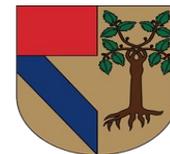




MEXICO UPDATE



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ABA • SECTION OF INTERNATIONAL LAW • MEXICO COMMITTEE



Message from the Co-Chairs

Since its inception, the ABA Mexico Update has sought to elevate voices from both the U.S. and Mexico, offering insightful commentary on legal issues that shape these countries and the world. Never before in our lifetimes has the entire globe been so engaged in a single crisis as it is today in the face of COVID-19. The pandemic has altered almost every aspect of modern life, and the law is no exception. It was only appropriate, then, that this publication continue to foster cross-border legal learning, cooperation, and innovation during the health emergency. We hope that this ABA Mexico Update serves as a source of news and ideas, and as a hopeful signal for continued cooperation and creativity not only in legal thought, but also in economic prosperity, scientific progress, and social justice—even in uncertain times. We hope that you enjoy the hard work of our impressive authors, and may you and your loved ones stay safe, healthy, and connected in these challenging times.

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May 2020

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Message from the Editors

This issue of MEXICO UPDATE addresses a sampling of key issues of Mexican law. We welcome contributions from our readers for the next issue. Although we publish in English, contributions may be submitted in Spanish or English. Our editorial team works to assure that everything is published in well-polished legal English. We can also suggest topics focused on specific judicial decisions or legislative and regulatory developments. Happy reading!

Karla Ruíz, Andres Nieto, Kelsey Quigley, Patrick Del Duca, editors



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About the Mexico Committee

Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee seeks to grow its members' involvement in dialog on current and potential developments of Mexican, United States and other law relevant to their practice of law and to the establishment of sound policy. Current substantive focuses of the Committee's work include arbitration, antitrust law, criminal procedure reform, data privacy, environmental law, legal education, secured lending, and trade law. The Committee contributes to the annual *Year In Review* publication, is developing its newsletter in partnership with a leading Mexican law faculty, maintains its website, and actively organizes programs at the spring and fall meetings in the Section of International Law.

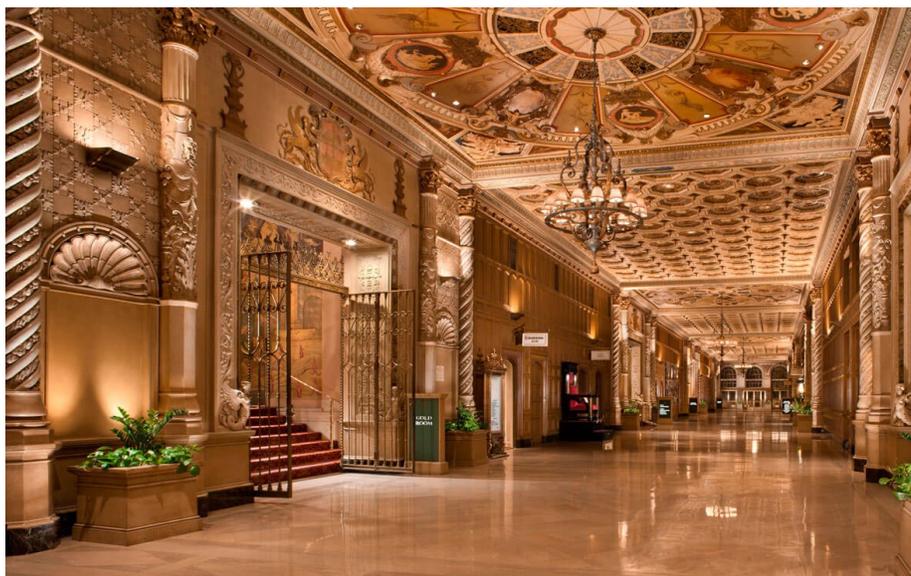
The Mexico Committee's membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely their suggestions and ideas.

Do you know?

An international lawyer (not licensed by a US bar) can join the ABA for US\$150, plus the Section of International Law for US\$65, for a total of US\$ 215? The application is available at:

<https://www.americanbar.org/content/dam/aba/marketing/Membership/membership-enrollment-form-2019-2020-Final.pdf>

Mexico Committee Members can access back issues of MEXICO UPDATE from inception through the Mexico Committee webpage library within ABA Connect.



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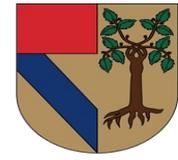
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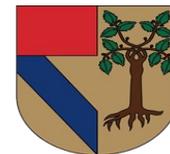
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SPECIAL EDITION NEWSLETTER— LEGAL IMPACT OF COVID-19 IN MEXICO

Enrique García & Vanessa Romero

According to the Organization for Economic Cooperation and Development “OECD”, the infectious disease of COVID-19 will affect 30% of the Mexican Gross Domestic Product “GDP” at constant prices. This situation has made possible several legal provisions and considerations whose practical application may be new to attorneys, including a declaration of emergency pursuant to the Federal Labor Act (*Ley Federal del Trabajo*), various actions of the General Health Council (*Consejo de Salubridad General*), the application of the theories of unforeseen circumstances and of hardship (*teoría de la imprevisión*), and the occurrence of force majeure events, among others.

An example that clearly illustrates the above is the paradigm shift we have experienced in the context of home office or smart working, a practice that lawyers used to deeply resist. This new way of working has encouraged us to reflect on the legal provisions that will be implemented for this type of work that, without a doubt, will continue to be present in our lives even after COVID-19.

The global pandemic has also led us to dust off articles, concepts and doctrines that we only knew theoretically. Clients come to us on a daily basis with the most varied issues, arising from not only the pandemic’s social and economic consequences in Mexico and the world, but also from the various measures that governments, federal and local, have issued in response. Some of the most relevant Mexico issues that have been recently raised by clients are developed throughout this Newsletter.

