



MIJARES ANGOITIA
CORTES Y FUENTES

LEGAL IMPLICATIONS OF COVID-19
FULFILLMENT OF CONTRACTUAL OBLIGATIONS IN MEXICO

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The recent global public health crisis resulting from the Coronavirus outbreak (COVID-19) has consequences in many areas of the current reality; the legal field is no exception.

The declaration by the World Health Organization of a pandemic and the measures adopted in Mexico, both by governmental authorities and the private sector, have raised various questions regarding potential exceptions to the fulfilment of contractual obligations and the corresponding enforceability of rights.

In that context, the concepts of "Act of God", "Force Majeure", "Material Adverse Effect" and other similar concepts become particularly relevant to the analysis of the rights and obligations of the parties to any contract.

PRINCIPLE OF WILL AUTONOMY (*PACTA SUNT SERVANDA*)

For the purposes of such analysis, it is feasible to start from the "*Pacta Sunt Servanda*" principle (what has been agreed is obligatory for the parties), a principle contemplated in articles 1796 and 1797 of the Federal Civil Code and in article 78 of the Commercial Code, which establishes that what has been agreed between the parties must be complied with, that is to say, that legally executed contracts must be faithfully complied with, notwithstanding the occurrence of unforeseeable future events that could alter the compliance of obligations.

Following the principle of the parties' autonomy of will, in practice it is usual for contracts to contemplate specific cases in which it will be considered that an Act of God, Force Majeure, Material Adverse Effect (and other similar concepts) has occurred, as well as the consequences derived from such occurrence; this is in order to avoid discussions between the parties on whether or not a certain case of fact leads to a liability release of the obligor.

In this regard, it is valid for the parties to agree on the cases in which it will be considered that an "Act of God", "Force Majeure", "Material Adverse Effect" or any other similar concept has occurred, as well as the legal consequences of such occurrence, the parties being able to agree on the temporary suspension of their obligations, the termination of the contract without liability for them, or any other consequences they deem appropriate. In the absence of an agreement between the parties, it is necessary to refer to what the law, jurisprudence and doctrine say about these matters.

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ACT OF GOD OR FORCE MAJEURE

Legal doctrine is consistent in admitting that there are situations in which non-fulfilment of an obligation cannot be attributed to the debtor, because such debtor is prevented from performing by an event beyond its control, which he could not foresee or, even when foreseen, could not prevent.¹

Act of God or Force Majeure means any unforeseeable and unavoidable general event that makes it physically impossible for the debtor to perform its obligations; its main consequence is to liberate the affected party from the performance of its obligations, based on the general principle of law that states that no one is obliged to the impossible, which is reflected, among other provisions, in article 1847 of the Federal Civil Code which states that "*the penalty cannot be enforced when the party obliged to it has been unable to perform the contract due to a creditor's act, Act of God or force majeure event*" and in article 2111 of the same law, which states that "*no one is obligated to an Act of God except when such person has given cause to it, has expressly accepted that responsibility, or the law imposes on it such responsibility*".

Some non-binding judicial precedents even support that individuals can be released from certain tax obligations when there is an Act of God or Force Majeure event, under the principle that nobody is obliged to the impossible.²

Nevertheless, it is clear from Mexican doctrine and jurisprudence that certain essential characteristics must be met for an event caused by nature or man to be considered as an Act of God or Force Majeure:

- 1) That it is a **general** event, meaning one which affects in a general way any legal entity or individual;
- 2) That it is an **external** event, meaning that it occurs beyond the responsibility of the obligor;
- 3) That the event is **unforeseeable**, meaning that the event could not have been avoided or anticipated;
- 4) That it is an **irresistible** event, which means that there is an absolute physical or legal impossibility for the debtor to fulfil its obligations.

¹FIRST COLLEGIATE COURT IN CIVIL MATTERS OF THE SECOND CIRCUIT

Amparo Directo 487/97. U.S.A. English Institute, A.C. 9 October 1997. Unanimity of Vows. Speaker: Ricardo Romero Vázquez. Secretary: Elizabeth Serrato Guisa. Period: Ninth Period. Registration: 197162. Instance: Collegiate Circuit Courts. Type of Thesis: Isolated. Source: Judicial Weekly of the Federation and its Gazette. Volume VII, January 1998. Subject(s): Civil. Thesis: II.1o.C.158 C. Page: 1069

²AUXILIARY CHAMBER OF THE NATION'S SUPREME COURT OF JUSTICE

Tax Review 114/54. Ministry of Finance and Public Credit (Unión de Crédito Agrícola de Matamoros, S.A. de C. V.). July 7, 1955. Unanimity of four votes. Absent: Rafael Matos Escobedo. Speaker: Mariano Azuela. Period: Fifth Period. Registration: 316651. Instance: Auxiliary Chamber. Type of Thesis: Isolated. Source: Judicial Weekly of the Federation. Volume CXXV. Subject: Administrative. Thesis: Page: 245.

