



## **Legal Alert - COVID-19**

Declared a pandemic by the World Health Organization on March 11, 2020, the novel coronavirus (COVID-19) has already had an enormous, social and economic, worldwide impact.

It is not an easy task to foresee the consequences this disease will have. Still, some situations are already happening, such as mass stoppages by industries and companies, breaches of contracts with suppliers, massive activation of insurance policies, and cancellations of major sports, culture and entertainment events, as well as many others. In the current scenario, it is crucial to analyze the situation and outline strategies to mitigate the impacts of the pandemic.

In this report, you will find essential information to help with your business decisions during this period of tremendous global turmoil.

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## 1. Contracts in general

How does the COVID-19 pandemic affect a validly celebrated contract between the parties when fulfillment is still ongoing or pending? Can the COVID-19 pandemic be considered an event of force majeure as described in Article 45 of the Chilean Civil Code?

To answer these questions, we need to make some crucial distinctions. In the first place, a distinction must be made regarding the nature of the contract. Some contracts have immediate execution (such as a purchase agreement or promise to purchase agreement). In contrast, others are successive performance contracts, that is, contractual relationships where fulfillment takes place over time (such as a periodic supply contract or a lease or a service provision contract). In immediate execution contracts, an event of force majeure can cause a total breach of the obligation. In successive performance contracts, the event of force majeure could lead to partial and temporary delays, or defaults in compliance with regular obligations.

Another variable to consider in each given contract is whether the force majeure event is regulated in the wording of the contract itself. A contract might have clauses for matters such as the following: notification procedures, alternatives or solutions to the occurrence of an event of this nature, suspension of the contract if force majeure is only temporary, early termination, and good faith review of the terms, prices or contractual conditions. Usually, these clauses are outlined in successive performance contracts and not in those of immediate execution, for which the parties must resort to the law.

Our jurisprudence has interpreted that the following are the constituent elements of force majeure:

- 1) The event derives from a cause that cannot be imputable to the parties, that is, it is beyond their control;
- 2) The event must be unforeseen and impossible to predict, that is, there was no reason to believe it would happen; and
- 3) The event cannot be resisted, that is, the event itself and its effects are insurmountable so that nobody placed in such a situation would be able to prevent what happened.



Therefore, we need to determine whether the COVID-19 pandemic may be considered an event of force majeure.

We must distinguish whether the impossibility of fulfilling the obligations undertaken through a contract is due to:

- i) practical or logistical difficulties in materially performing the contract (for example, not having sufficient stock due to logistics or shipping problems, having specialist personnel on medical leave, etc.); or
- ii) imposition of regulations by the authorities that legally prevent performance of the contract (for example, gyms or restaurants that must be closed during a state of constitutional exception, and are therefore unable to fulfill contractual obligations with suppliers or clients).

In the second case, it is easier to prove that the impossibility of fulfilling the obligations contracted was due to a fact that is both unpredictable and beyond the party's control. An example would be legal orders issued by the competent authority. These are known and public facts and will not require further proof.

On the other hand, if the unpredictable and unavoidable circumstances caused by the COVID-19 pandemic cause delays or breach of contract obligations, the party invoking force majeure must prove that the magnitude of the circumstances in the specific case has met the requirements of being an unforeseen event impossible to withstand.

Therefore, the COVID-19 pandemic is not, per se, a sufficient cause in itself to invoke force majeure without first analyzing the restrictions imposed by the authorities, as well as the impact on the standard and regular performance of a contract.

If the fulfillment of a contractual obligation becomes difficult or unfeasible, it is advisable to review the possibility of modifying or renegotiating the agreements in good faith. An effort should be made by the parties to achieve the best financial balance possible, to mitigate losses as far as possible, to prevent the termination of the contract and possible conflicts and potential legal costs.



## 2. Public administration contracts

In cases of force majeure or emergencies such as the COVID-19 pandemic, the general principle applicable to public administration contracts, i.e., public bidding, can be set aside. It can be changed to private bidding (where certain parties are invited to make proposals) or to direct contracting (where a supplier or contractor is chosen, sometimes within a Framework Agreement or "*Convenio Marco*").