Some articles describe how labor and employment laws apply to employers whose industries have been forced to close as “non-essential” pursuant to federal, local and municipal decrees, like that published in the March 31 Mexican Federal Official Gazette (*Diario Oficial de la Federación*) to address the health emergency generated by the SARS-CoV2 virus. Other articles cover legal considerations related to the modification and suspension of civil and commercial contracts, previously agreed to by the parties, or account of the pandemic.

This Newsletter also deals with trade and maquila issues relating

to disruption in domestic import and export and the disruption of various industries’ supply chains. These considerations stem beyond North America, to the region that first felt the effects of the virus: China. The initial disruption to the work of Chinese suppliers, which then followed in Europe and the Americas, will deeply affect Mexico, which has an enormous manufacturing sector. And this effect will inevitably reverberate back to China, Europe, and other regions in the Americas.

Furthermore, this Newsletter explores provisions in real estate law and tax law. The emergency will affect real estate leases and contracts, especially in considering how these provisions might be altered in times of isolation and home office. The Newsletter also explores tax law, especially as related to the application of tax benefits bestowed by various government orders.

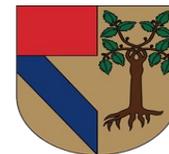
Lastly, the Newsletter covers banking and finance, particularly the modification of certain obligations that apply to financial institutions; energy law relating to the operation of projects in timed of pandemic; personal data and e-commerce; and insolvency, including the development of existing legal options in the face of the impossibility of performing obligations to creditors.

Considering the evolving nature of COVID-19, and Mexico’s response, it will be important to continue to monitor new provisions, agreements, decrees and other developments.

We would like to thank the legal advisors who have collaborated in the preparation of this Newsletter to support other practitioners and the general public in the U.S., Mexico and beyond in the face of this global emergency.



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Payment Of Wages During The Health Contingency In Mexico: Solidarity Or Imposition?

Estanislao Solorzano

During March 2009, Mexico was one of the countries most affected by the health epidemic caused by influenza A(H1N1), or as commonly known, the swine flu. On April 25 of that same year, the then President of Mexico, Felipe Calderón Hinojosa, published in the Official Gazette (hereinafter DOF), the “DECREE ordering various actions in the field of general health, to prevent, control and combat the existence and transmission of the epidemic seasonal swine influenza virus”¹

As of July 9, 2009, Mexican health authorities had registered a total of 12,645 confirmed cases and a total of 122 deaths², and the social and economic consequences included the closure of business or entertainment centers, the suspension of academic activities at all educational levels, the holding of closed-door ceremonies for religious worship. This led to the “loss of 40,000 billion pesos”³, which in turn affected private company development and employer-worker relations, as Mexican labor law did not provide for benefits or for a balanced and fair wage, in the wake of the partial closure of workplaces and the consequent lack of profits and wage payments.

On December 1, 2012, in an effort to mitigate similar effects in a future epidemic, reform was enacted in the Federal Labor Act (hereinafter LFT). Specifically, the following terms were added:

- “Section 42 Bis: In cases where the competent authorities issue a declaration of health contingency, in accordance with the applicable provisions, which involves the suspension of work, the provisions of section 429, subsection IV of this Law shall apply .

- “Section 427: The following are causes for the temporary suspension of working relations in a company or establishment: VII. The suspension of work or jobs, declared by the competent sanitary authority, in case of a sanitary contingency.
- “Section 429: In the cases established in Section 427, the following rules shall be observed: IV. In the case of subsection VII, the employer shall not require the approval or authorization of the Board of Conciliation and Arbitration and shall be obliged to pay its workers compensation equivalent to one day of the general minimum wage in force, for each day that the suspension lasts, without exceeding one month.⁴

Thus, in the hope that a health problem with serious consequences for the formal labor sector would not be repeated, Mexico positioned itself, legally and normatively, on an aggressive footing, to fight against possible future pandemics.

And a future pandemic did indeed arrive. As if a line from a movie like *Soylent Green*, during the month of December 2019, around a seafood market in Wuhan, China, researchers sequenced the first genome of a new coronavirus, which they isolated in a man working in the market, becoming the reference for scientists to track the SARS-CoV-2 virus. The virus would leave in its wake a trail of death, fear, social isolation and economic uncertainty.

In the course of months, the virus arrived in Mexico, and the Federal Ministry of Health, the President, and the country tried to respond. On March 24, the first federal COVID-19 decree was published in the DOF as a resolution of health risks posed by the SARS-CoV2 virus

⁴ http://www.diputados.gob.mx/LeyesBiblio/pdf/125_020719.pdf reviewed on May 4,2020

¹ https://www.dof.gob.mx/index_113.php?year=2009&month=04&day=25 reviewed on May 1, 2020

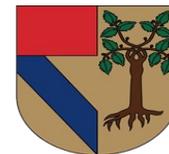
² <http://saludpublica.mx/index.php/spm/article/view/6924/8818> reviewed on May 1, 2020

³ <https://www.jornada.com.mx/2009/07/04/sociedad/031n1soc> reviewed on May 1,2020

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COVID-19)⁵ and a second decree formalized the initial publication. A blow to thousands of small and medium business came from the resolution published in the DOF on March 30, in which the General Health Council issued the “resolution declaring a health emergency due to force majeure, the disease epidemic generated by the SARS-CoV2 virus (COVID-19).” Then, on March 31, a decree was published in the DOF, as issued by the Ministry of Health, which ordered private companies to “immediately suspend non-essential activities from March 30 to April 30,2020, in order to mitigate the transmission of the virus.”⁶

During this month of suspension, who would guarantee the wages of workers at private companies and how? Everything suggested that Mexico had entered into a situation covered by the newly drafted sections of the LFT, as outlined above. In this case, employers operating in non-essential activities would pay their workers, for at most one month, a daily minimum wage (\$123.22 pesos)

However, this has not been the case. Employers in the country have been instructed by the federal administration to pay full wages to their workers; because the LFT refers to a suspension of labor relations motivated by a health CONTINGENCY and the COVID-19 resolutions declared a health EMERGENCY. Despite the fact that the issues underlying a CONTINGENCY are undoubtedly the same as those underlying an EMERGENCY, the federal government quite purposefully used the language that did not invoke the provisions of the LFT.

