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### **CORONAVIRUS AND CONTRACTUAL FORCE MAJEURE**

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*The outbreak of coronavirus has a huge impact in human life. It is also bound to have deep consequences in legal relations. Among many examples are the cancellation of flight tickets -issued pursuant to a contract for flight transportation - and the subsequent conflict about whether or not the company must reimburse the price already paid. Or the hypothetical spread of the virus within medical premises and the potential tort claims -based in the alleged negligence- that might be addressed to the medical service.*

*Legal solutions to those cases shall depend on each factual situation. It is possible, however, to describe the theoretical framework under which said cases would be judged. While situations involving either a breach of contract or a tort will allow a compensation claim, the performance of contracts would suffer wider consequences: coronavirus could impede the discharge of one party's obligations but not the other's, any of such obligations must become impossible to fulfill while others not, the disease may merely postpone the discharge of the contract instead of frustrating it, etc.*

This is the legal applicable framework in Argentina:

Argentine law regulates the effects in contracts of acts of God and force majeure. The main statutory source is article 1730, first part, of the Argentine Civil and Commercial Code -hereinafter 'CCC'-, which provides that: "...Act of God and force majeure shall be deemed those events that could not have been foreseen or that, having been so, could not be avoided." The same article makes clear that both "Acts of god" and "force majeure" are synonyms and that is occurrence "...waives the liability unless otherwise provided".

Acts of a third party for which none of the parties to a contract is responsible are also equivalent to acts of God and force majeure, pursuant to article 1731 CCC. But it is also required that said act of the third party has the same features of article 1730 CCC, i.e. that it could not have been foreseen or avoided. This opens the door for potential third party's actions that would not meet the requirements to be levelled with the acts of God and force majeure, a situation again to be assessed on a case by case basis.

The CCC waives the liability of the party affected by the act of God or force majeure. This means that the affected party shall neither be required to discharge her obligations nor to compensate the counterparty. The affected party would not be in breach of contract because due fulfillment would be impossible. There are, however, some particular situations listed in article 1733 CCC.:

- (a) if the party undertook to comply even if an act of God or force majeure event occurs,*
- (b) if for a specific case there was a legal provision excluding the effects of acts of God and force majeure,*
- (c) if the act of God or force majeure event occurs when the debtor is in default - unless the default was irrelevant in the case-,*
- (d) if the act of God or force majeure event arises from the debtor's breach or negligence - which would require finding a causal link between them-,*
- (e) if the act of God or force majeure event was "... a contingency inherent to the risk or activity ..." carried on by the debtor -again the causal link between the two must be found - and*

*(f) whether the debtor must return the thing obtained through an unlawful act and before that happens the act of God or force majeure event occurs.*

In all of art. 1733 CCC cases the act of God or force majeure event does not have the usual consequence - that of art. 1730 CCC- of waiving the debtor's liability.

Acts of God or force majeure events can cause the frustration of the contract or merely a temporary hardship, but the effects of both situations may coincide. Art. 955, first part, CCC provides that the definitive impossibility extinguishes the obligation without causing liability. Temporary impossibility - art. 956 CCC – may also cause the 'discharge by frustration' when time is of the essence for the performance of the contract, either due to a contractual deadline or because it "... frustrates the creditor's interest irreversibly". These ideas are reinforced in article 1732 CCC, which additionally provides that "The existence of this impossibility must be assessed taking into account the requirements of good faith and the prohibition of the abusive exercise of rights." In other words, even if the act of God or force majeure event exists, the claim must be reasonable and, above all, made in good faith.

What about the party unaffected by the act of God or force majeure event? Art. 1032 CCC allows her to withhold her own performance if a material threat of damage arises because "... the other party has suffered a significant impairment in its ability to comply ...". But if the affected party finally discharges her obligations or gives sufficient assurances of compliance, the withholding must cease.

Evidence of the act of God and force majeure event must be produced by the party invoking it -art. 1736 CCC.

The CCC framework is applicable by analogy to Public Law contracts, to which the State and its agencies are parties. Regulations and contractual terms and conditions usually regulate the acts of God and force majeure events extensively, since in Administrative Law they have wider effects on the public authority-contractor relationship. But the basic system is the one analyzed herein and most of the times it is directly referred to by the applicable Administrative law rules.

Unlike English common law, Argentine law has no specific provisions about mitigation or aggravation of the effects of acts of God or force majeure events. However, similar principles can be found in the CCC articles concerning contractual good faith -CCC arts. 9, 10, 1061, 1067, etc.- and due diligence in its performance -CCC arts. 1725, 1728, 1729, etc. Moreover, contractual terms and conditions usually regulate these issues thoroughly.

The application of this legal framework to the specific situations generated by the spread of the coronavirus will have different consequences depending on the particularities of each case. As a general idea - and with that sole extent - we can answer some basic questions:

***Can the coronavirus constitute an act of God or force majeure event?***

Certainly, provided that its breaking into the contractual relationship could not have been foreseen or otherwise prevented.

***Can the affected party be waived from her contractual obligations and avoid a breach of contract?***

Yes, unless any of the provisions in article 1733 CCC come into play. As an example the coronavirus may affect a debtor who negligently exposed himself to it, in which case an act of God or a force majeure event may not be deemed to occur.

***Can an act of God or force majeure event cause the frustration of the contract without the affected party becoming liable?***

Yes, if the act of God or force majeure event causes a definitive impossibility or a temporary one that equally frustrates the purpose of the contract.

***What can the part not affected by the coronavirus do?***

Preventively withhold her own performance, until the other party fulfills her obligations or provides guarantees of due performance. Such remedy would be available if the party affected by the coronavirus is nevertheless willing to fulfill her obligations, thereby putting the other party at risk of contagion: the latter could refuse to continue with the contract until the situation is controlled, on the grounds that the affected party suffers "... a significant impairment in its ability to comply..." according to article 1032 CCC -see above.

In all circumstances the parties must act reasonably and in good faith, standards of conduct that will be applied by the judges when establishing whether there were responsibilities and breaches that should be compensated

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