effect Clauses, among others, and their impact in promissory agreements, purchase and sale agreements subject to installments, among others, and the need to execute amendments thereto and/or contract renegotiations

At *Sanchez Devanny*, our Real Estate practice has been following closely the development of the health contingency in Mexico and its legal implications for the real estate sector and the construction and infrastructure industry. Thus, we are prepared to ably assist you in the analysis of the relevant contractual obligations, as well as the effects of the health emergency and official provisions in the performance of said obligations, as well as contract renegotiation and restructuring of all type of real estate contracts during and post COVID-19.

Mergers & Acquisitions Considerations

How has the market been impacted?

The market for mergers & acquisitions has been deeply impacted by the effects of the current pandemic. Any number of deals have been called off, while others will necessarily be delayed. Some of the ongoing transactions have been maintained, but their processes have naturally been affected.

How has the due diligence process been affected?

Due to all the restrictions imposed, including travel bans, lockdowns, shut-down of governmental operations, closure of non-essential activities and others, due diligence processes in many cases have been severely impacted.

We recommend that the parties review the preliminary commitments they have entered into and agree on the extension of exclusivity periods and others, to account for delays in the due diligence process.

These days, technology allows for the exchange of information through electronic platforms. These provide the parties means to continue the due diligence process, although on-site visits will probably need to wait until restrictions are eased.

Buyers should be particularly wary of the effects that the pandemic will have on the condition of the target company and the extent of deterioration suffered.

What is the impact on required consents?

Parties will definitely find it harder to obtain governmental and third party consents required to close the transaction. In particular, it may be more difficult to get consent from parties that have no particular interest in the transaction moving forward.

Just like for the due diligence period, the parties should try to modify the terms which they have agreed to for the completion of the transaction. In the case of a one-step (signing and simultaneous closing) transaction, consider the extension of the drop dead date for closing. In the case of a two-step (signing and deferred closing) transaction, consider the extension of the period between signing and closing to allow for reasonable time to obtain the consents.

What exit clauses should be considered?

In light of the uncertainty that the pandemic has brought to businesses in general, more than ever it would be sensible to include exit clauses in the transaction documents. These clauses will allow a party to be relieved of its obligations or provide the ability to walk away from the transaction. The parties, in particular buyers, should consider force majeure and material adverse change clauses.

Under a force majeure clause, a party may be relieved from its obligations if an event beyond the control of the parties prevents any of them from performing under the contract. Force majeure clauses may be complex and they have to be drafted carefully. However, they are an alternative for the parties to enter more confidently into a contract.

Material adverse change clauses are contractual provisions that would allow a buyer to step out of the transaction before closing, upon the occurrence of events detrimental to the target company business. These clauses are also complex and shall be carefully drafted. The broader the better, as it will contemplate more events that would trigger it.

The content of a material adverse change clause needs to be very precise, as there is no established definition under Mexican law of this concept. In some cases, these clauses will be tied to a specific amount so as to provide a clearer indicative threshold. However, having an amount involved in not always necessary.

How do we deal with purchase price considerations?

As we have mentioned before, buyers must be particularly wary for the effects that the pandemic will have on the condition of the target company and the extent of deterioration suffered.

It is recommendable to revisit valuations and, if necessary, carry out a new valuation process. In addition, the contract must address purchase price adjustments. Although it may be normal to set a fixed price upon the signing of the contract, in these particular times, it may prove useful to incorporate price adjustment procedures to determine the price at the closing of the transaction based on agreed guidelines and principles.

Are there alternatives to carry out the closing of the transaction?

In Mexico, closing has generally been a rather formal

in-person meeting where documents are executed and personally exchanged. This has evolved in the last decade, especially in the case of multi-jurisdiction transactions, where a number of actions are performed virtually.