For example, on March 30, Marcelo Ebrard, Secretary of Foreign Affairs, issued the following remarks: “Companies must pay workers their full wages and not reduce wages in view of the health emergency in Mexico due to the expansion of the coronavirus. This declaration is a health emergency due to force majeure. Companies that try [to pay less than their workers are entitled to] will face a labor process that they will lose, because the law is very clear.”⁷

What, then, is the constitutional legal basis for the federal government to mandate that employers to pay their worker’s wage in full, while also forcing these same employers to keep workplaces closed? There is none.

In an ideal world, employers would voluntarily support their workers with full payment, inspired by solidarity, but given the seriousness of the economic consequences that the country has faced to date, Mexican leaders opted for tactics of imposition and open threat, without the support of any legal provision whatsoever.

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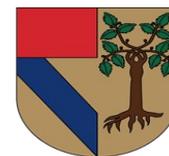
⁵ https://www.dof.gob.mx/index_113.php?year=2020&monyh=03&day=24 reviewed on May 5, 2020

⁶ https://www.dof.gob.mx/index_113.php?year=2020&monyh=03&day=31 reviewed on May 7, 2020

⁷ <https://www.elfinanciero.com.mx/nacional/empresas-deben-pagar-salarios-completos-de-trabajadores-en-emergencia-sanitaria-ebrard> reviews on May 7,2020.



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COVID-19 And “Essential Activities”

At The US Border And Beyond

John Walsh & Kelsey Quigley

On March 30, 2020, the Mexican federal General Health Council declared a sanitary state of emergency due to the force majeure of the SARS-CoV2 viral pandemic¹. The following day, on March 31, the Mexican Ministry of Health published an Administrative Ruling (the Administrative Ruling) that suspended all “nonessential activities” and urged people to “stay at home” (*quédate en casa*) and to respect social distancing measures—all with the help of creatively named superhero, *Susana Distancia* a Word play on “your safe distance”.²



Source: <https://coronavirus.gob.mx/multimedia/>

The Administrative Ruling was initially scheduled to remain in effect until April 30, 2020, with limited exceptions. With the Administrative Ruling, the Mexican federal government required the immediate suspension of all “nonessential activities” and set out categories of “essential activities” that may continue during the health emergency. These activities fall into broad categories: those “necessary to respond to the sanitary emergency”, those related to “public security and citizens” protection”, those “in fundamental sectors of the economy”, those “directly related to the operation of social programs run by the government,” and those “necessary for the conservation and maintenance and repair of critical infrastructure”. This initial Administrative Ruling was followed by three primary federal activities:

- **April 6**— Secretary of Health Technical Guidelines that explicitly included as “essential activities” steel, cement, and glass production companies, coal mining and

and distribution companies, certain IT service companies, and online messaging companies and trading platforms.³

- **April 8**— Secretary of Communication and Transport resolution itemizing certain “essential activities” within its purview in the categories of infrastructure, transportation, and communications.⁴
- **April 21**— Secretary of Health resolution extending emergency measures until May 30, 2020—except in municipalities determined by the federal Ministry of Health to have “low or no” transmission of COVID-19, which may reopen as soon as May 18, 2020⁵

Potential sanctions for non-compliance may be quite severe. During a nightly press conference on April 16, Dr. Hugo López-Gatell, Undersecretary of Prevention and Health Promotion, who has become the face of the Mexican response to COVID-19, noted that companies deemed nonessential that continue to operate may be subject to forced closure and potential criminal prosecution.⁶ Importantly, these remarks were not followed by any document that codified, or guidance that clarified, Dr. López-Gatell’s threats. To date, it is unclear whether any of this proclamations will be issued in writing, through more official channels or whether they will be enforced as threatened, but state-level authorities appear to have taken them as a statement of national policy.

Against this backdrop, lawyers, businesspeople, and politicians both in Mexico and abroad have criticized the federal directives for being technically flawed, vague, and ambiguous.⁷ The imprecision has resulted in inconsistent enforcement efforts across Mexican states.

³ http://dof.gob.mx/nota_detalle.php?codigo=5591234&fecha=06/04/2020.

Notably, the Technical Guidelines also specifically allow for the completion of short-term commitments for President Lopez Obrador’s emblematic “mega projects,” including Dos Bocas, Tren Maya, Felipe Angeles Airport, and Corredor Transistmico.

⁴ https://www.dof.gob.mx/nota_detalle.php?codigo=5591372&fecha=08/04/2020

⁵ *Ibidem*

⁶ <http://www.youtube.com/watch?v=NMxFezk2QUc>

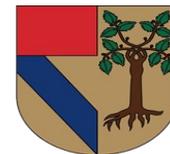
⁷ See, e.g., <https://www.lajornadaadeorient.com.mx/puebla/decreto-ambiguo-empresas/>; <https://www.informador.mx/economia/Ambigua-emergencia-para-empresas-por-coronavirus-20200401-0023.html>; [https://www.naturalgasintel.com/articles/121827-mexico-worries.mount-as-coronavirus-cases-rise-and-lockdown-extends-through-end-may](https://www.naturalgasintel.com/articles/121827-mexico-worries-mount-as-coronavirus-cases-rise-and-lockdown-extends-through-end-may); <https://latinlawyer.com/article/1225747/covid-19%E2%80%99s-worst-case-scenario-for-workforces-closures-and-mas-layoffs>

¹ http://dof.gob.mx/2020/CSG/CSG_300320_VES.pdf

² https://dof.gob.mx/2020/SALUD_310320_VES.pdf



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For example, in the border state of Baja California, which is among those to have most strictly enforced the emergency measures, as of April 17, the state Secretary of Labor had reportedly closed 562 business for not complying with the emergency sanitary measures.⁸

