

## COVID-19 In Mexico: Legal Implications and the Legal Validity of Electronic Signatures

### Introduction

Less than two months have passed since the first case of COVID-19 was registered in Mexico, on 27 February 2020. Since then, the epidemic has been growing exponentially in the country. As of 27 April 2020, the Health Secretary reported 15,529 positive cases and 1,434 registered deaths nationally. At global level, as at 26 April, there were approximately 3,063,814 confirmed cases and 213,273 deaths, whilst around 906,898 people have reportedly recovered from the virus.

A few days after the Health Secretary implemented a National Social Distancing period, on 24 March 2020 the Mexican health authorities declared the country to be in Phase 2 of its contingency plan to fight the coronavirus pandemic. This meant that, for the first time, local and inter-community transmissions had taken place. Consequently, a series of official measures were introduced in order to halt, to the extent possible, transmission of the virus. Such measures included social distancing and self-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.

As the epidemic advances in both Mexico and the world, Mexican national authorities have been implementing measures and taking various actions to mitigate and limit infection amongst the population. On the morning of 21 April 2020, the Health Undersecretary, Hugo López-Gatell, announced the start of Phase 3 of the Covid-19 contingency plan and extended the National Social Distancing period until 30 May. According to the Undersecretary, today Mexico is “exactly at the stage in which the epidemic advances at its quickest”.

In this briefing, we will review the measures and actions taken by the Mexican health authorities, together with the legal consequences stemming from such actions. Similarly, we will look at the legal validity of an electronic signature in Mexico, particularly in light of the unique present circumstances.

### Measures and Actions Taken by the Health Authorities

Having officially declared Phase 2 of the pandemic, on 30 March 2020 the General Health Council declared an emergency health situation as a result of the pandemic caused by the SARS-CoV2 virus (i.e. Covid-19) in the Federal Official Gazette. The declaration stated as follows:

*“First. A ‘force majeure’ emergency health situation is declared as a result of the pandemic caused by the SARS-CoV2 virus (Covid-19).*

*Secondly. The Health Secretary will establish all necessary actions for addressing this emergency.”*

The Health Secretary subsequently issued a Decree (published in the evening session of the Official Federal Gazette on 31 March 2020), which established extraordinary measures for addressing the ‘force majeure’ emergency health situation caused by the SAR-Cov2 virus, and implemented a series of eight measures (as contained in Article 1).

The measures for mitigating the transmission of coronavirus, as contained in the Health Secretary’s Decree, were declared compulsory through their publication in the Official Gazette.

Measure 1 suspends non-essential activity and provides that:

*“It is hereby ordered that non-essential activity shall be suspended with immediate effect from 30 March to 30 April 2020, in order to mitigate the spreading and transmission of the SARS-Cov2 virus in the community, and to reduce the burden of disease, together with its complications, and death on the population residing in the national territory.”*

Measure 2 defines in detail which activities are considered to be essential, including: those related to the health sector, such as paramedics, and general administrative and support staff for the National Health System; those related to the public security and justice systems; those related to key sectors of the economy, such as finance, energy, food, agriculture, fishing and livestock; those directly related to the government’s social initiatives; and those involved with conserving, maintaining and repairing critical infrastructure.

Measure 3 establishes certain compulsory practices which must be followed in all places and vicinities where essential activities (as defined by Measure 2) are carried out. Such compulsory practices include: restricting meetings or gatherings of more than 50 people; hand and mouth sanitation, including the frequent washing of hands and complying with respiratory protocols when coughing or sneezing; and “[A]ll the other prevailing measures for social distancing decreed by the Federal Health Secretary”.

Measure 4 urges members of the entire Mexican population who are not participating in essential activities to remain at home for a period of one month, from 30 March to 30 April. This is defined as a “voluntary restriction on movement, to remain in a private home or a non-public space, for the longest time possible”. This measure is expressed as an encouragement, which naturally carries different legal consequences to an order. The

nature of an encouragement allows for a certain degree of discretion, while an order is binding and is enforced by the coercive power of the State.

In contrast to the encouragement to remain at home (as set out in Measure 4 of the Health Secretary's Decree), Measure 5 makes it compulsory for persons of greater age or who are in a vulnerable situation to remain at home.

The other measures deal with the health authorities' powers to issue guidelines to ensure the country's "orderly, phased and regional" return to work, the suspension of censuses and registers, and the unconditional respect which must be conferred on human rights when applying the measures contained in the Health Secretary's Decree.

