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CLIENT ALERT

COVID-19 in Latin America: Continuing Considerations for Force Majeure

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For over 18 months, COVID-19 has relentlessly impacted businesses and commercial relationships in Latin America. In an effort to prevent the virus's spread, governments across the region implemented lockdowns, gradual phased re-openings, and several other measures. With the recent spread of the Delta variant and vaccination rates remaining low compared to the United States, Canada and much of Europe, the region is expected to continue to experience outbreaks, and governments may be forced to impose further COVID-related restrictions.

Though it has been more than a year and a half since the World Health Organization declared the COVID-19 outbreak a pandemic, its effects on contractual performance—and non-performance—continue. As long as Latin American countries struggle to reopen and their governments continue to implement and enforce restrictions, businesses in the region may continue to experience disruption.

As in other parts of the world, the question of whether the COVID-19 pandemic constitutes a force majeure event is being tested in Latin America. In Mexico, for example, the state-owned petroleum company PEMEX declared in April 2020 force majeure on fuel imports from its trading arm PMI Comercio Internacional. Likewise, in January 2021, Mexico's flag carrier airline Aeromexico requested Mexican labor authorities to terminate collective bargaining agreements with unions ASPA and ASSA, citing force majeure.

While COVID-19-related force majeure declarations—and parties' inability to comply with contract terms accordingly—are starting to result in disputes, it is too early to predict overall outcomes. Given that each jurisdiction in Latin America offers distinct contractual and other protections, has taken different measures in response to the pandemic, and faces unique political and economic challenges, there is still uncertainty around whether parties may be able to successfully invoke force majeure or other provisions when performance of a contract obligation is prevented or significantly impaired by COVID-19-related measures.

What Companies Should Think About When Invoking or Challenging Force Majeure in Latin America

In dealing with past, present, and potentially future delays arising from past, ongoing or new COVID-19 related restrictions in the Latin American region, parties will evaluate the application of contractual and statutory force majeure or other provisions to excuse interruptions and delays or extend the time for performance, as well as to provide avenues to recuperate costs or damages. A party to a potential dispute involving a force majeure claim or defense will consider the following:

- **Contractual Terms.** Whether a country follows the civil law (which Latin American countries do) or the common law, the terms of the contract reign supreme when it comes to force majeure. Close attention must be given to what conditions are required to invoke a force majeure provision, whether it incorporates events such as COVID-19 and/or government measures associated with it, what options and remedies might be available (e.g., extension of time for performance, an equitable adjustment to the contract price, etc.), what steps must be followed once a force majeure event has been

declared, and what occurs if performance is ultimately excused. The contract will often also define the parties' respective obligations in respect of a force majeure event, including any deadlines imposed to timely declare force majeure (or its end) or reject such a declaration.

- **Applicable Law(s).** There is no universally accepted definition of force majeure. (We recap below how five Latin American countries define "force majeure".) Accordingly, in addition to the terms of the contract, parties look to applicable substantive law for guidance on what constitutes a force majeure event, how the law has been interpreted by local courts, and whether it addresses the parties' ability to account for such events. Additionally, parties review: (i) what actions the national and local governments took in response to the crisis affecting contract performance, including what measures were mandated (versus encouraged) and the duration of such measures, and (ii) whether other contractual disputes that may arise concerning surety bonds or other guarantees are likely to be litigated in a different jurisdiction.
- **Mitigate Damages.** How best to track and mitigate any damages that may be incurring due to delay, including liquidated damages, is a paramount consideration. While it is more common for contractual force majeure provisions to provide additional time only, rather than costs, parties are also encouraged to set up a system for segregating and tracking additional costs incurred as a result of a force majeure event and efforts undertaken to mitigate it (such as priority shipment costs). Such tracking can also be of particular assistance to claimants who wish to argue in the alternative that the event did not prevent performance, but rather that performance has become unduly burdensome or more onerous than originally contemplated by the contract, thereby triggering *imprevision* or clausula *rebus sic stantibus* under the applicable law (*see*, e.g., Art. 868 of the Colombian Code of Commerce; Art. 1440 of the Civil Code of Peru).
- **Record Keeping.** The party with the superior documentation often has the advantage. Companies faced with a force majeure event or claim are well-served to give particular attention to generating and maintaining a careful record of all correspondence and documentation related to the force majeure event, its impacts and communications about it. This includes documentation that will help to connect or segregate impacts on performance to or from the pandemic, and a record of contact information for all current and former employees who were actively involved in the project, and who may serve as witnesses in a potential arbitration or litigation. A party must necessarily be able to articulate some causal connection between the non-performance and the force majeure event—raising or attacking force majeure declarations requires a full record to credibly establish the respective positions.

The bottom-line is that between the continuing uncertainties throughout the world that the pandemic has brought and the particular risks of enhanced disruptions in the Latin American region related to both the impacts of COVID-19 and government measures to combat it, force majeure remains a highly relevant consideration for parties to contracts there. As set out above, how disputes over the invocation of force majeure will ultimately be resolved remains unclear. It remains reasonable to expect a wave of COVID-19-related, force-majeure based claims flowing from Latin America in the coming years.

Recap of the Definition of Force Majeure in Select Latin American Jurisdictions

As summarized in previous Crowell & Moring Alerts on the impact of COVID-19 regarding force majeure (*click here, here and here*), below is a recap of how these five Latin American countries define "force majeure":

- **Argentina**: Article 1730 of Argentina's National and Civil Commercial Code defines "force majeure" or "fortuitous event" (a/k/a "*caso fortuito*" or "Act of God") as an occurrence that could not be foreseen or, having been foreseen, could not be avoided.
- **Colombia**:Article 64 of the Civil Code of Colombia defines "force majeure" or "fortuitous event" (a/k/a "*caso fortuito*" or "Act of God") as an event that is unforeseen or that is impossible to resist, like a shipwreck, an earthquake, enemy capture, the acts of authority executed by a government official, etc. While Article 64 does not include epidemics or pandemics as examples of events that conform to force majeure situations, Article 847 groups epidemics with other types of Acts of God.
- **Mexico**: Although Mexico has no statutory definition of force majeure, it does contemplate events conforming to force majeure scenarios as those caused by nature or human conduct that (1) are beyond the parties' control; (2) are unavoidable; (3) are impossible to overcome; and (4) prevent at least one of the parties from performing its contractual obligations.
- **Peru**: Article 1315 of the Civil Code of Peru defines "force majeure" or "fortuitous event" (a/k/a "*caso fortuito*" or "Act of God") as a non-attributable cause, consisting of an extraordinary, unforeseeable and irresistible event that prevents performance of an obligation or determines its partial, late or defective performance. On March 25, 2020, Peru's Public Procurement Supervisory Body issued Statement No. 005-2020-OSCE, establishing that the country's declaration of emergency due to the pandemic "constitutes a force majeure situation which may affect the contractual relationships entered into under public procurement legislation, both on the part of the contractor and on the part of the Contracting Authority."
- **Venezuela**: Under the Civil Code of Venezuela, obligations must be performed exactly as agreed upon by the parties unless when there is an *external cause not attributable to the parties*, including "force majeure" and "fortuitous events" (Articles 1271 and 1272). The Organic Tax Code of Venezuela also establishes that while force majeure or fortuitous events do not excuse compliance with tax obligations, they do relieve payment of penalties or interest in each case (Article 85.4).

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To learn more about our previous Crowell & Moring Alerts on the impact of COVID-19 in Latin America regarding force majeure, click here, here and here.

For questions regarding force majeure or to learn more about our Latin America Practice, please contact any of the team members below.

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