Adding to these compliance uncertainties has been the fact that the federal directives are silent on whether “essential activities” include business (like manufacturing facilities known as *maquiladoras*) that are parts of supply chains supporting essential sectors and operations in other countries, most notably, the United States. On April 22, over 300 US manufacturing executives sent a letter to the President of Mexico, requesting that he align Mexico’s definition of “essential” with that of the United States.⁹ In addition, US diplomats have reportedly been in talks with the Mexican federal administration to address the confusion caused by the emergency measures.¹⁰ The issue has drawn the attention of the US Congress as well: on April 29, a bipartisan group of US senators published a letter sent to US Secretary of State Mike Pompeo, urging him to request that the Mexican government include as “essential” those business providing components to several critical industries, specifically food, medical, transportation, infrastructure, aerospace, automotive, and defense.¹¹

the state Secretary of Labor had reportedly closed 562 business for not complying with the emergency sanitary measures

The pressure from US government and industry may have had an impact. On May 5, the Mexican Secretary of the Economy, Graciela Márquez Colín, conferred with a group of Mexican senators via video conference, and, among other comments, explained that given the potential and gradual opening of industries and sectors in some US states, the Mexican Ministry of the Economy will present a plan for the opening of certain operations related to value chains with the US and China.¹²

The Mexican government response to the rapidly developing pandemic continues to evolve on a daily basis, and close attention to new developments is crucial to understanding the best legal responses and strategies for US and Mexicans clients alike.

⁸ <https://www.elimparcial.com/tijuana/dinero/Secretaria-del-Trabajo-ha-cerrado-562-empresas-en-Baja-California-20200417-0027.html>

⁹ <http://documents.nam.org/GR/NAM%20CEO%20to%20Mexican%20President%20Lopez%20Obrador.pdf>

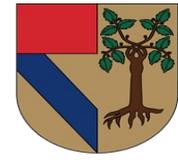
¹⁰ <https://www.politico.com/news/2020/04/27mexico-american-production-coronavirus-212971>

¹¹ <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=39D4B1D5-9D06-45CF-8E06-A38262D775D5>

¹² <http://www5.diputados.gob.mx/index.php/es1/Comunicacion/Boletines/2020/Mayo/04/3662-Se-reunen-Jucopo-y-secretaria-de-Economia-para-revisar-la-situacion-del-pais-ante-la-emergencia-sanitaria-del-coronavirus>; <https://www.forbes.com.mx/covid-19-y-t-mec-entre-temas-de-encuentro-diputados-y-graciela-marquez/>



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Foreign Trade And Maquilas

Eduardo Díaz Gavito

North America has consistently economically integrated since the 1980s, when Mexico entered the General Agreement on Tariffs and Trade and the maquila regime. The integration was boosted with the entry into force of the North American Free Trade Agreement (“NAFTA”) in 1994. The NAFTA accelerated the process of integration by eliminating tariffs for goods originating from North America, opening the services sector to foreign investment, and providing businesses with a rules-based system including a binding dispute settlement mechanism for investor-State disputes. After over 25 years of operation, the NAFTA needed to be reviewed and updated to reflect the circumstances of the XXI century, which resulted in the negotiation of the United States -Mexico-Canada Agreement and is scheduled to enter into force on July 1, 2020.¹

This integration process has resulted in the creation of value and supply chains that span the entire North America region. Businesses have looked for efficiencies within the region and set up production facilities accordingly. Goods are produced and traded freely, crossing the border a number of times, gaining value at each production stage, before finally being offered to final consumers. The free movement of goods and services is fundamental for an efficient supply chain, but freedom of movement has been fundamentally altered by the pandemic.

On March 19,2020, the Mexican General Health Council, in extraordinary session, determined that the disease caused by the virus SARS-CoV-2 would be considered as a critical illness in Mexico, deserving priority attention.² On March 24, 2020, the Ministry of Health published an executive order establishing preventive measures to control the illness. These measures, which were sanctioned by Presidential Decree published on the same date³, included mandatory social distancing and the temporary suspension of activities that require the gathering, transit or movement of people, in the public, private, and social sectors until April 19, 2020.

The executive order allowed certain industries to continue to operate, so long as these activities did not result in large gathering of people. These industries included hospitals, clinics, pharmacies, laboratories, medical services, finance, telecom and information services, hotels, restaurants, gas stations, supermarkets, and transport.

Thereafter, on March 30, 2020, the General Health Council declared the epidemic as a force majeure sanitary emergency. As a result, the Ministry of Health established a series of extraordinary measures through an executive order published on March 31,2020⁴, which include the suspension of non-essential activities for the public, social, and private sectors until April 30,2020.

This executive order defined essential activities as those in industries that participate in the supply of goods and services related to health activities, such as the pharmaceutical sector, including production, distribution (pharmacies), manufacture of materials, equipment and technologies related to health, disposal of biological hazardous materials, and cleaning and sanitization of medical units are considered essential sector. Furthermore, the activities considered as fundamental for the economy were the financial sector, tax collection, distribution and sale of energy, gas stations, drinkable water, food and non-alcoholic beverage industries, markets and supermarkets, convenience stores, sale of prepared meals, transport of persons and goods, agriculture, cattle and fishing industries, chemical industry, cleaning products, courier services, private security, child care, senior citizen homes, telecommunications and information services, storage and cold chain off essential materials, logistics (airports, ports, and trains).

On April 21,2020, the Ministry of Health amended its executive order, extending the suspension of non-essential activities until May 30,2020.