Technical guidelines relating to the activities outlined in the Health Secretary's Decree of 31 March 2020

On 6 April 2020, the Health Secretary issued another decree which set out technical guidelines relating to the activities outlined in sections (c) and (e) of Article I, Part II of the 31 March Decree.

In accordance with Article 1 of the 31 March Decree, as an extraordinary measure for addressing the emergency health crisis, the health, social and private sectors must implement various measures. Part II of Article 1 establishes which activities are considered to be "essential". In particular, sections (c) and (e) expressly provide the following:

*(c) Fundamental sectors of the economy are: finance, tax revenue, distribution and sale of energy resources, petrol and gas; production and distribution of drinking water, the food and non-alcohol drink industries, food markets, supermarkets, convenience, grocery and convenience food stores; transport services for people and cargo, the fishing, agriculture and livestock industries, the agro-industry, the chemical industry; cleaning products; hardware stores, mail services; security guards; day centres for children and older people, nursing homes, refuges and centres for women victims of violence and their children; telecoms and media outlets; private emergency services, funeral and cremation services, storage services and refrigeration of essential consumables; logistics (airports, ports and railways), as well as activities which, if suspended, would suffer irreversible effects regarding their continued operation;*

*(e) Necessary activities for the conservation, maintenance and repair of critical infrastructure which will ensure production and distribution of indispensable activities, namely: drinking water, electric power, petrol, gas, jet fuel, basic sanitation, public transport, medical and hospital infrastructure, together with other activities that can be listed in this category.*

The 6 April Decree serves as an extension of the 31 March Decree. Based on three components – all of which require compliance with the measures provided under Article 1, Part III of the 31 March Decree – the 6 April Decree provides technical guidelines for: (i) businesses which would suffer irreversible effects if their activities were suspended; (ii) delivery businesses; and (iii) businesses necessary for the conservation, maintenance and repair of critical infrastructure, which ensure the production and distribution of indispensable services: in this case, electric power.

- I. With regards to the first component, Article 1 defines which activities would suffer irreversible effects on their continued operation if suspended. In accordance with section (c), Part II, such activities include: steel, cement and glass production companies; information technology production companies which ensure continuity of the information systems used by the public, private and social sectors.
  - a. In respect of the first activities, the 6 April Decree decrees that a minimum level of activity should be maintained in order to avoid irreversible effects on operation, provided that the Secretary of Economy is informed, *in accordance with “Annex 1” and within a period no greater than 24 hours from the publication of the current Guidelines, of the total number of employees who would be indispensable for these purposes.*
  - b. Notably, the 6 April Decree guarantees the Federal Government’s existing contracts with producers of steel, cement and glass solely in respect of the current administration’s main projects, namely: *the ‘Dos Bocas’ project, the ‘Mayan Train’ project, the Felipe Ángeles Airport, the ‘Transísmico Corridor’ project; together with current contracts considered indispensable for the national oil company, Petróleos Mexicanos, and the Federal Electrical Commission.*
- II. With regards to the second component – regarding delivery businesses – the 6 April Decree establishes that delivery services include electronic trading businesses and platforms.
- III. With regards to the third component – regarding businesses necessary for critical infrastructure which ensure the production and distribution of indispensable services – the 6 April Decree specifically addresses electric power. It provides that coal mines will be restricted to the minimum level of production needed to satisfy the demand of the Federal Electrical Commission, and that they will have to inform the Secretary of Economy via email (economia@economia.gob.mx) in accordance with “Annex 1” within 24 hours.

- a. For distributors of coal, the 6 April Decree provides that they must maintain minimum levels of operation, using only the fewest number of employees possible.

For our readers' ease of reference, a copy of "Annex 1" (as previously referred to) is provided below:

**Employee Register in order to Continue Operations During the Emergency Health Crisis**

Name of Business	
Names of Legal Representative	
Mexican Tax Identification Number	
Contact Telephone Number	
Email Address	
Address	
Contract Number and Name of Project or Work (each project or work to be listed as a separate entry)	
Number of employees hired under normal circumstances	
Number of employees hired during the emergency health crisis	

**Phase 3 of COVID in Mexico**

Pursuant to the announcement on 21 April 2020 that Mexico had entered Phase 3 of the Covid-19 epidemic, Mexican health authorities put into effect the next stage in the fight against coronavirus. Phase 3 was first discussed when, on 9 April, the Undersecretary, López-Gatell, announced that it would likely take place in approximately 15 days from then.