This applies both to new contracts and to extensions of existing ones. Notably, for goods and services that, due to the state of emergency, are urgently required by the community. It is also possible that these exceptional contracts contemplate a certain term, renewable or not, that may last the duration of the emergency. These exceptional procedures cannot be used for contracts of long duration.

However, in order to avoid any illicit or improper situation, attention must be given both to the formalities of the administrative procedures and to the valid justification of the process, including choice of company, price, term, etc.

On the other hand, public administration contracts are governed by administrative law, general public law, and, ultimately, civil or common law. These various applicable regulations imply that, notwithstanding what is stipulated explicitly in the contract, in the event of unforeseen events or force majeure, the public administration body may modify its content invoking common good or national security. It may adapt the contract conditions to new requirements, or even impose unilateral early termination of the contract. However, certain conditions established by law may provide for compensation, an extension of the term, or an adjustment of the price.

The above can even apply to the "fact of the prince" situations, i.e., a circumstance that occurs when the State, acting not as a contractual counterpart, nor necessarily concerning the contract, dictates measures or regulations that alter in any way its economic and financial outcome. But these scenarios can be nuanced in favor of private contracting companies. It is advisable and possible to argue for and secure the economic and financial outcome of the contract, alleging various principles of law, including equivalence of the obligations, maintaining good faith, preventing unjust enrichment, among others, effectively countering the exorbitant powers of the State. This must be done in such a way that the party receives adequate consideration for the variations or terms of the contract.

The COVID-19 pandemic may lead to a higher number of these situations occurring. These must be confronted with proper criteria and discernment for correct negotiation, or they will necessarily lead to conflict and judicialization.



### 3. Publicly-held companies

Publicly listed companies and companies subject to the supervision of the Commission for the Financial Market (*Comision para el Mercado Financiero - CMF*) are still obliged to comply with and observe the legal and regulatory provisions regarding their periodic and contingent obligations, such as the preparation and disclosure of financial statements, reports, and other documents. There are additional requirements for certain entities such as insurance companies, banks, and securities issuers to report on and implement their operational continuity plans and evaluate financial impacts.

Financial statements must provide a careful analysis of the impacts of COVID-19 pandemic on their business, including comments on the principal risks and uncertainties that arise. In some cases, the nature of the industry or service entails mandatory communication of a relevant or essential element that affects the business.

Particularly during this exceptional period, the authorities must respect their own specific instructions, such as General Standards No. 435 (*Norma General N°435*). This norm regulates remote participation and voting mechanisms for shareholders' meetings, as well as bondholder and fund donor meetings.

Another example is Bulletin No. 1,141 (*Oficio Circular N° 1.141*), which gives instructions on the use of technological communication and sets forth the possibility of arguing before the Commission for the Financial Market reasons of force majeure that prevented the holding of meetings.

Regarding corporation board meetings, the CMF has reiterated that these may be held remotely, according to the rules and requirements established in article 47 of Law No. 18,046 on Corporations and Bulletin (*Circular*) No. 1,530.

Lastly, General Standards No. 434 of 2020 authorizes public limited companies supervised by the CMS to use an electronic signature board meeting minutes, through mechanisms that meet the conditions outlined in Law No. 19,799.



#### 4. Infrastructure

Regarding infrastructure contracts (FIDIC, EPC, etc.), what has been said about contracts in general and public administration contracts in particular, is of course applicable. However, a few details should be added.

Usually, the exercise of the powers of public administrative bodies to modify or terminate a contract in exceptional circumstances will result in cases such as the modification of the planned works or the execution of new or extraordinary works, the use of new materials, an extension of the term, etc.

The private contracting parties will always bear the risks of the contract, including any extra costs, both their own and that of its subcontractors. This risk allocation applies even in the event of act of god or force majeure, and this is, in fact, expressly stated in the law on public works concessions.