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UNFORESEEABILITY THEORY (*REBUS SIC STANTIBUS*)

Furthermore, some local laws have adopted the "*Rebus Sic Stantibus*" clause, also called Unforeseeability Theory, which allows the party affected by an unforeseeable event to request the early termination of the contract or, alternatively, to balance the reciprocal obligations between the parties, in the case of contracts of a successive nature, such as leases, gratuitous bailment contracts, mandates, among others, whenever such event (i) makes it physically or legally impossible for one of the parties to comply with its obligations, or (ii) causes the obligations of one of the parties to be more onerous than those originally agreed.

It is important to mention that some Collegiate Circuit Courts have determined that the Unforeseeability Theory is not applicable in commercial matters³, since article 78 of the Commercial Code adopts in a total way the principle *pacta sunt servanda* and establishes an absolute hierarchy of the will autonomy of contracting parties over the equity and balance of benefits. Moreover, it is difficult to argue that articles 1796, 1797 and other related and correlative provisions of the Federal Civil Code are supplementary, since the supplementary rules are contrary to the text in article 78 of the Commercial Code.

LEGAL CONSEQUENCES OF ACTS OF GOD OR FORCE MAJEURE

As mentioned above, it is valid for the parties to agree on the legal consequences arising from the occurrence of an "Act of God" or "Force Majeure", and the parties may agree at a contractual level on the temporary suspension of obligations, the termination of the contract (without liability for the parties) or any other consequence they may deem appropriate, establishing for such purposes the applicable requirements, procedures, and deadlines.

However, in the event that contracts do not refer to the foregoing or there is controversy in their interpretation, it will be necessary for the competent judicial authority to determine whether an "Act of God" or "Force Majeure" has occurred, as well as the consequences of the occurrence of such event, by means of a final binding judicial resolution.

In this case, the interested party that has initiated the corresponding action may request the application of precautionary measures, such as the suspension of the provision of services, the performance of obligations or the payment of the agreed consideration, after providing a collateral and providing sufficient evidence of the need for the precautionary measure requested.

³Period: Ninth Period. Registration: 195622. Instance: Collegiate Circuit Courts. Type of Thesis: Isolated. Source: Judicial Weekly of the Federation and its Gazette. Volume VIII. September 1998. Subject(s): Civil. Thesis: III.2o.C.13 C. Page: 1217. THEORY OF UNFORESEEABILITY. INAPPLICABILITY OF THE, IN THE CASE OF ACTS OF COMMERCE.

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COVID-19 - LEGAL IMPLICATIONS

In the current situation, an Act of God or Force Majeure event can not only derive from the epidemic outbreak. Faced with an event of this type, governmental authorities usually issue general provisions to deal with the health crisis; such provisions, in some cases (as it has happened in the past), may limit the activity of individuals to the extent of preventing them from fulfilling certain contractual obligations and, therefore, the general provision issued by the authority, by itself, might constitute an Act of God or Force Majeure.

In theoretical terms, we would be facing two potential events of Act of God or Force Majeure; one derived from the event of nature (the epidemic) and the other derived from acts of authority (general provisions to address it and that affect compliance with obligations).

In this regard, on March 24, the Mexican Health Ministry published a Decree in the Federal Official Gazette establishing the preventive measures for the mitigation and control of health risks derived from COVID-19; this decree provides that certain groups must avoid attending their workplaces (such as people over 65 years of age and groups of people at risk of developing serious illness and/or dying from it); as well as the temporary suspension of public, social and private sector activities involving physical transportation, transit or movement of people.

Therefore, in order to determine the specific consequences that COVID-19 will have in relation to the fulfilment of contractual obligations, it is necessary to carry out a case-by-case study of the contracts and the applicable law, also considering the specific impact of the governmental provisions adopted in this respect

CONCLUSIONS

The epidemic outbreak caused by Coronavirus (COVID-19) generates consequences that impact, among others, the legal field, especially when it comes to fulfilling contractual obligations.

The coronavirus epidemic and the governmental measures to deal with it do not necessarily imply an Act of God or Force Majeure that exempts the parties from complying with their obligations, since it is necessary to refer to the applicable legislation for each contract and its clauses, in order to determine the corresponding legal consequences.

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Even though there are general guidelines in Mexican doctrine and jurisprudence to determine when an Act of God or Force Majeure occurs, it is common for the parties in a contract to define the concepts of "Act of God", "Force Majeure", "Material Adverse Change" or other similar concepts, as well as the requirements for such concepts to exist, and their consequences, therefore it is essential to review each specific case in order to determine whether an event such as the outbreak of Coronavirus and the governmental measures taken to deal with it can be considered an "Act of God" or " Force Majeure " and, consequently, exempt the parties, partially or totally, from the fulfilment of their contractual obligations.

We suggest our clients and friends to review the terms and conditions of their contracts, particularly with respect to the provisions related to the subjects covered by this note, and seek our advice if there is any doubt regarding their interpretation and application, as well as the legal implications that the contingency in question and the measures adopted by the government authority to address it may have.

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