⁴ *Ibidem*

¹ www.gob.mx/se/prensa/t-mec-entrara-en-vigor-el-1-de-julio-de-2020 reviewed on May 8, 2020

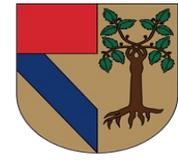
² www.dof.gob.mx reviewed on May 8,2020

³ *Ibidem*

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Similar decrees and executive orders have been issued by the United States government. So one might think that the Mexican and U.S. administrations coordinated on the concept of “essential services.” Surprisingly, this was not the case. As it turns out, the Mexican and U.S. administrations have different definitions of what essential and industries mean.

The Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, issued by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“CISA”), mentions a number of industries and sectors that are similar to those included in the Mexican emergency health decrees.⁵ However, the CISA guidance includes other industries, such as “critical manufacturing” which includes the manufacturing of metals (like steel and aluminum), industrial minerals, semiconductors, materials and products needed for medical supply chains and for supply chains associated with transportation, aerospace, energy, communications, information technology, food and agriculture, and chemical manufacturing. Additionally, the guidance refers to workers needed to maintain the continuity of these manufacturing functions and associated supply chains, in addition to the workers necessary to maintain a manufacturing operation in warm standby.

The difference between the U.S. and Mexican definitions of “essential” has effectively severed the supply chains of a number of industries across North America. Industries that are fully integrated throughout the region, such as the automotive and aerospace industries, now face extreme challenges to keep up with demand and fulfill contractual obligations. Although Mexico has not closed its borders or restricted the movement of goods or persons, the suspension of production and distribution in sectors deemed non-essential means that many production lines are simply unable to continue working, due to lack of materials.

⁵ www.cisa.gov reviewed on May 8,2020

This was evidenced by a letter sent by the National Association of Manufactures (“NAM”) to President López Obrador on April 22,2020.⁶ In the letter, executives of over 300 manufacturing companies expressed concern about Mexican federal and state health emergency decrees, which had resulted in the forced or threatened shuttering of supply and manufacturing facilities, imperiling their ability to deliver critical supplies and daily essentials to people in Mexico and across North America.

Similarly, on April 29,2020⁷ a bipartisan group of eleven senators wrote to U.S. Secretary of State Mike Pompeo, urging him to work with the Mexican government to prevent disruptions in the U.S. supply chain by clarifying what Mexico considers “essential”. In particular, the senators urged Secretary Pompeo to press his Mexican counterparts to incorporate industries providing components to the food, medical, transportation, infrastructure, aerospace, automotive, and defense sectors.

As the situation evolves, there is no certainty as to when the restrictions on production will be lifted and if any steps will be taken to open the North American supply chains. It is clear that the health and wellbeing of workers is the principal concern of governments. However, it is of the utmost importance that the U.S. and Mexican administrations find common ground on the definition of “essential” to help businesses reopen and to help the region regain its competitiveness in the global arena. If they do not, the health crisis will result in an economic catastrophe of enormous proportions.

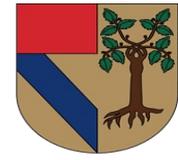
⁶ www.nam.org reviewed on May 8,2020

⁷ www.mema.org reviewed on May 8,2020

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Implications Of The COVID-19 Pandemic In Civil And Commercial Contracts In Mexico

Alejandro E. Staines A.

Given the wide-reaching effects of COVID-19, it is becoming increasingly important to analyze the impacts of the pandemic on commercial and civil contracts in force before the pandemic's outbreak. In Mexico, these notable COVID-19 developments include: (1) the March 24 Executive Order issued by the Ministry of Health (*Secretaría de Salud*) that established epidemiological surveillance measures; (2) the March 24 directive and associated Presidential Decree that laid out measures for controlling health risks associated with the disease; (3) the March 30 Executive Order issued by the National Health Council (*Consejo General de Salud*) that declared a health emergency due to force majeure; and (4) the March 31 Executive Order issued by the Ministry of Health, which established the federal government's ability to take extraordinary actions to deal with the health emergency. Some of the important considerations arising from these developments include the possibility of contractual breaches and how to draft new contracts in the wake of this pandemic. These considerations can be broken down into four categories, which are discussed herein.

i) Can force majeure be invoked due to the COVID-19 pandemic?

These above-mentioned governmental directives, in conjunction with agreements later issued by the Ministry of Health, suspended "non-essential activities" to prevent the spread of COVID-19, which qualifies as an extraordinary event or circumstance that triggers force majeure clauses. In other words, these directives and subsequent government agreements compromised an act of authority that makes impossible the carrying out of certain commercial activities, as resolved by the First Collegiate court in Civil Matters of the Second Circuit, in Isolated Thesis 19716, FORTUITOUS EVENT OF FORCE MAJEURE. WHEN THE ACT OR FACT THAT IS SUSTAINED IS AN ACT OF AUTHORITY FIRST COLLEGE COURT IN CIVIL MATTERS OF THE SECOND CIRCUIT Direct protection 487/97. USES. English Institute, A.C. October 9, 1997. Unanimity of votes. Speaker: Ricardo Romero Vázquez. Secretary: Elizabeth Serrato Guisa.

¹ Epoch: Ninth Epoch Registration: 197162 Instance: Collegiate Circuit Courts Thesis Type: Isolated Source: Federal Judicial Weekly and its Gazette Volume VII, January 1998 Subject (s): Civil Thesis: II.1o.C.158 C Page: 1069 FORTUITOUS EVENT OR FORCE MAJEURE. WHEN THE ACT OR FACT IN WHICH IT IS SUSTAINED IS AN ACT OF AUTHORITY FIRST COLLEGE COURT IN CIVIL MATTERS OF THE SECOND CIRCUIT Direct protection 487/97. USES. English Institute, A.C. October 9, 1997. Unanimity of votes. Speaker: Ricardo Romero Vázquez. Secretary: Elizabeth Serrato Guisa.