Phase 3, which is the epidemiological phase, is characterized by a rapid and extensive spreading of the virus at national level, together with various regional outbreaks and a shift from hundreds of cases to thousands of cases; thus, in Phase 3, the risk of saturating the health system is significantly higher. Accordingly, Phase 3 reinforces the obligatory and extreme nature of the measures previously introduced.

In this regard, further to analysis carried out by 'Grupo Científico Asesor' which received approval of the General Health Council in its plenary session on 20 April 2020, it became necessary to: extend the National Social Distancing period until 30 May; intensify measures for mitigating the spread of the virus at regional level; and extend the period of voluntary self-isolation until 30 May. It is important to note that on 20 April, a further Decree was published in the Official Gazette which declared that 20 and 30 April 2020 would be non-working days in order to carry out administrative procedures with regards to the General Health Council.

In a video released on 21 April, the Undersecretary confirmed that the prevention and health safeguarding measures "remain the same" as the measures previously implemented in Phase 2, i.e. those set out in the Decrees referred to above.

By way of follow up to the previous Decrees, the Health Secretary issued a third Decree on the same day, which was published in the evening version of the Official Federal Gazette. The third Decree modifies the previous Decree published on 31 March 2020 which established extraordinary measures for addressing the emergency health situation caused by the SARS-CoV2 virus.

The 21 April Decree modifies Measure 1 (as set out in Part I, Article I of the 31 March Decree) which ordered the immediate suspension of non-essential activities. This measure has now been extended by a further month, so that it will now run from 30 March until 30 May 2020. However, it also now provides for an 'early exit' for municipalities which, as at 18 March, showed low or zero viral transmissions. The other seven Measures of the 31 March Decree remain unchanged.

Aside from this modification, Articles 3 to 6 (inclusive) of the 31 March Decree were added to the 21 April Decree. Article 3 provides that the Health Secretary will establish guidelines for reducing mobility between municipalities which are experiencing a particular spread of the virus.

Article 4 provides that the Health Secretary will have the authority to make necessary adjustments to the systems for monitoring and collating epidemiological information. The aim here is to enhance special monitoring of patients who are critically ill with the Covid-19 virus, as well as monitoring the demand and availability of hospital services.

Article 5 is directed at Federal Governments and requires them to:

- (i) maintain updated daily reports on the occupancy, availability and level of care needed as a result of Severe Acute Respiratory Syndrome (SARS) and any other syndrome deemed necessary by the Health Secretary;
- (ii) implement prevention and control measures which are deemed appropriate in light of the general criteria issued by the Health Secretary;
- (iii) establish and implement measures for reducing the mobility of inhabitants between municipalities which are experiencing a distinct spread of the virus, in accordance with the criteria provided by the Health Secretary and with the assistance of federal public administration agencies; and
- (iv) ensure the adequate and timely implementation of these measures, and periodically report to the Health Secretary.

Article 6 establishes that the execution and supervision of plans for converting and expanding hospitals – so as to ensure the population receives appropriate and timely healthcare – conforms to plans at federal government level and the National Health System.

The authorities discarded the idea of a curfew implemented at federal level and, to date, have not yet suspended all activities.

In Mexico City, the Governor also announced, on 21 April, that five specific measures would be implemented so as to prevent people clustering and decrease the risk of contagion in the country's capital. These five measures are:

- (i) closing 20% of metro stations, bus stations and light rail stations from 23 April in order to speed up transit in crowded stations;
- (ii) increasing the frequency of franchised public transport and the RTP autobus network;
- (iii) making the “No Driving Today” program compulsory, regardless of the hologram on the vehicle, that would otherwise allow such vehicles to circulate every day;
- (iv) increasing measures for sanitizing public spaces and transport; and
- (v) supervising and verifying to a much greater extent the businesses which fail to comply with the immediate suspension of non-essential activities measures, pursuant to Measure 1 of the 31 March Decree.

The Mexico City Governor assured that there will be no curfew or fines imposed on local residents leaving their homes. However, the Governor stressed that the health authorities' instructions must continue to be followed.

### The Mexican Healthcare 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 (known in Mexico as the "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.

### Legal Considerations

One of the main consequences of implementing the measures provided for in the Health Secretary's Decree of 31 March undoubtedly derives from Measure 1. Suspending, with immediate effect, all activities which do not fall within the "essential" category is no small thing, since a measure of such scale will create a series of economic, employment, contractual and commercial ramifications.

