By Cristina Cárdenas, Francisco Rivero and Ben Antillon

Litigation risk management in cross-border disputes and force majeure

Take*aways*

- The pandemic has created difficult legal issues, particularly in foreign trade
- Application of civil law – prevalent in Latin America – may have serious implications in force majeure claims
- Proactivity is required to defend against force majeure claims

Cross-border disputes have been – and will continue to be – significantly impacted by the COVID-19 pandemic. Companies face a broad range of legal concerns arising from or relating to the outbreak, including labor, regulatory, supply chain, and liquidity issues. Moreover, government responses to the pandemic and the economic fallout of the COVID-19 crisis have affected parties' abilities to fulfill their contractual obligations. These challenges are becoming ever more complicated within the realm of cross-border business relationships given the variations in countries' responses to the virus.

Force majeure: What happens when contractual obligations are impossible to carry out

Legal issues are particularly complex where cross-border contracts are involved. This is in no small measure due to differences in how the virus is impacting and being managed in countries throughout Latin America and other regions around the globe.

For example, Peru's Public Procurement Supervisory Body in March 2020 decreed that the government's emergency declaration due to the pandemic constituted force majeure with respect to public contracts. For those jurisdictions that did not issue similar declarations, COVID-related questions and challenges will require determination on a case-by-case basis. Absent a specific and applicable declaration – such as Peru's – analyzing pandemic effects will required statutory and/or case-by-case contractual definitions of force majeure.

In Latin American, force majeure is frequently regulated by the applicable civil code found in a given jurisdiction and, as such, applicable contracts may not be required to specifically address all of the events that could come to constitute force majeure. Some jurisdictions, such as Argentina, Chile, Colombia, and Peru, explicitly define force majeure in their codes (see article 1730 of the Argentinian National and Civil Commercial Code, article 45 of the Chilean Civil Code, article 64 of the Colombian Civil Code, and article 1315 of the Peruvian Civil Code). Other jurisdictions, such as Mexico, do not. The basic elements of force majeure, however, are similar across jurisdictions – an unavoidable event outside of the parties' control that cannot be foreseen or overcome.

Some Latin American jurisdictions have express provisions that allow for termination and/or adaptation of a contract resulting from changed circumstances. For example, Brazil's Civil Code contains provisions that allow termination or adaptation of a contract due to "excessive" onerousness (see articles 478-480). The concept of "excessive onerousness" is broader and more permissive than "impracticability" under, say, the U.S. Uniform Commercial Code. Lawyers are now attempting to incorporate these types of provisions – regardless of their own respective legal system – into their contracts to expressly allow for the modification of contractual terms based on changed circumstances.

International contracts in Latin America will call for the application of both civil and common law particularly as they relate to project financing agreements. Critically, the doctrines of force majeure and impracticability in common law jurisdictions, such as the United States, are often stricter than similar doctrines in Latin America. For example, in the United States, changes in market conditions or increased costs to perform may not represent impracticability, thereby excusing non-performance. Conversely, some Latin American jurisdictions may excuse non-performance where conditions are deemed sufficiently severe. In the United States, force majeure has largely become a contractual matter, with courts often preferring to avoid excusing performance where force majeure events have not been expressly mentioned within an applicable contract.

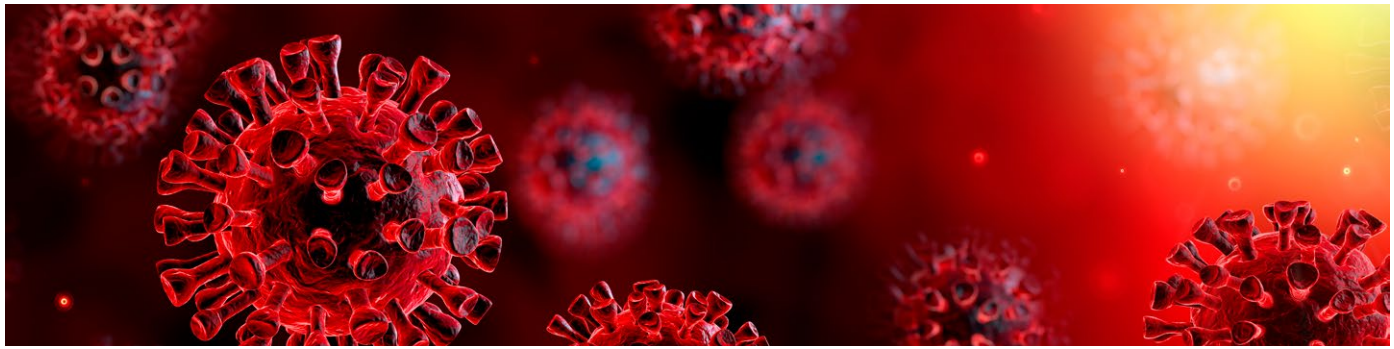
Responses to litigation risk management challenges caused by COVID-19

In order to minimize risks arising from force majeure events, it is crucial to be proactive and identify potentially affected contracts early. A premium should also be placed on developing a coherent strategy to be applied in a uniform manner. Inconsistent approaches may present challenges in litigation.

Once a potential force majeure event has occurred, where possible, efforts should be made to document what transpired. The party claiming an impact will often bear the burden of proof – be it force majeure, impracticability, or excessive onerousness. Depending on the jurisdiction and applicable law, the party might need to produce verifiable documentation of delays, disruptions, and supply chain issues.

The party responding to a claim, on the other hand, may look to obtain documentation and test the counterparty's assumptions. Knowing what the contract requires, whether the impact was foreseeable, and what mitigating actions the counterparty took to minimize impact, could be important.

Be careful when drafting force majeure clauses. Any attempt to list every contingency that might be considered a force majeure event is itself an impossibility. However, a carefully drafted clause that includes applicable catch-all provisions may prove useful in capturing events beyond those specifically listed. In addition, while defenses such as impossibility, impracticability, and frustration of purpose generally require that an event excusing performance be unforeseeable, parties are generally free to fashion force majeure clauses as they see fit – including to attempt to excuse foreseeable risks.



About the authors

M. Cristina Cárdenas focuses her practice on international arbitration and complex commercial litigation. She is a native Spanish speaker and has experience representing clients in a variety of complex international arbitrations and business disputes. Cristina has served as counsel, both in Spanish and in English, before many of the most important arbitral institutions, including the International Chamber of Commerce, the International Centre for Dispute Resolution, the American Arbitration Association, and the Inter-American Commercial Arbitration Commission. She also coordinates and oversees the work of local counsel in connection with litigation proceedings in Latin America.

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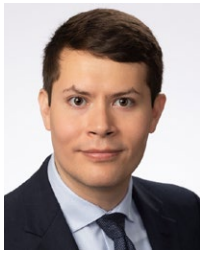

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