

The logo features the letters 'CCN' in a white, sans-serif font, stacked vertically within a white square. To the right of this square, the word 'NEWSFLASH' is written in a large, bold, white, sans-serif font. The background of the entire header is a dark blue gradient with a faint image of hands typing on a keyboard.

CCN NEWSFLASH

COVID-19 and Applicability of Force Majeure Clauses under Mexican Law

March 20, 2020

On March 11, 2020, the World Health Organization (“WHO”) declared the spread of the virus known scientifically as COVID-19 as a pandemic, which resulted in numerous governments taking a series of extraordinary measures that have affected the movement of people and goods. In many cases, these restrictions and difficulties may cause a breach of contract or otherwise complicate a contracting party’s ability to perform and/or comply with its contractual obligations. It is in these cases that force majeure clauses can come into play. Below is a general description of potential legal consequences of this type of case in contractual relationships governed by Mexican law. The declaration of COVID-19 as a pandemic triggered questions regarding potential breaches of contract and the effects of such breaches, including the question of whether the COVID-19 pandemic can legally be considered an event of force majeure or an “act of God”, which could exempt the parties from performing and bearing the consequences of breaching their contractual obligations (e.g., payment of conventional penalties for delays in deliveries of goods, among others). In a case in which the pandemic results in the contract becoming more onerous for only one of the parties, the affected party may request the contract to be amended in order to restore contractual balance, arguing that the general terms have changed radically, a legal doctrine known as the “theory of unpredictability”. The answer to the question of whether COVID-19 can be legally considered as an event of force majeure or an Act of God under Mexican law will depend on the following: i) whether the situation makes it absolutely and directly impossible to perform required obligations; ii) whether at the time of entering into such obligations, it was impossible to foresee the circumstance; and iii) whether the damages were clearly caused by matters beyond the parties’ control. Based on the above, one can preliminarily conclude that Mexican law would not excuse performance and allow for a contract to be breached or terminated if the COVID-19 impacts only complicate performance of a contract, or if necessary measures are not or have not been taken to prevent a breach. A force majeure defense under Mexican law is even less available if a party knowingly allows the circumstances of the pandemic to affect its ability to perform its obligations. Therefore, we recommend taking the following preventive measures to mitigate the impact of conditions and risks arising as a result of COVID-19: 1) Review each contract, agreement, purchase order, and any executed document to determine whether such contain any provisions limiting liability or exempting the parties from liability in the case of an event of force majeure or an Act of God, and with the intention of complying with the terms stipulated in the contract. 2) If force majeure provisions do not exist in the agreement or

respective document, give immediate written notice to the other party of the occurrence of the extraordinary and insurmountable event that seriously affects the performance of contractual obligations. If one asserts a force majeure or unpredictability defense with respect to civil contracts, it is important to note that such right must be invoked within a certain period (for example, in Mexico City an extraordinary event must be notified or alleged within 30 days of the event). In either case, it is generally recommendable for the party at risk of breaching the agreement to approach the other party to discuss the matter and potentially reach an agreement. These communications should be documented in writing in case they are needed later to evidence the parties' communications.³⁾ All businesses and parties should take measures to mitigate risks and potential losses and undertake planning on how to handle a prolonged COVID-19 pandemic.⁴⁾ It is essential to review the terms and the extent of coverage under current insurance policies in order to analyze coverage in the event of a claim.⁵⁾ Finally, businesses should try to limit breaches of contractual obligations to as little as possible, as it may become difficult later to prove that a breach was directly caused by the virus. Therefore, we recommended that all kinds of evidence such as documents, regulations, recommendations, resolutions, and publications from federal, state, and local authorities from the affected places and/or countries, be saved and archived in case such are needed to show a justifiable excuse for the breach of an obligation caused by the COVID-19 pandemic.