General provisions issued by the General Health Council are compulsory for the country according to Article 73, Part XVI, 1st Basis of the Mexican Constitution. Consequently, and as provided for in the Health Secretary's Decree of 31 March, it is necessary that all non-essential employment, academic and social activities are suspended until 30 May 2020.

On the other hand, while the imposed measures will continue to apply until 30 May 2020, Measure 6 clearly provides that guidelines will be made available for phasing an orderly and gradual return; however, the full extent of the timescale of this return may change as the epidemic develops throughout the country.

### Contract Law

Various types of restrictions imposed by governmental authorities will give rise to situations where compliance with contractual obligations may be impaired, thereby triggering legal consequences, such as breach of contract or situations justifying non-performance of contractual obligations – e.g. a '*force majeure*' case.

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.



Commercial 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. Meaning, each State and Mexico City have their own civil codes which regulate, among other areas, the law of contracts.

Commercial 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 Commercial 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 has thus 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.

## Validity of the Electronic Signature in Times of COVID-19

Given the situation the world now finds itself in as a result of Covid-19 – which includes widespread social isolation and suspension of non-essential activities – the handwritten signature and the need to be physically present when signing contracts will invariably be restricted. In this regard, the electronic signature (“ES”) and the ‘advanced electronic signature’ (“AdES”) will be viable alternatives for concluding contracts which are only required to be in writing.

In Mexico, a handwritten signature is the traditional way, and indeed the very cornerstone, of authenticating a document, demonstrating willingness and expressing consent. However, alternatives to the handwritten signature are recognized in Mexican legislation. The electronic signature, for example, is a tool that is revitalizing the way in which business is done and can enhance the efficiency of transactions.

### Legal framework for the handwritten signature in Mexico

By way of a brief introduction, the electronic signature can simply be *a box that is ticked to accept Terms of Use on a webpage, the numbers which generate tokens or pin codes allowing users to access their online banking, biometric data such as fingerprints or facial recognition, a signature written in digital format, voice recognition etc.*<sup>1</sup>

By contrast, the AdES is an electronic signature that fulfils the requirements set out in Article 97 of the Commercial Code, as set out further below. A prime example of the AdES is the *e.firma*/FIEL, issued by the Tax Administration Service of Mexico for individuals and legal entities. This form of signature is composed of the following: (i) a public certificate (known as “.CER”); and (ii) a private key (known as “.KEY”), together with a private password.

National law makes it possible to carry out certain actions – both civil and commercial – electronically, and it recognizes the validity and legal effect of electronic signatures as a means of expressing the willingness of the parties involved.

In particular, Title II of the Commercial Code deals with electronic signatures, and Article 89 thereof contains the following definition:

*“‘Electronic Signature’ means data in electronic form in, affixed to or logically associated with, a Data Message, which may be used to identify the signatory in relation to a Data Message and to indicate the signatory’s approval of the*

---

<sup>1</sup> Tomás Álvarez Melis, *Legal validity of the electronic signature in Mexico*, 2019, available at: <https://blog.mifiel.com/validez-firma-electronica/>. DocuSign is another electronic signature platform which has created the first signature and contract management Cloud: <https://www.docusign.com/>.

*information contained in the Data Message, and which produces the same legal effects as a handwritten signature, being admissible as evidence in court.*

*'Advanced or Trusted Electronic Signature' means an Electronic Signature which complies with the requirements set out in sub-sections I to IV of Article 97.*

*References in these provisions to Digital Signature shall mean the same as references to Electronic Signature."*

It is therefore safe to say that there are sufficient ways of enabling the parties to a contract - being the document crystallizing their agreement and expression of consent - to be identified. Thus, the legal validity of an electronic signature can be assured in Mexico.

The Commercial Code recognizes the legal validity of electronic documents that are signed electronically. Regardless of the content of the underlying document, the Commercial Code provides that the legal effect, validity and binding nature of such documents will be upheld solely on the basis that the document takes the form of a 'Data Message' (as above). Article 90 of the Code sets out when it can be presumed that a Data Message originates from the Sender. The time on which a Data Message is deemed to be received (Article 91), acknowledgement of receipt of a Data Message (Article 92), the place of issue of a Data Message (Article 94) and other related aspects concerning Data Messages are also covered by the Commercial Code.