That legal doctrine definitely establishes that there are occasions when the breach of an obligation cannot be attributed to the nonperforming party when that party is prevented from complying with the terms of the contract as issue due to an unforeseeable or unavoidable event that is beyond the control of his or her will. An event of this nature is called a fortuitous event or force majeure. Various writers, such as Bonnacase, García Goyena, Henri León Mazeaud and André Tunc, articulate three categories of events that constitute fortuitous events or forces majeures: events that arise from events in nature, from acts of man, or from acts of authority.² If the event falls under any of these categories and makes it impossible for the nonperforming party to fulfill his or her obligation, that nonperforming party should be excused from non-compliance. It further follows that the nonperforming party cannot be civilly held liable for non-performance because nobody can be obliged to do the impossible.

It is insufficient that carrying out the act has become more difficult, more onerous, or imbalanced in reciprocal benefits. In addition, a nonperforming party must take due precautions to avoid foreseeable events; if he or she fails to do so, no fortuitous event or force majeure can exist. When a force majeure arises in the context of acts of authority, the force majeure principle applies to all impediments that result from whatever act (s) made performance impossible.

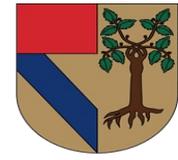
ii) Does the fortuitous event have to be in a contract's force majeure clause to invoke the release of liability for non-compliance?

² Note that some authors such as Manuel Borja Soriano classify events arising due to acts of authority as events arising due to acts from man. See. Manuel Borja Soriano *Teoría General de las Obligaciones Ed. Porrúa 1982 pág. 472*

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Mexican law establishes that “[n]o one can be bound to the fortuitous case, except when he has given cause or contributed to it, when he has expressly accepted that responsibility, or when the law imposes it.”³ The same law further establishes that “[t]he penalty may not be effective when the obligor has not been able to fulfill the contract due to the creditor, acts of God, or insuperable force majeure”.⁴

In the event of omission of a clause in a contract between the parties, or in the absence of a contract executed between the parties in the relevant commercial relationship, the commercial relationship is governed by the Mexican Federal Civil Code Articles 1847 and 2111 as deemed appropriate by the judiciary. A judge will ultimately determine whether, given the COVID-19 pandemic and the related government directives, the parties are totally exempt from compliance with their obligations or if they are only partially exempt.

Even where such provisions exist, it is also important to understand the provisions for non-compliance agreed to in the contract. Some contracts establish that if the triggering event continues for some amount of time, any parties involved in the commercial relationship may terminate the contract. Other contracts establish a method for covering pending obligations or provide for a party’s ability to demand fulfillment of certain obligations or compensation even if they are the party that has terminated the contract.

Finally, to determine whether the COVID-19 crisis and subsequent government directives constitute a fortuitous event, their foreseeability *and* inevitability must be taken into account.

iii) If in a business relationship there is no signed contract and only it has been maintained through Purchase or Service Orders without further special conditions, what impact could the breach have due to fortuitous event or force majeure?

It is common for various commercial operations to be carried out without the formal conclusion of a contract. These operations are carried out through purchase orders or services or by mutual agreement. In these cases, the contract is interpreted to be an agreement similar to the commercial

relationship displayed by the parties’ behavior—and force majeure considerations are to be made in light of that.

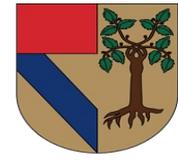
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³ Código Civil Federal Art. 2111

⁴ Código Civil Federal Art. 1847



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Force Majeure And COVID-19: The US Perspective¹

Carla Pareja & Sarah Fernandez

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. Governments around the globe have implemented travel, movement, and large-gathering bans, as well as restrictive interventions such as the closure of non-essential businesses.

The pandemic, both by the virtue of the illness and of the unprecedented measures taken to stop its spread, has extraordinarily impacted businesses around the world. The public health crisis has led to an economic crisis. One of the first signs of distress is companies' inability to fulfill contractual obligations.

This article focuses on how force majeure provisions in commercial contracts and related principles may excuse parties from contractual nonperformance, as well as on the importance of recognizing the contracts' governing law.

The Force Majeure Clause.

A contract is commonly defined as a "set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"². By nature, a validity concluded contract generates binding obligations on its parties. Force majeure clauses address potential obstacles on performance and aim to allocate the risk of such nonperformance between parties. Therefore, such clauses excuse nonperformance when circumstances beyond the control of the parties prevent performance.³

Courts tend to interpret force majeure clauses narrowly, looking to their plain language to determine the types of events that constitute force majeure. Often times expansive catch-all force majeure clauses will be ineffective, as courts will only excuse a party's performance if a listed event (or an event similar to those listed) occurs.⁴

Catch-all force majeure provisions are the object of fact-intensive analyses to determine what the parties intended; therefore, they must be carefully drafted.⁵

A party invoking force majeure clause will also have the burden of demonstrating that the event was (i) outside of its reasonable control: and, (ii) did not result from its own fault or negligence.⁶

The COVID-19 pandemic may be sufficient to trigger a force majeure provision when diseases, pandemics or like terms are expressly contemplated in the contract. Governmental measures resulting from the virus may prompt the force majeure clause pursuant to a state of emergency, government action, or related language.

Foreseeability

Courts will examine whether a force majeure event was foreseeable at the time of entering into the contract, especially if the event is not expressly identified in the force majeure clause.⁷

The foreseeability of COVID-19 outbreak is hotly debated, given the occurrence of other pandemics in the past. Now various outlets have warned that new waves of COVID-19 are likely. To avoid uncertainty going forward, a contradicting party should consider expressly including in the force majeure clauses pandemics epidemics and/or diseases and government actions as valid excuses for nonperformance,

⁵ See, e.g., 30 Richard Al Lord, Williston on Contracts § 7:31 (4th ed.2004)

⁶ See *Goldstein v. Orensanz Events LLC*, 146 A.D. 3d 492, 492 (1st Dep't 2017).

