

CLIENT ALERT

COVID-19: The Latin America Perspective

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[español](#)

In a world battling a global pandemic, it was only a matter of time before COVID-19 and its impact on commercial relationships arrived in Latin America and the Caribbean. As the vast majority of countries in Latin America and the Caribbean have confirmed cases, governments have increasingly implemented unprecedented measures and other efforts to prevent the spread of the virus.

As discussed in previous Crowell & Moring alerts, COVID-19 is causing significant business disruptions worldwide, forcing companies to make determinations as to whether force majeure or other analogous principles may be applicable to mitigate or excuse those interruptions. This alert provides an overview of the measures currently being implemented in two major economies in the region, **Colombia** and **Mexico**, and their impact on contracts through provisions of force majeure and similar principles. Notwithstanding the pendency of COVID-19's qualification as a force majeure event as defined in these two jurisdictions, companies need to scrutinize their agreements on a case-by-case basis to determine whether they or their counterparts may be excused from complying with their contractual obligations on a force majeure basis.

Crowell & Moring has assisted clients and worked with local counsel across Latin America and the Caribbean, and is closing monitoring how governments in the area are responding to COVID-19 and how commercial relationships are impacted by the global pandemic.

Colombia

On March 22, the Colombian Government issued [Decree No. 457/20](#) declaring a nationwide quarantine through April 13. The announcement followed President Iván Duque's declaration of a [state of emergency](#) on March 17, as well as the closing of borders and ports, and the suspension of international and domestic commercial flights. The shutdown of the borders was particularly significant due to increasing migration and refugee [flows](#) from Venezuela.

This unprecedented quarantine measure completely limits movement of people and businesses at the national level, with just 34 exceptions, in part, related to movement of individuals to access food, medicine, and medical or financial services. Of particular relevance to the business sector, the Decree also allows—subject to certain conditions—the following activities:

1. Import, production, transportation, distribution and commercialization of food, medicine, medical devices and supplies, personal care and cleaning products, and agricultural and livestock products, among other products;
2. Activities that are strictly necessary to prevent, mitigate and address the health emergency caused by COVID-19, and provide indispensable services by the Colombian State;
3. Banking, financial and notary services;
4. Dredging-related activities;

5. Activities in the hospitality, technology, energy, oil and gas, and mining sectors, among others; and
6. Activities that are strictly necessary to the essential maintenance and operation of businesses, plants, mines or construction works.

The Decree reinforces other measures previously adopted by the Colombian Government, including self-isolation orders, prohibition of social gatherings and closing of public spaces.

With the Colombian Government's response to COVID-19 affecting commerce on a nation-wide scale, many commercial relationships are being interrupted. As a result, companies are forced to review their contracts, and the applicable law, to consider what protections they have from the impact. Resembling other jurisdictions in the region—such as Chile and Ecuador, which have nearly identical provisions—the Civil Code of Colombia defines “force majeure” or “fortuitous event” (a/k/a “*caso fortuito*” or “Acts of God”) as the event “*unforeseen or that is impossible to resist, like a shipwreck, an earthquake, enemy capture, the acts of authority executed by a government official, etc.*” Based on this definition, as a general rule, companies may be excused from contractual obligations on the basis of COVID-19, the quarantine Decree No. 457/20, or a combination of both events. The Colombian judicial system, however, will ultimately determine whether the global pandemic qualifies, under Colombian law, as a force majeure event (*i.e.*, as an unforeseen event beyond the parties' control) sufficient to excuse parties from complying with their contracts, an issue that it is expected to be litigated in courts on a case-by-case basis.

Colombian law also allows companies to invoke force majeure or fortuitous event as a basis to suspend employment contracts. However, the Colombian Ministry of Labor has reportedly provided guidance on these concepts which—although yet to be seen—appears to set a higher standard for labor disputes than for contractual disputes.

With the pandemic impacting all parts of the economy, Colombia also recently suffered a sovereign credit downgrade from Fitch Ratings. Issuers of securities and other public and private sector entities should evaluate the impact of the sovereign credit downgrade on their securities and related agreements moving forward.

Mexico

On March 30 and 31, the Mexican Government declared a national health emergency based on “force majeure” and published in the *Official Federal Gazette* a Decree establishing “extraordinary” measures to prevent the spread of COVID-19. In the Decree, the Mexican Government ordered businesses to suspend “non-essential” activities until April 30. Non-essential activities are those that fall outside of the five general “essential activity” categories that are enumerated in the Decree:

1. Activities necessary to attend to the health emergency, including the medical and pharmaceutical fields and those that provide support and supplies to those fields;
2. Activities involved in public safety, national security, justice, and legislative activity at the federal and state levels;
3. Activities related to fundamental sectors of the economy, including the financial sector, tax collection, the distribution and sale of energy, the generation and distribution of drinking water, food markets and supermarkets, agriculture, the chemical industry, hardware stores, telecommunications and information media, passenger and cargo transportation services, and courier services;
4. Activities directly related to the operation of government social programs; and

5. Activities necessary to maintain and repair critical infrastructure, including water, energy, basic sanitation, public transportation, and hospital and medical infrastructure, among others.

Although not explicitly stated in the Decree, research related to coronavirus may fall within the categories of essential activities because such research is arguably related to the production of pharmaceuticals and/or health care technologies.

The Decree also limits non-essential gatherings and imposes strict self-isolation orders on individuals over 60 or with certain medical conditions.

The Mexican Government's suspension of non-essential activities has disrupted businesses and will likely affect the ability of many entities to fulfill their contractual obligations. Like other jurisdictions, under Mexican law, parties are bound by terms agreed upon until a contract is fulfilled ("*pacta sunt servanda*"). However, Mexican law also contemplates the concepts of "force majeure" or "fortuitous event," unforeseen events caused by nature or by human conduct that are beyond the parties' control, unavoidable, impossible to overcome, and prevent at least one of the parties from performing its contractual obligations. Whether a party may rely on the Decree to be excused from its contractual obligations will depend on several factors, particularly the terms of the contract and whether the party can establish that the restrictions imposed by the Decree qualify as a force majeure. That is, the affected party likely will have to demonstrate, and in some cases before Mexican courts, that the restrictions of the Decree are unforeseen, beyond its control, unavoidable, and insurmountable.

Before the Mexican Government declared a national health emergency, S&P downgraded Mexico's sovereign credit rating on March 26, based on plunging oil prices and anticipated economic impacts of the pandemic. Issuers of securities and other public and private sector entities should evaluate the impact of this downgrade in Mexico's sovereign credit rating on their securities and related agreements.

The COVID-19 pandemic and the extraordinary measures currently being taken by Latin American governments to prevent its spread may qualify, in many jurisdictions, as unforeseen, uncontrollable events. However, whether a party may be excused from its contractual obligations based on a force majeure or fortuitous event should be determined on a case-by-case basis, with a careful focus on contractual terms, applicable law, and the facts on the ground.

To learn more on previous Crowell & Moring Alerts on the impact of COVID-19 in other jurisdictions regarding force majeure, click [here](#) and [here](#).

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