

March, 2020

RELEVANT ASPECTS OF THE ENFORCEMENT OF COMMERCIAL CONTRACTS IN CHILE IN CASES OF NON-COMPLIANCE RESULTING FROM COVID-19 OUTBREAK

We foresee that, as a result of the current situation of the Covid-19 outbreak in Chile, there may be a significant increase in breaches to the obligations set forth in commercial contracts, under the argument of force majeure.

In such a scenario, the following considerations should be borne in mind:

1. *A force majeure event under domestic legislation and other exculpatory circumstances*

Article 45 in the Chilean Civil Code defines force majeure as an "(...) unforeseen event impossible to withstand, such as shipwreck, earthquake, apprehension by enemies, acts of authority exercised by a public officer, etc."

Based on the foregoing, domestic jurisprudence has established that, for an event of force majeure to exempt the non-compliant party from any liability as regards its obligations under a contract, such event (i) must be unforeseeable and impossible to withstand and (ii) must not have been caused by the party claiming exemption from liability, and neither must such an event take place while the party claiming it is already in breach of its obligations.

Given the above, in Chile, force majeure is deemed a cause for exemption of liability of general application. Thus, in a contract, a party thereto affected by a force majeure event preventing it from meeting its obligations may exempt itself from liability resulting from such breach even when an express mention to such ends has not been set forth in the contract.

The latter notwithstanding, and by virtue of the principle of contractual freedom, the parties to a contract may include in it certain provisions regulating or modifying the effects of a force majeure event or, even, include specific facts or events that constitute force majeure (additional to those consecrated in article 45 of the Civil Code). Moreover, the parties are likewise authorized to rate, under a contract, as force majeure event certain facts or events that do not meet the requisites set forth in Art. 45 of the Civil Code.

As regards other doctrines associated to exemption of liability on contractual breach, it should be noted that Chilean law does not expressly recognize as such the unpredictability or frustration of the termination of the contract, without prejudice to the possibility of building them on the basis of other principles as they are consistent with the common statute.



If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

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II. *Rating the sanitary emergency due to Covid-19 as a force majeure event*

The discussion on whether it is possible to rate the sanitary emergency triggered by the dissemination of coronavirus as a force majeure event is just starting. This rating shall hinge on how courts of law construe or build the requisites that constitute force majeure and their application to specific cases resulting from non-compliance disputes or contractual terminations under the impact of Covid-19.

In this same scope, and given the magnitude of the sanitary emergency, it is likely that certain special laws or regulations will be passed or issued to reduce the negative impact the Covid-19 outbreak may have on business and contract enforcement, which might eventually entail a reinterpretation of the concept of force majeure on the part of local courts of law.

III. *Deciding on the law applicable to commercial contracts*

In the event of a dispute arisen from contractual breach, courts shall, first, review the provisions of the contract as regards applicable law.

If the contract contains no clause regulating this matter and it was executed in Chile among Chilean parties, the court will apply Chilean law to solve the dispute submitted for its decision.

In the event the parties to a contract have chosen to govern their provisions by a foreign law, the courts shall only apply such provisions if **(i)** the contract's nature is that of an "international contract", as rated by the court overseeing the case, and **(ii)** there is a connecting factor between the parties and the foreign law chosen by them to govern the contract.