⁷ *Team Marketing USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242 (3d Dep't 2007); *TEC Olmos, LLC v. Conoco Phillips Company*, Court of Appeals of Texas, Houston, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018)

¹ Note to reader: The cases cited in this legal update are mostly resolved by state trial courts and are contract disputes matters. State courts generally preside over cases arising out of state laws, such as contract law, even if federal courts may also rule on such disputes under certain conditions

² Restatement (Second) of Contracts § 1(Am.Law.Inst. 1981)

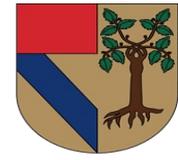
³ *Aukema v. Chesapeake Appalachia, LLC*, 839 F. Supp 2d 555 (N.D.N.Y.2012)

⁴ See *Goldstein v. Orensanz Events LLC*, 146 A.D. 3d 492, 492 (1st Dep't 2017)

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even if scientifically foreseeable.

Mitigation

To be excused of nonperformance due to a force majeure event, parties are generally required to show an attempt to mitigate a foreseeable risk of nonperformance and to resume performance as soon as possible thereafter. Such clauses commonly include “best efforts”, “reasonable efforts”, “good faith efforts”, or similar standards. A party attempting to mitigate risk of nonperformance may take steps such as securing alternative suppliers or planning to offer services remotely.

Degree of Excuse and of Interference for Relief

Force majeure clauses differ as to the standard under which a party’s performance can be excused. While some clauses provide that performance must be impossible, others merely require impracticability,⁸ which may be determined based on pre-fixed milestones. Similarly, some clauses limit the excuse to delay in performance.⁹ Because it is a contract-specific remedy, there is no “one size fits all”.

Notice

Invocation of a force majeure clause may require notice of the triggering circumstances within a specified timeline, by certain means, or in connection with a specific duration of the event. Failure to comply with such notice requirements may preclude a party from availing itself of the force majeure protections.¹⁰

Common Law Principles and Civil Law Lens

Civil law and common law jurisdictions share certain principles of contract interpretation, such as good faith and respect for the parties’ intent, even if the supremacy of these principles varies between different countries.

Under both systems, however, if a contract does not contain a force majeure clause—and in some instances even when it does—a party might still invoke non-contractual defenses to nonperformance.

Examples of these include the common law principles of frustration of purpose, impossibility, or impracticability, which may find their counterparts in the civil law doctrines of *caducité res si stantibus*, *force majeure*, or *hardship*.

Notwithstanding notable differences among the foregoing, the unforeseeable change in circumstances is a salient prerequisite. While the doctrine of frustration of purpose results from the elimination of the anticipated value of contract, impossibility requires that performance becomes objectively impossible because either its object or the means of performance are no longer available.

An example of impracticability is found in the Uniform Commercial Code (“UCC”), which governs the sale of good and expressly contemplates that a seller may be excused for a delay in delivery or partial or complete non-delivery due to “compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid”.¹¹ Official comments to the UCC clarify that cost increase alone does not trigger this provision, except it is a result of an “unforeseen contingency which alters the essential nature of the performance.”¹²

In a civil law jurisdiction, the applicability of the doctrine *caducité* may allow the court to modify or even terminate a contract when, due to changed circumstances, an essential element of contract formation no longer exists. A typical example is a termination triggered by the disappearance of the contract’s cause; while this may be similar to the common law principle of “frustration of purpose”, differing results could ensue¹³

United Nations Convention on Contracts for the International Sale of Goods (“CISG”)

Unless expressly excluded, the CISG governs sales of goods between contracting parties based in different countries,

¹¹ Uniform Commercial Code, § 2-615 (Am. Law Inst. 1977).

¹² *Id.*

¹³ Ewoud Hondius & Hans Christoph Grigoleit, *Overview: concepts dealing with unexpected circumstances*, in *Unexpected Circumstances in European Contract Law* 55–172 (Ewoud Hondius & Christoph Grigoleit eds., 2011).

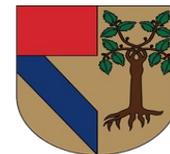
⁸ *Stand Energy Corp. v. Cinergy Services, Inc.*, 144 Ohio App. 3d 410, 760 N.E. 2d 453 (1st Dist.2001); *Butler v. Nepple*, 54 Cal. 2d 589, 6 Cal. Rptr. 767, 354 P. 2d 239 (1960)

⁹ *Citrus Soap Co. v. Peet Bros. Mfg. Co.*, 50 Cal. App. 246, 194 P. 175 (1920).

¹⁰ *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Is. Corp.*, 771 F. Supp. 63, 67-68 (S.D.N.Y. 1991).



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provided that both countries are signatories to the treaty. The roster of CISG has more than 80 nations, including the United States and Mexico.

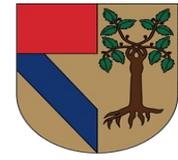
An exemption from contractual liability is provided in § 79 of the CISG, the key requirement of which is that an “impediment” is present. An impediment must result from (i) the defaulting party’s lack of control over the situation, (ii) its unforeseeability at the time of entering into the contract, and (iii) its insurmountability.

A defaulting party that successfully invokes § 79 is excused for a failure to perform only for as long as the “impediment” exists. While during such delay the non-defaulting party is barred from recovering damages, other remedies might still be under the treaty.

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Real Estate

Enrique García & Vanessa Romero

The real estate market has not been immune to the global crisis caused by COVID-19. In fact, the real estate market has suffered most rapidly and most drastically from the health crisis. The uncertainty has led to, among other effects, the modification and cancellation of plans to buy, lease and invest in real estate. As reported by McKinsey, the real estate industry, which over the past years generated steady cash flows and returns, has been hit hard across the value chain.

Real estate companies are being impacted in different ways, largely dependent on region and asset class. In the near-term, real estate executives are concerned with preserving value and liquidity; keeping tenants and visitors safe, including through increased cleaning measures; and complying with governmental agencies requirements.