However, this principle has been nuanced by jurisprudence, so that liability is not necessarily inevitable in case of changes in circumstances for reasons beyond the private contracting party's control that were unforeseeable at the time of contracting.

Given the occurrence of these extraordinary circumstances, the first thing to review is the terms of the contract (mainly in the Bidding Bases - "*Bases de Licitación*"), for example, reviewing any contract provisions allowing price adjustment mechanisms.

Finally, the law, usually expressly incorporated into the contract, must also be carefully considered. In particular, there are specific compensatory mechanisms in the law applicable to public works contracts and concessions.



## 5. M&A

The COVID-19 pandemic may also affect an M&A process, and the consequences will depend mainly on the stage of the negotiation and the kind of transaction.

A pandemic will particularly affect those M&A processes in which agreements have been executed and where the fulfillment of conditions precedent and deadlines are pending (for example, letters of intent with binding clauses, promise to buy shares agreements, contracts subject to conditions precedent, etc.).

The parties must identify those clauses or conditions that would prevent compliance either absolutely (e.g., because they are subject to a peremptory deadline), or temporarily, while the pandemic is active (e.g., obtaining documents from an institution that is not operating regularly as a result of the contingency).

After analyzing these situations, the parties may review the convenience of maintaining the agreement, suspending it, or, ultimately, ending it, either by mutual consent or unilaterally by one of the parties. In order to prevent a conflict, it is necessary to review the state of progress of the agreements, the negotiations, the conditions that must be met before completing the M&A process, taking into consideration the particulars of the specific case.



## 6. Labor

During the COVID-19 pandemic status, the employer must take the measures that are necessary to comply with the protocols and guidelines that the health authority establishes, and consequently grant the permits that are reasonably necessary for employees to attend preventive examinations. Medical leave should be granted to those with a positive result for the COVID-19 test. The medical leave certificate will serve to justify non-attendance at work and to receive, if applicable, the subsidy established by the current labor regulations.

If the contagion can be determined as caused by a work situation, the providers of accident and professional illnesses insurance should grant the corresponding medical and financial benefits, as per Law N ° 16.744.

Given the "State of Constitutional Exception of Catastrophe", and the ensuing grim economic scenario, companies have opted for different labor measures that are detailed below:

- a) Legal holidays toke in advance: Employers may agree with individual employees to advance pending of future legal holidays, so these are spent during the period of a health crisis. This measure only requires the consent of employees to use their vacation days and must be negotiated individually with each of them.
- b) Collective holiday: The employer is empowered (only once a year) to determine that the entire company, or part of it, is to be closed for a minimum of 15 business days so that employees use legal holiday collectively. In this case, the holiday must be granted to all employees of the company or of a division of the company.
- c) Suspension of the employment agreement: Employer and employees may agree on the suspension of the employment relationship for the period determined by mutual agreement. This implies that the employee's obligation to provide services and the employer's obligation to provide work conditions and pay a salary are suspended. However, the employment relationship is maintained for purposes of calculating the employee's seniority.
- d) Suspension of the payment of wages due to force majeure: If the authority decrees the closure of a workplace, this event could be considered an event of force majeure or Act of God. This would release the employer and employee from complying with their respective obligations for as long as the situation continues. Therefore, the employer would be exempt from providing the agreed work and from paying the agreed salary, and the employee would be exempt from providing their services.





e) Remote work: This allows the employer to agree with the employees to provide their services totally or partially from a place or places other than the company premises. On March 24, a new remote work law was enacted, which among other matters, set forth that the employer is obliged to provide the employee with the equipment and materials necessary for the execution of the remote work.

f) Other modifications: If any worker is unable to opt for remote work, the parties may agree on modifications to the way the service is provided. This includes temporary reduction of salaries, agreement on deferred entry and departure times, to avoid crowded periods for transport and distribution of working or lunch hours by using shifts, etc.

g) Use of the funds held by the unemployment insurance administrator: A recent law allows a suspension of the contract agreement or a reduction of the working day, with compensation for the decrease in wages with resources from the Solidarity Unemployment Fund. The employment relationship and all the employee's labor rights will be maintained, so the employer must continue paying the social security contributions.

