

Effects of the State of Calamity in Contracts

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Governments have taken different actions, such as focalized or generalized quarantines, the closing of borders and the suspension of public and private activities, with the purpose of preventing the expansion and effects of the Coronavirus (COVID-19) pandemic, declared by the World Health Organization (WHO).

On March 5, 2020, President Giammattei declared a State of Calamity in accordance with the Public Order Law. On March 16, 2020, he issued the presidential provisions which are in force from March 17 to March 31 of 2020, and which are of mandatory abidance. The issued provisions include: the suspension of labor activities in the public and private sectors (with the exception of companies mandated to continue operating, such as pharmacies, gas stations, supermarkets, among others); the prohibition of any type of events, regardless of the number of participants; the prohibition of sport, social and cultural events; and the closing of shopping malls. Such presidential provisions were amended and extended on March 21, 2020 inviting to voluntary suspension of all business activities from March 23 to March 21, 2020, excluding some essential sectors.

Such provisions affect commercial, industrial, construction, and services operations; and there is no clarity on their scope or effects. Even though the Ministry of Economy has published a form through which all companies (with the exception of forbidden activities, such as bars, discotheques, sport and recreation activities, among others) may request an authorization to operate, provided that they meet the requirements provided therein (implementation of sanitary measures and the provision of transportation), the reality that the companies face is the uncertainty regarding the continuity of their operations and the fulfillment of their obligations with clients, providers and associates.

The consideration of force majeure and the foreseeability or serious hardship doctrine in the civil and commercial fields is of great importance in this context.

a) Force Majeure:

Upon executing a contract, the parties undertake to fulfill what is agreed on, and the breach, by willful intent or culpability, leads to compensation for damages. However, the compensation standard is not an absolute one. Force majeure is one of the exceptions to the compensation standard, because the cause of the breach by the debtor in this situation is a situation alien to him.

As it is defined by authors' teachings¹, force majeure consists of a force greater than any control and prevision, and in order to weigh its existence, it must be considered the normal and reasonable prevision that the circumstances demand to adopt in each specific case or the inevitability of the practical possibility, because the event is unpredictable and it could not have been possible to prevent it, even using the utmost diligence.

Section 1426 of the Civil Code of Guatemala provides: "*The debtor is not liable for the failure to fulfill the obligation due to force majeure or an Act of God, unless he is in default when it occurs.*"

If an event that constitutes force majeure (not defined in our legislation) occurs and if the debtor cannot physically or legally fulfill the contractual obligation, he shall be indefinitely exempted from it, if and only if he was not previously in default.

b) The Foreseeability or Serious Hardship Doctrine:

It is based on the rebus sic stantibus clause, considering that the parties undertake to fulfill the obligations assumed in the contract, provided that the performances to which they are bound by remain the same and unalterable up to the time of their fulfillment. However, this clause or the foreseeability doctrine presumes that

¹ Consulted on March 20, 2020 in:
https://guiasjuridicas.wolterskluwer.es/Content/Documento.aspx?params=H4siAAAAAAEFAMtMSbF1jTAAAUJic3NDtbtLUouLM_DxblwMDCwNzAwuQQGZapUt-ckhlQaptWmJOcSoA4q2LTjUAAAA=WKE

the debtor can indeed fulfill his contractual obligations at the time of the execution of the contract, but because of a subsequent change in the circumstances that existed upon the execution of the contract, the debtor is unable to fulfill the contract because its fulfillment has become a serious hardship.

Section 1330 of the Civil Code provides for the foreseeable doctrine: *"If the circumstances under which the obligation was assumed notoriously change, as a consequence of extraordinary events impossible to foresee and prevent, making their fulfillment a serious hardship, the agreement may be reviewed through a court declaration"*.

In this respect, Section 688 of the Commerce Code also provides for the termination of commercial contracts in case of an unexpected serious hardship, in the following manner: *"Only in continual performance and deferred performance contracts, the debtor may demand the termination if the performance at his expense becomes a serious hardship, due to the ensuing of extraordinary and unpredictable events. The termination shall not affect the performances already carried out and those in which the debtor is in default. The termination shall not apply in aleatory contracts; or in commutative contracts, if the ensuing hardship is a normal risk of them"*.

The current situation of the pandemic, besides its lack of legal regulation and the emergency governmental provisions that are being adopted, is generating very changing and unpredictable scenarios for the normal development of businesses. It must be analyzed in each specific case if the situations caused by the preventive measures due to COVID-19 may constitute force majeure causes, cause the suspension of contracts or their termination, exempting or not the breaching party from liability; or cause the revision and change to the contractual conditions, whether the party who may not be able to fulfill the contract may mitigate its liability; or the party who claims the fulfillment of the contract may face a force majeure or serious hardship defense.

We recommend in any case to take some initial actions, such as: the review of your most important contractual relationships in force:

- Can any of them be affected by COVID-19?
- How would they be affected?
- How are they documented?
- What type of contractual relationship is?
- If documented, is there any clause considering Force Majeure?
- If not documented, what proactive actions may be taken to mitigate the risks?

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