The Commercial Code clarifies the difference between an Electronic Signature and an Advanced Electronic Signature in Article 97, as follows:

*Article 97*

*When required by law or in the event that the parties agree on the existence of a Signature with respect to a Data Message, such requirement will be deemed to be satisfied if an Electronic Signature is used in a manner suitable for the purposes for which it was created and communicated in the Data Message.*

*An Electronic Signature will be considered Advanced or Trusted if, at the very least, it complies with the following requirements:*

- I. Signature Creation Data, in the context in which it is used, must exclusively correspond to the Signatory;*
- II. Signature Creation Data must, at the time of signing, be under the exclusive control of the Signatory;*

- III. *It must be possible to identify any alteration made to the Electronic Signature after the moment of signing; and*
- IV. *With regards to the integrity of the information contained in a Data Message, it must be possible to identify any alteration made to such information after the moment of signing.*

*Without prejudice to the provisions of this Article, any person may demonstrate in any such manner the reliability of an Electronic Signature; or present evidence that an Electronic Signature is not reliable.*

Importantly, Article 99 sets out the obligations of the Signatory as follows:

*Article 99*

*The Signatory shall:*

- I. *Comply with the obligations deriving from the use of the Electronic Signature;*
- II. *Exercise reasonable care and establish reasonable measures for avoiding unauthorized use of Signature Creation Data;*
- III. *When a Certificate in relation to an Electronic Signature is used, exercise reasonable care to verify that all declarations that have been made with respect to the Certificate and the validity thereof, or have been set out in the same, are accurate;*
- IV. *Be answerable for obligations deriving from non-authorized use of their signature, in the event that the Signatory has not exercised due diligence to prevent such use, unless the Recipient has been informed of the unsecure nature of the Electronica Signature or has not exercised due diligence.*

Furthermore, Article 1803 of the Federal Civil Code provides the following:

*Article 1803*

*Consent can be express or implied, and for the following purposes it shall be:*

- I. *Express when it is presented verbally, in writing, by electronic means, by optical means or by any other technological means, or is otherwise presented unambiguously, and (...)*

In light of this, it is clear that electronic signatures are also recognized by Mexican civil law. There are, however, other rules dealing with electronic signatures.

In particular, the Law on the Advanced Electronic Signature published in the Official Gazette on 11 January 2012 provides as follows in Article 4 (2):

*In relation to commercial acts and registrations in the Public Commercial Registry, the use of the advanced electronic signature shall be governed by the Commercial Code and other applicable laws relating thereto, without prejudice to the application of the provisions of such Law where appropriate.*

The Federal Law on Consumer Protection also falls within the legal framework of electronic signatures. Articles 10 and 86 *bis* of this Law provides for the possibility of the customer approving transactions electronically.

#### Legal considerations regarding the electronic signature

There are several legal considerations to take into account regarding the use of an electronic signature. The AdES, for example, is principally used in specific governmental transactions; however, it is not limited to governmental use and can be used by individuals. Most commercial transactions would only require, as a minimum, a simple electronic signature (ES). However, it is undeniable that the AdES is legally stronger than an electronic signature, since it is conferred by law with a presumption of legality and non-repudiation, insofar as the burden of proof falls on the person who denies having signed.

Occasionally, witnesses are required by law to participate in the signing of certain legal documents and the performance of certain acts. This can be problematic in relation to electronic signatures, since, by nature, an electronic signature only has a digital presence, not a tangible one. In the absence of any Mexican legal provision governing the participation of witnesses in this regard, it could be assumed that witnesses are able to sign electronically as and when required. Notably, one of the characteristics of the AdES is that it gives rise to a legal presumption of attribution, as is the case with documents signed before a notary public, which would thus confer legal certainty on any documents signed with a witness.

However, if legislation expressly requires witnesses to be present when legal transactions are being completed, this requirement must be respected (to the extent possible) so as to avoid the risk of any penalties. Similarly, certain acts and documents require to be granted before a notary public (or other officers who, as referred to in Spanish, are vested with “Fe Pública”); if so, the presence of a notary public will still be necessary and the parties’ signatures cannot be written electronically.

What about negotiable instruments? In Mexico, negotiable instruments are governed by the General Law of Negotiable Instruments and Credit Operations (referred to here as “the NICO Law”). This law contains no prohibition or restriction on using electronic signatures. However, debt securities which are signed electronically cannot be endorsed in accordance with Articles 38 and 39 of the NICO Law, as the debt holder must certify the ownership of the debt through an unbroken series of endorsements. As such, it is not possible to generate the required unbroken series of endorsements by way of either a normal electronic signature, an AdES or a EC. Meaning, these methods of signing cannot be used for certifying the ownership of debt securities. In these times of Covid-19, it will therefore be important to look to cutting edge technologies - such as Blockchain – for ways of enabling debt securities to be endorsed securely.

