

COVID-19 / Legal implications in Mexico

Introduction

On March 24, 2020, the Mexican health authorities declared the Country to be in phase 2 of its contingency plan for the Coronavirus (COVID-19) pandemic, which means that the first local, inter-community transmissions have occurred.

Prior to this date, health authorities had not reported any cases where the disease had been acquired by way of local transmission, but rather, the confirmed cases were, reportedly, only imported cases, or cases associated with imported cases.

As of March 24, the authorities have now recognized that local transmission has started in the Country, and an official declaration regarding phase 2 has been issued. Consequently, the measures corresponding to this phase will now be officially implemented, such as social distancing and isolation, suspension of widely attended events, closure of establishments such as cinemas, stadiums, restaurants, and restrictions on mobility and transit, including closure of parks, beaches and other places of public gatherings.

Even though phase 2 had not been officially declared before March 24, both the public and private sectors had implemented some of these measures in advance, notably universities and schools.

As of March 28, based on information provided by the health authorities during a press conference, 848 positive cases of COVID-19 have been tested in Mexico, which have resulted in 16 human deaths. Based on the official declaration regarding phase 2, local transmission is now occurring and the number of positive cases is expected to increase exponentially in the following four to five weeks.

The purpose of the measures corresponding to phase 2 is to slowdown the dissemination of the disease as much as possible, in an attempt to avoid a situation where the health system, both public and private, collapses.

Separately, yet relevant to the present situation, Mexican Congress has approved a constitutional reform whereby the right of access to health is guaranteed to every person who lacks access to social security institutions. The reform also constitutionalizes certain social programs in favor of the elderly (i.e. persons over 68 years old) and students in poverty. The reform has yet to be approved by the majority of the legislative bodies of the States of the Republic before it can enter into force.

Health Mexican Legal Framework

Article 4 of the Mexican Constitution recognizes the right to health as a fundamental human right, and indicates that the law shall define the basis and means for accessing health services, and will establish coordination between federal and local authorities.

The law regulating these areas is the General Health Law, which creates the General Health Council (*Consejo de Seguridad General*) as the highest health authority in the country, with power to issue general provisions that are binding on all administrative authorities in the Country, at both federal and local level.

The General Health Council issued a decree on March 23, which took effect on March 24, 2020, in which the Council recognized the COVID-19 pandemic as a serious illness which has to be addressed as a matter of priority. It also announced that the authorities shall issue various measures in order to prepare for, prevent and control the epidemic (phase 2).

Curfew and Restrictions on Freedom of Movement

Notwithstanding the fact that extreme measures, such as mandatory movement restrictions, including curfew, correspond to phase 3, eight municipal authorities of the State of Sonora have issued decrees declaring a curfew between 9:00 pm and 5:00 am., taking effect as from March 23, 2020

Federal authorities have declared that no such measures are expected to be implemented at federal level.

Restrictions and suspensions of human rights of this sort are the exclusive competence of the President of the Republic, subject to Congressional approval or authorization and a prior review by the Supreme Court of Justice.

A decree suspending rights has not been issued in Mexico since World War II; not even in the wake of major natural disasters, such as the 1985 and 2017 earthquakes.

Therefore, the curfews declared by the municipalities of the State of Sonora are highly questionable under Mexican Constitutional Law.

Consequences of Imposed Restrictions

Contract Law

Various types of restrictions imposed by governmental authorities will give rise to situations where compliance of contractual obligations may be impaired, thereby

triggering legal consequences, such as breach of contract or situations justifying non-performance of contractual obligations.

Mexican contractual agreements may be governed by commercial or civil law, depending on the parties to the contracts and/or the nature of the contractual obligations.

Mercantile agreements are governed by commercial law, which is federal in nature.

Other agreements between private non-commercial parties are governed by civil law, which is local in nature. That is to say, each State of the Republic and Mexico City have their own civil codes which regulate, among other areas, the law of contracts.

Mercantile agreements are regulated by the Commercial Code, which applies to the whole territory of Mexico and to all commercial transactions entered into in the Country.