As a general principle, parties could agree on having a virtual closing and establish the details of the process. Virtual closings may however be limited depending on the type of deliverables involved. This would have to be dealt with on a case by case basis. Likewise, parties need to consider that registration of acts before governmental authorities (e.g., commercial and property registries) may take more time than expected.

What are the integration challenges?

Integration of businesses may prove to be challenging under the current pandemic conditions. Parties should consider executing transition services agreements allowing the sellers to operate and/or provide temporary services to the business while the conditions return to normal.

Final remarks

At *Sanchez Devanny*, our M&A practice has extensive experience in these matters, so please do not hesitate to contact us in case of any comment or question.

Considerations related to the processing of personal data

If one of my employees has a positive COVID-10 test result, what measures should I take to inform remaining personnel?

Recently, the National Institute for Transparency, Access to Information and Protection of Personal Data (INAI) issued several recommendations related to precautions in the processing of personal data of persons diagnosed with COVID-19.

The most recent was published on April 2, in which public and private health agencies are called to exercise extreme caution in the treatment of personal data of patients diagnosed with COVID-19, including those who are in process of being confirmed.

Likewise, it is reiterated that personal data related to the current or future health status of a person is sensitive, so disclosing it may put their privacy at risk and be a basis for discrimination.

Therefore, the identity of persons affected by COVID-19 should not be disclosed and if it is necessary to share the information with coworkers, communications must be treated as strictly confidential.

Due to the current situation, my business has had to promote home based online operations. How can I make sure that I am complying with obligations regarding personal data processing?

It is important to verify that the company has a Privacy Notice and verify that the updated version is available on the corresponding website.

It will be necessary to review the Privacy Notice to corroborate the following:

- Confirm if the personal data that is collected in internet operations is specifically described in the Privacy Notice or if it can be understood as included within a category of personal data.
- Review the purposes of the processing of personal data and whether they are sufficient to cover online operations.
- Identify the technological security measures that the business has and confirm that they are sufficient to protect the business from possible cyberattacks.
- If applicable, review if the Privacy Notice permits data transfers to third parties.

What measures should I take in the event of personal data breaches?

The first step is to do a quick self-assessment to determine: the type of leak, the personal data that may be affected and the security measures that must be established to prevent a new breach.

After the self-evaluation is concluded, it is important to determine whether or not any stolen data allows the identification of the data owners and the type of data that was object of the breach.

According to the Regulations to the Federal Law on the Protection of Personal Data Held by Private Parties, the data controller must inform the data owners, without delay, of breaches that significantly affect the property or non-pecuniary rights of the data owners upon confirming the breach and having taken action to trigger an exhaustive review of the magnitude of the breach so that the prejudiced data subjects may take the appropriate measures.

Otherwise, if the breach affected isolated data whose violation does not significantly affect data owners, the notification may be made through a statement indicating the measures taken by the business to prevent a new violation of security.

What measures must be adopted by my employees when working at home to avoid improper processing of personal data?

It is important to start by establishing if employees have equipment provided by the business at home (computers, laptops, cell phones) or, if they are using their personal equipment, to execute their tasks.

If the equipment was provided by the business, then it is necessary that all communication with colleagues or clients is done through work accounts.

Additionally, the use of passwords and the encryption of documents is recommended so that the computers are protected in the event that a third party has access to them.

If the equipment used by the employee is their own, measures must be taken to remotely install work email accounts.

It is also important to provide clear and precise instructions to workers to temporarily archive the information to which they have access, so that when they return, the offices can make a secure transfer of information in their personal equipment to their work equipment.

Finally, the installation of antivirus programs is recommended.

Final remarks

At *Sanchez Devanny*, our Data Privacy practice has extensive experience in these matters, so please do not hesitate to contact us in case of any comment or question.

Sánchez Devanny is a leading Mexican law firm that provides **full-service legal advice** both to Mexican and international clients.

We build enduring client relationships because we make every effort to understand our clients' businesses and expectations, to serve as an ally, and to provide **complete, accessible and personalized advice.**

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