In the context of a stock purchase which does not require the involvement of a notary public, if electronic signing services are not used or offered by the relevant institutions, shares will have to be transferred by way of ordinary assignment. According to Article 131 of the Mexican Corporations Act, this will need to be reflected on the shares’ certificate, (as opposed to an endorsement).

If a Mexican corporation needs to be incorporated urgently, it has been possible, since 2016 - pursuant to the Mexican Corporations Act – to do so in an expedited and straightforward way by creating what is known as a Simplified Joint Stock Company (or “SAS”). The SAS is a type of company formed by one or more shareholders, and it can be created electronically without the need to involve a notary public. Furthermore, decisions relating to the company can be made electronically. The company’s incorporation is carried out via the Electronic System of Company Constitutions, which is specifically set up for SASs and overseen by the Finance Secretary. To access this system, a valid *e.firma* is needed.

The current epidemic has given rise to various problems relating to board meetings and shareholder meetings, whether ordinary or extraordinary. In the daily running of a Mexican company, resolutions need to be formally approved at the relevant meetings. Mexican law, however, recognizes the possibility that such resolutions may be formally approved outside of a shareholder or board meeting, provided that the resolution was passed unanimously and confirmed in writing by all, so long as the company’s charter of incorporation and by-laws of the company expressly provide for the possibility of adopting resolution in writing in lieu of an actual meeting.

However, approving resolutions requires the signature of the relevant directors or shareholders, as the case may be. While it is not currently possible to convene physical meetings - either at board or shareholder level - companies have the option of holding their meetings electronically (i.e. by teleconference), and thereafter confirming the resolutions unanimously in writing, using the ES or AdES signature method. This approach is called the “Unanimous Resolution taken in lieu of a Shareholder Meeting or

Board Meeting”. In this regard, it is highly recommendable that, in the case of Mexican companies, the by-laws are reviewed in the first instance in order to ensure that this method is expressly recognized therein – both for board resolutions and shareholder resolutions.

Since 2000, various legislatures of federal entities or states, have issued different laws dealing with the use of the AdES signature method, including: Aguascalientes, Baja California, Chiapas, Colima, Mexico City, Durango, Mexico State, Guanajuato, Guerrero, Hidalgo, Jalisco, Morelos, Quintana Roo, Sonora and the Yucatán.

Regarding alternative dispute mechanisms, Article 15 of the Law on Alternative Justice of the Supreme Court of Justice of Mexico City provides that the Centre for Alternative Justice will rely on automated systems for enabling mediation services to be delivered by “electronic, optical or other technological means”. Accordingly, mediation will be able to be conducted digitally.

Articles 35 and 50 of the Law on Alternative Justice sets out the requirements and formalities for mediation agreements, regardless of whether such agreements are concluded through private mediation or otherwise. According to both articles, one provision for mediation agreements provides that it has to be completed with the signatures or fingerprints of the parties, without requiring more stringent conditions for validating a signature. On the basis of the above, and in the absence of an express restriction to the contrary, a simple ES or an AdES may be used by the parties to sign their mediation agreements.

In conclusion, the electronic signature – and whichever of its legally recognized alternatives – has enabled certain types of contracts and other legal acts to be completed more efficiently and pragmatically. Before, completing an international transaction would have incurred days and considerable logistical costs in transporting documents around the globe for signature, whereas today, it can simply take a few clicks.

It is important to understand that, as ever, the benefits of using electronic signatures come with certain drawbacks. For example, if there is a dispute regarding the validity or reliability of an electronic signature, it may be necessary to pay for an expert (which would have associated financial and procedural implications). In such circumstances, it would be pertinent to consider whether, in fact, the parties’ signatures should be confirmed before a notary or if the parties should continue to proceed with electronic signatures, bearing in mind the benefits and risks of doing so.

Although there are still gaps in the legal framework, Mexico recognizes the legal validity of legal acts and documents completed by electronic signatures, and puts electronic signatures on par with handwritten signatures. In the current legal environment, using electronic signatures can reap many benefits, which is why their use should be promoted

and an integral system should be developed in order to facilitate and integrate this type of technology into daily legal life.

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 or local civil law.

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

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 Mexican pesos at the official exchange rate determined by the 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.

### The stock market

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 National Banking and Securities Commission, in order to avoid a suspension or cancellation of the trading of their respective securities.

On 25 March, the National Banking and Securities Commission issued certain temporary special accounting measures to banking institutions, in order to give special treatment to benefits offered to borrowers as a result of the Covid-19 crisis.