Acts of God and Force Majeure

Mexican contractual law, both Mercantile and Civil, recognizes the concepts of an Act of God (*Caso Fortuito*) and *Force Majeure* (*Fuerza Mayor*).

An Act of God refers to a situation or occurrence that could not have been predicted or prevented, while *Force Majeure* refers to a situation that, even if predicted, could not have been prevented and thus has created an obstacle preventing a contractual party from complying with its obligations. Typical cases of *Casos Fortuitos* are governmental legal acts, or other human acts such as strikes. *Force Majeure* refers to acts or situations produced by natural events which also prevent a contractual party from being able to comply with agreed contractual obligations. The COVID-19 pandemic is another example of the latter, i.e. *Force Majeure*, rather than an Act of God. In any event, the difference between the two concepts is irrelevant for practical purposes. Both concepts refer to situations that arise which are beyond the obligor's control and which create an obstacle that the obligor cannot overcome so as to fulfil their contractual obligations.

Under Mexican law, in order for a contractual party to justify non-compliance with a contractual obligation, the party has to provide evidence that the impediment was due to the direct and immediate cause of the *Force Majeure* situation. In other words, a causal nexus between non-compliance and the *Force Majeure* event must exist and be substantiated by evidence.

In particular, it can become impossible to comply with a contractual obligation where the obligor has agreed to perform a certain act (*obligaciones de hacer*). If the *Force Majeure* event becomes an obstacle which prevents a contractual party performing a certain act, such non-performance could therefore be justified.

The COVID-19 pandemic could produce innumerable situations where it is impossible to perform contractual obligations in accordance with the contractual agreement; however, a case by case analysis will be required for every specific situation.

Economic crisis and *rebus sic stantibus* (unpredictability theory) vs *pacta sunt servanda*

The COVID-19 pandemic has severely effected global economics. Mexico is no exception. The Mexican peso has suffered a strong devaluation of around 30 percent against the US dollar. The exchange rate prior to COVID-19 was around \$19.00 pesos per dollar, and is currently at more than \$25,00 pesos per dollar.

Also, an increase in production costs and inflation is expected to occur in the near future.

Contracts entered into before the crisis were based on economic predictions that are no longer applicable.

The question is whether, under Mexican law, a contractual party can invoke the theory of unpredictability, known as *rebus sic stantibus*, in order to seek mandatory renegotiation of the economic terms of the agreement, as sanctioned by a judicial authority. This could be relevant, for example, where a debt has been denominated in dollars.

As mentioned before, contract law can governed by either commercial and local civil law.

The civil codes of various States of the Mexican Republic (such as Mexico City, Aguascalientes, Jalisco and Quinta Roo) recognize the principle of *rebus sic stantibus*. The commercial code, however, does not recognize this legal concept.

Judicial precedents have established that the principle of *pacta sunt servanda* applies to commercial contracts (and also to civil contracts governed by civil codes which do not recognize the *rebus sic stantibus* principle). According to this principle, parties must abide by the terms and conditions originally agreed between them, regardless of a material change in circumstances.

Irrespective of these two principles, party autonomy means that, between themselves, the parties may agree a different approach by including, for example, a “material adverse change” or “material adverse effect” clause in their financial agreements. In which case, their express agreement would override the application of the relevant principle.

Therefore, in the absence of a material adverse change or effect clause, a debt denominated in dollars would have to be honored either by paying in dollars or in Mexican pesos at the official rate of exchange determined by Mexican Central Bank on the date of payment, and a contractor's obligation under a supply agreement to finalize certain works at a fixed price (*obra a precio alzado*) would have to be complied with, despite any adverse material changes in circumstances.

As before, a case by case analysis will be required for each specific case.

Public Companies

Companies trading on the Mexican stock exchange have also been suffering the effects of the crisis – and will continue to do so. The Mexican stock exchange indices have significantly fallen.

Additionally, public companies have an obligation to disclose any “relevant events”, according to the applicable laws and regulations governing securities.