### **Termination of an employment relationship:**

a) Needs of the company: These general grounds for termination allow payment of severance to the employee, and lesser risk of litigation.

b) Relating to force majeure: To invoke these grounds of termination, it is necessary to meet the following requirements: unpredictability, insurmountability, and that the situation was not caused by the person who alleges it.

c) Disciplinary dismissal: Unless there is a valid health reason, any absence from the workplace must be duly justified by the employee. If not justified, there may be cause for disciplinary dismissal. Abandonment of the workplace, unjustified absence for 2 or more days, or serious breach of contract obligations could lead to the application of these grounds of termination.



## 7. Tax

Considering the current health contingency, the Chilean government established the following tax measures to support companies and improve business cash-flows:

- **Income tax**

1. Corporate tax: Suspension of mandatory monthly Provisional Tax Payments for the next three months (April, May and June 2020).
  2. Income tax declaration: for small or medium-sized companies, income tax payments are postponed until July 2020. The advanced repayment of income tax to be returned to small or medium-sized companies.
  3. Income tax affidavits: Flexibility in deadlines for submission.
- **VAT.** The deferral of VAT payments for the next three months for companies with sales of less than 350,000 UF (approximately USD 12 million). The delayed payment must be paid together with the installments due in June, September, and November.
  - **Property taxes.** April property tax is postponed for companies with sales of less than 350,000 UF and individuals with properties with a tax assessment of less than 133 million pesos. Additionally, the payment of this property tax may be made at any time with a real interest rate of 0%.
  - **Stamp Tax.** Transitory reduction of stamp tax on loans to 0% for the next six months.
  - **Other taxes.** Flexibility measures for tax debt payments for small and medium-sized companies.



## 8. Financial Markets / Financial Contracts

### 8.1. Financial Markets

In the context of the global COVID-19 pandemic, the Financial Market Commission (CMF) has announced a package of exceptional and transitory measures to facilitate the credit flow to companies and households, as well as other measures to ensure the operation of financial institutions and the payment chain.

- a) Provision of adequate attention and information to clients, reinforcing communication channels, such as web platforms, mobile phone applications, among other actions.
- b) Deferring up to three installments of mortgage loan payments. Rescheduled dividends will not be treated as renegotiations of debt. It applies to debtors who were up to date with their payment obligations at the time the authorities decreed the state of emergency.
- c) Regulatory flexibility so that banks can postpone deadlines up to six months for small and medium-sized companies and individuals debts, without this being considered a renegotiation of debt.
- d) Using surplus mortgage guarantees to ensure loans to small and medium-sized companies.
- e) Exceptional 18-month extension of the term that banks have for the disposal of goods received in payment. The objective is to avoid forcing the sale of goods in a period of economic contraction.



## 8.2. Financial Contracts

Credit contracts could be strongly impacted if the income of companies and individuals decreases. This might lead to the inability to pay financial obligations or a breach in non-financial requirements established in a financing contract, possibly resulting in the early collection of the entire loan.

Each financial contract must be analyzed individually to assess the impact on its provisions and to determine whether it regulates the existence of force majeure events or unforeseeable circumstances that could justify requesting the suspension or alteration of the parties' obligations or even the termination of the contract.

Furthermore, the same analysis should be carried out if, after the signing of a credit agreement, the disbursement has not yet occurred. In this case, an analysis must be made as to whether there are provisions that regulate the material adverse effect, or if there are precedent conditions or representations and guarantees, that may have been breached as a consequence of the deterioration of the debtor's financial situation due to the COVID-19 pandemic.



## 9. Debt Restructuring / Insolvency

Because of the emergency caused by COVID-19 pandemic, it is expected that some companies will have problems meeting their financial commitments for a variety of reasons.

Even though a debtor and its creditor can freely enter into negotiations to avoid a possible breach of a contract, Law N° 20,720, "Law on Reorganization and Liquidation of Companies and Persons" establishes the Bankruptcy Reorganization Procedure.