Generally, these benefits entail a partial or total payment deferral of underlying capital and/or interest for a period of up to four months, with the possibility of renewing such benefits for a further two months in respect of the total amounts payable.

On 26 March 2020, the National Banking and Securities Commission published a decree in the Official Gazette setting out certain measures and suspending some time limits as a result of Covid-19 with regards to entities and individuals subject to its supervision. Initially, this decree was intended to last until 19 April. However, on 17 April, the Commission published another decree extending the measures until 30 April 2020, or until such later date as determined by the President of the Commission.

The requirement to submit information or reports to the National Banking and Securities Commission, which falls on financial entities or individuals subject to its control, will not have to be fulfilled by submitting physical documents; rather, such information and reports can be submitted digitally *as per* the electronic guidelines published by the Commission.

## Labor law

Employees' rights are protected under Mexican Federal Labor Law.

With regards to labor, it is particularly relevant that none of the Decrees published in the Official Federal Gazette refer to a "health contingency declaration", but to a "force majeure' health emergency" declaration. This is relevant for the purposes of Article 42 *bis* of the Federal Labor Law, which provides the following:

*"Article 42 bis*

*In cases where the competent authorities issue a health contingency declaration, in accordance with the applicable provisions, which involves suspending labor, Article 429, Part IV of this Law shall apply."*

The Government's position was repeated many times, including in the nightly press conference on 30 March, the morning press conference on 31 March, in a video featuring the Labor Secretary, Luisa María Alcalde, and in the "List of Frequent Questions on the Labor Situation: Labor Situation before COVID -19", posted on the Ministry of Labor's website. The authorities indicated that the Decrees issued on or before that date did not involve a "contingency declaration" regarding health, for the purposes of Article 42 *bis* above.

On the other hand, the use of the term '*force majeure*' would appear to invoke Article 427, Part I of the Federal Labor Law; similarly, Part VII would also come into play. These provisions set out the following:

*"Article 427*

*The following are causes for temporary suspension of working relationships in a business or institution:*

*I – A force majeure or an Act of God, physical or mental incapacity, or death which, in the case of labor, causes (...)*

*VII – A suspension of labor or work, as declared by a competent health authority, in cases of a health contingency."*

Furthermore, Article 429 establishes the following:

*"Article 429*

*In the cases outlined in Article 427, the following rules are noted:*

*I – In the case of Part I, the employer or his or her representative shall advise the Court of the suspension, so that it [can be] approved or disapproved.*

*IV – In the case of Part VII, the employer shall not require the approval or authorisation of the Court and shall be required to pay his or her employees compensation equivalent to one day's minimum wage, for each day of the suspension up to one month."*

Due to the ambiguity in Mexican labor law, there is some debate about the scope and effect of the use of the concept of a "force majeure emergency health" situation, as opposed to the concept of a "health contingency declaration" situation. The debate revolves around whether the scenarios provided in the Federal Labor Law exempt an employer from the obligation to pay salaries, and instead oblige an employer to pay compensation of an amount equivalent to a day's minimum wage for up to 30 days.

In this sense, and in accordance with the position adopted by the authorities, it is understood that the instances where employers can suspend labor because of a health contingency do not apply because no "contingency health declaration" has specifically been declared. Similarly, the instances where labor can be suspended because of *force majeure*, under Articles 427 and 429, are also understood not to apply; since, in this case, the law provides that the relevant labor court must approve the suspension following a request by the employer in the first instance. This problem is exacerbated by the fact that all Conciliation and Arbitration Boards – both federal and local – are closed and have suspended their activities.

However, there is no doubt with regards to the application of Measure 1, insofar as all activity considered non-essential is to be suspended.

In the context of Measure 1, employees who can carry out their work remotely (i.e. home-office) should continue receiving their full salary. In the event no arrangement is agreed with employees for whom home-office is not possible, 100% of their salaries would also have to be covered because of the fact that, as previously mentioned, a formal health contingency for the purposes of Articles 42 *bis.* and 429, Part VII of the Law has not been formally declared. This would enable compensation equivalent to one day's minimum wage to be paid for each day of the suspension up to one month.

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 (the 'ISS'), which would cover a subsidy based on the employee's incapacity of an amount equivalent to 60% of the employee's base salary.