Any public company that, as a result of the economic crisis stemming from the COVID-19 pandemic, faces a situation that could fall within the scope of one or more of the “relevant events” in accordance with the relevant legal provision, should notify the corresponding stock exchange where its securities are traded and the securities and exchange commission (*Comisión Nacional Bancaria y de Valores*) in order to avoid suspension or cancellation of the trading of their respective securities.

Labor issues

Employees' rights are protected under Mexican Labor Law.

Despite the declaration of a health contingency plan (i.e. phase 2), a health contingency plan has not yet been formally declared for labor purposes, as health authorities have only ordered the suspension of essential, not all, activities.

In the event an emergency contingency is formally declared which involves suspending *all* activities, Mexican Labor Law expressly provides that this would give rise to the possibility of suspending the labor relationship between an employer and an employee, at the election of the employer. In such a scenario, employers are required to pay employees the equivalent of a minimum daily salary up to 30 days, starting from day on which the emergency contingency is declared. Currently, minimum salaries in Mexico range from \$123.22 pesos to \$185.56 pesos, as applicable in Mexico City and the Northern border's free zone.

However, employers may decide, whenever possible, to instruct their employees to perform their duties from home (i.e. home office). In which case, the labor relationship

should continue on the same terms as before; meaning, employees would be required to perform the duties instructed by the employer in accordance with the terms of their labor contract on a home office basis, and, in return, the employer would be required to pay the employees' salaries on the same terms.

If the job description does not allow the employee to perform their duties remotely (for example, in the case of machine operators), the employer could choose to suspend the labor relationship with the employee and together they could negotiate such terms and conditions which should apply during the suspension period; except if an emergency contingency is formally declared, in which case the employer can elect to suspend the labor relationship and pay the employee in the manner described above.

In the current phase 2 situation, employers can also establish different terms and conditions for the labor activities performed by an employee, such as a reduced work schedule with a correlative reduction in salary, and other negotiable terms and conditions.

In the event an employee falls ill as a result of COVID-19, Mexican Labor Law and Social Security Law will apply. COVID-19 illness would be considered a non-professional malady. Therefore, if an employee is prevented from performing their labor activities because of the illness, an employer is not required to pay the employee's salary until the employee has recovered and can start to perform their labor activities again.

In such circumstances, the salary gap would be covered (to an extent) by the Mexican Institute of Social Security, which would cover a subsidy based on the employee's incapacity of an amount equivalent to 60% of the employee's base salary.

Notwithstanding the above, an accord issued by the Federal authorities on March 24 has established that all employers, in both the public and private sectors, must grant paid "leave of absence" to persons that belong to vulnerable groups, such as persons over the age of 65, pregnant women, or persons with certain preexisting health conditions.

Tax breaks and administrative deferral programs and benefits

At federal level, there have currently been no deferrals or extensions granted by the Mexican Revenue Service (*Servicio de Administración Tributaria*) with respect to filing of annual tax returns and paying of income tax (which is federal in nature).

Legal entities must file their annual tax returns no later than March 31, while individuals have until no later than April 30 to do so.

Most, if not all Federal Agencies, such as the Mexican Institute for Industrial Property and the Regulatory Commission for Energy, have issued orders stopping non-essential activities and thus suspending all of its procedures until April 20.

At local level, some States have declared activities to be suspended until April 20, while others are still functioning (meaning that any relevant procedural timeframes will continue to elapse).

In the case of Mexico City, certain procedures that can be performed electronically are still in operation, such as registering certain guaranties and incorporating companies.

On March 25, the Mexican banking authority (National Banking and Securities Commission), issued certain special temporary accounting measures for credit institutions, which grant certain benefits to borrowers as a result of COVID-19..

In general, these benefits may consist of a partial or total deferral in the payment of principal and/or interest for a period of up to four months, with the possibility of extending such benefits for a further two months with respect to all repayable amounts.

Judicial deferrals

Courts all across the country, both at federal and local level, have suspended activities as a result of COVID-19 until April 20. Accordingly, all procedural timeframes have been suspended until then.

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