This law allows viable companies, which are facing a liquidity problem or are subject to a complex financial situation of a transitory nature, and therefore in danger of falling into a state of insolvency, to judicially restructure all their assets and liabilities, to continue their economic activity and generate the income that allows them to pay their debts.

Bankruptcy Financial Protection for the debtor company means that during that period:

- a) A bankruptcy liquidation procedure may not be declared or initiated against the debtor company, nor may executive judgments, executions of any kind or restitution in lease judgments be initiated against it.
- b) All the contracts signed by the debtor company will retain their validity and payment conditions.
- c) The debtor company is subject to the intervention of the administrative receiver.
- d) Their assets may not be disposed of.



## **10. Working Hours and some additional information of Courts, Arbitration Chambers, and some administrative bodies**

### **I. Chilean Courts**

- Resolution AD N° 335-2020 establishes security measures of operation of the Supreme Court.
  - o Hearings will be held only on urgent matters referred to in the instructions, which will be determined by each chamber, arranging the formation of extraordinary schedules from Monday, March 23.
  - o It suspends the hearing of the trials that do not concern those referred urgent matters, until the cessation of the health emergency.
  - o Each chamber of the Supreme Court will determine the day and modality of operation in the hearings and for the review of the matters in the account and previous view of the cause.
  - o It suspends the sessions of the "*Tribunal Pleno*" for March of this year, without prejudice to the measures adopted for the review and decision of urgent matters that so warrant, which may also be adopted by the Committees of this court. in urgent cases.
- ACTA N° 41-2020 - Implementation of teleworking and videoconferencing.
- ACTA N° 42-2020 - On sanitary alert and the operation of courts. In short, the closure of the courts, the suspension of hearings and their operation through telework have been established. For its part, the Santiago Court of Appeals will function in 4 Chambers for extraordinary trials.
- Civil Courts will be functioning according to their determination.

### **II. Arbitration Chambers**

*Centro de Arbitraje y Mediación (CAM Santiago):* Public attention will be restricted to the main offices. All inquiries may be made by email and telephone assistance. About the presentation of writs, it must be made through the e-camsantiago system and writs will be understood as signed by the user who uploads them into the system, without the need to contain their signature.

Hearings: The arbitrators are urged - in those cases it is deemed prudent - to suspend the hearings ex officio until further notice. Notwithstanding the foregoing, the Court must use all the electronic means of the e-camsantiago for the processing of the process. If necessary, the hearings and test practices may be carried out through systems such as videoconferencing, telephone or similar means of communication.



### III. Some administrative bodies

#### 1. Chilean Internal Revenue Offices

- Resolution EX. SII number 32 – Extends the deadline to submit sworn statements, as listed at the document, some for March 27, and others for April 3.
- Resolution EX. SII number 33 – Authorizes the stamping of dispatch guides through the website.
- Circular SII number 18 – Defines the procedure to obtain and recover the initial internet password by the website.

#### 2. Real State and Commerce Registry (*Conservador Bienes Raíces Santiago*)

It has special hours of operation, which will be from 9:00 a.m. to 2:00 p.m., with restricted access (<https://www.conservador.cl/portal/>).

#### 3. Public Notaries

Each notary has autonomously defined its operating hours. Following you will find the information about two public notaries that our law firm use their services often:

- Notaria Rieutord: working hours from 09 a.m. to 2 p.m. and from 3 p.p.m. to 4:30 p.m. (<http://www.notariarieutord.cl/>).
- Notaria Mendoza: no information on deferred working hours. It remains from Monday to Friday from 9:30 a.m. to 6:30 p.m., continued. Documents can be requested through the website. (<http://www.notariamendoza.cl/>).



If you have any consultation, please do not hesitate to contact one of our lawyers. We are working in a home office system and with all the conditions to help you and your company to mitigate the impacts of the measures and use the legal amendments in the best way.

Visit our website for updated information and follow our networks to receive the notification about the current situation in Chile.

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