It is worth noting that the Technical Council of the ISS, being a decentralized public body, has promoted the instrument relating to agreement of payment of the employer-employee quotas by instalments, as set out in Articles 40 (c) and 40 (d) of the Social Security Law. This law envisages an initial payment of 20% of the quota relating to the employer and 100% of the quota relating to the employee, with the ability to defer the balance for up to 48 months. Notably, the outstanding amount will incur certain updates and surcharges with a monthly interest rate of between 1.26% and 1.82%.

Regardless of the declared emergency health situation, all businesses which are continuing to operate – by virtue of falling within the scope of essential activities – should comply with the provisions of labor law currently in force which relate to health and hygiene (especially the provisions relating to an employer's obligation to control epidemics, as provided in Article 132, Part XIX *bis.* of the Federal Labor Law). Such businesses should also comply with the General Health Law, because failing to do so would could give rise to applicable penalties provided for by that law (Articles 411, 421, 422 and 425), and also by Title 16 of the Federal Labor Law.

Moreover, in accordance with the Health Secretary's regulation, failure to suspend non-essential work activities can result in the imposition of penalties consisting of fines or, for those who continue carrying out non-essential activity, the closure of the business.

#### Tax breaks and administrative deferment schemes and benefits

Although entities had to file an annual tax return by 30 March, with the entry into force of Phase 3 in Mexico and at a press release on 22 April (012/2020), the national tax authorities in Mexico (the "Servicio de Administración Tributaria", known as the "SAT") extended the time period for tax return filings for individuals by two months. Individuals therefore have until 30 June 2020 to file them. Furthermore, the SAT intends to grant tax relief to taxpayers until November, allowing them to pay tax by instalments for up to six months.

A digital platform, the SAT-ID, was introduced along with this measure. This platform will enable the necessary passwords for declaring taxes and completing relevant procedures to be generated without the need for taxpayers to visit a revenue office in person.

One day later on 21 April, a Decree was published in the Official Gazette which granted tax benefits to certain taxpayers. Pursuant to this Decree, such benefits are granted to:

- (i) taxpayers who are under an obligation to pay for shared utility, as provided by the Law of Income Tax in relation to Hydrocarbons, not exceeding an amount of MX \$65 billion; and
- (ii) taxpayers who are under an obligation to pay a provisional payment on account of tax for shared utility.

According to this benefits package, there will be no tax refunds or accumulated income.

Most, if not all federal agencies, such as the Mexican Institute of Industrial Property (known as the “IMPI”) and the Energy Regulatory Commission, have issued orders halting non-essential activity, as well as all of their respective procedures. On 17 April, the IMPI issued a decree extending the suspension of activities until 30 April; however, it has introduced an online platform for dealing with applications and promotions.

Similarly, the National Copyright Institute extended its time limit suspensions until 30 April, by way of a Decree published in the Official Gazette.

With regards to Mexico City, certain procedures that can function electronically will continue to operate, such as the registries for specific guarantees and incorporation of companies.

#### Suspension of the judiciary

Originally, courts throughout the country – both on a federal and local level – suspended activity as a result of Covid-19 until 20 April. As a result, all procedural timescales have been suspended since then. However, certain courts have extended the suspension beyond that date, while others have lifted the suspension.

For the first time in history, the National Supreme Court of Justice held its first remote session on 20 April. One week later, on 27 April, pursuant to General Decree 7/2020, the Court extended the suspension of its judicial activities until the final day of May, with the exception of emergency cases and sessions conducted remotely. Similarly, the Federal Judicial Council - pursuant to general decree 7/2020 - stated that federal courts and tribunals will continue to be suspended until 5 May 2020. However, by Press Release 15/2020 dated 27 April, it extended the suspension again until 31 May 2020.

Pursuant to Decree SS/11/2020 dated 13 April 2020, as published in the Official Gazette on 17 April, the Federal Court of Administrative Justice extended the suspension of its terms and procedures until 5 May.

On 14 April, Mexico City’s Supreme Court lifted the suspension on the activities of the City’s four sentence-enforcement courts.

For more information about Curtis, please visit [www.curtis.com](http://www.curtis.com).

*Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.*

**Please feel free to contact any of the persons listed below if you have any questions on this important development:**



**Antonio M. Prida**

Partner

[aprida@curtis.com](mailto:aprida@curtis.com)

Mexico City:

+52 55 9138 4934



**Santiago Corcuera**

Partner

[scorcuera@curtis.com](mailto:scorcuera@curtis.com)

Mexico City :

+52 55 9138 4938



**Eloy Barbará de Parres**

Partner

[ebarbara@curtis.com](mailto:ebarbara@curtis.com)

Mexico City :

+ 52 55 9138 4936