In Mexico, the hospitality sector and shopping centers will be most affected by the pandemic, while the quickest to recover will be the industrial and multifamily sectors. In all sectors, the industry is changing and it will evolve in response to this pandemic. COVID-19 will open the door to new technology and change the paradigms of the real estate industry. The challenge will be in keeping up with the changes and adapting to the new flow.

Tenants are among those who have been most affected by COVID-19, and by the government's mandatory suspension of nonessential activities. On the one hand, tenants have experienced a reduction in income with which they used to pay the rent. And on the other hand, they have been unable to use leased properties, as in the case of businesses in Mexico City shopping malls, which, after the closure of department stores on April 1 by city declaration, have been unable to operate.

The general rule in contractual lease agreements is that the parties shall comply with what has been agreed between them in the manner intended. Therefore, to determine whether a pandemic such as COVID-19 justifies exemption from liability in the event of breach of a contractual obligation (such as paying the rent), it will be necessary to analyze the agreement or legal act from which the relevant obligation derives. Analysis will also be required to determine, under the agreement, what constitutes an "Act of God" or force majeure, the required duration of such an event, and any procedure to be followed for notification that such an event has occurred.

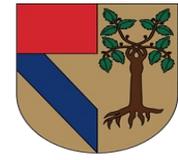
If the parties have not included provisions to that effect in the relevant agreement, they shall apply the provisions of the Civil Code of the relevant state. In this context, it is important to remember that Mexico is composed of 31 states and Mexico City. The Federal Constitution enumerates the matters for which the Federal Congress is authorized to make laws. The matters not expressly delegated to the Federal Congress are reserved to each state. The law applicable to real estate is that of the place where the real property at issue is located.

Pursuant to the provisions of the Civil Code for Mexico City, no one is bound to perform obligations made impossible by "Acts of God" due to the COVID-19 pandemic and, if applicable, the relevant health contingency decrees, unless they have expressly accepted said responsibility or when the law imposes it.

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Notwithstanding the foregoing, it is pertinent to highlight that it will be necessary to prove in a procedural manner the causal relationship between COVID-19 or the relevant health emergency decree and the breach of the contractors' obligations.

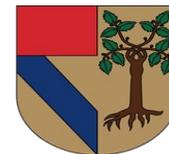
By way of example, we refer to the provisions of Article 2431 of the Civil Code for Mexico City: *“If by reason of an Act of God or force majeure the tenant is totally prevented from using the leased item, no rent shall be due for the duration of the impediment, and if the impediment lasts for more than two months, the tenant may request the termination of the agreement”*. Other similar provisions are included in the civil codes of the various states of Mexico. Most Mexican civil codes, in addition to including provisions similar to those mentioned above, state that such provisions are non-waivable.

However, not all real estate assets are performing the same way during the crisis. Assets that have greater human density seem to have been hit harder, and by contrast, self-storage facilities, industrial facilities, and data centers have faced less significant financial

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Legal Impacts For The Fulfillment Of Obligations In Commercial Companies In Corporate Matters

Alejandro E. Staines A.

The Ministry of Health's March 31, 2020 COVID-19 emergency measures, due to force majeure, have affected corporate governance and other corporate matters, especially with respect to the rights and obligations of partners, shareholders, and administrative bodies.

First, according to the General Law of Mercantile Companies, (Ley General de Sociedades Mercantiles), General Shareholders' Meetings or General Partners' Meetings—depending on the type of company—must be held at the company's registered corporate domicile, except in the event of a force majeure.

This assumption existed before the COVID-19 pandemic and before the Mexican federal government's response to the pandemic, which occurred in the form of decrees and executive orders issued on March 24, March 30, and March 31.

But now, as of March 31, 2020 and due to an unforeseen cause or force majeure, companies that have called these meetings cannot convene as scheduled at the corporate domicile to carry out corporate affairs. In these cases, the company must draw up a document that explains the impossibility of holding a meeting and that moves the meeting to a place other than the registered corporate domicile or postpones the meeting for a future date.

In the case of corporations, all shareholders can take resolutions without assembling. These "resolutions taken outside the meeting" must be made in accordance with the provisions of article 178 of the General Law of Mercantile Societies, through unanimous shareholder vote that is later confirmed in writing.

In the case of LLCs, if the company's bylaws provide for it, resolutions may also be carried out with the unanimous vote of the partners and with written confirmation. In addition, article 82 of the General Law of Mercantile Companies provides that an LLC's bylaws may establish when a meeting is not necessary, in which case the text of resolutions should be sent to each partner and the partner may cast a vote by mail. However, if the bylaws do not include these provisions and a fortuitous event or force majeure arises and the Partners' Meeting cannot take place, such a meeting will be postponed.

Regarding meetings of the Board of Directors of corporations (Sociedad Anónima), article 143 of the General Law of Mercantile Companies establishes that resolutions taken outside of formal board meetings have full legal effect, as long as the resolutions are approved unanimously by board members and later confirmed in writing.

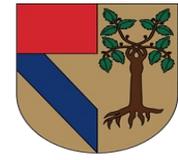
In the case of Simplified Limited Companies, article 268, subsection V of the General Law of Mercantile Companies applies. This section provides that shareholders vote in writing or by electronic means only if an information system is agreed upon, in accordance with the provisions of article 89 of the Commercial Code, either face-to-face or outside the assembly.

There are other corporate or economic rights that could be affected by the pandemic, including the exercise of preferential rights and rights of opposition to resolutions taken in a Shareholders' Meeting. In this context, the provisions of article 2111 of the Federal Civil Code apply, in the sense that "[n]o one is obligated in the fortuitous case, except when he has given cause or

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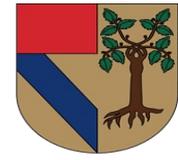
contributed to it, when he has expressly accepted that responsibility, or when the law imposes it.” In the exercise of corporate rights, absolute and definitive impossibility must be proven, within the terms established by the General Law of Mercantile Companies.

Finally, there are other aspects of corporate governance that might be hampered by the declaration of emergency due to force majeure declared by the federal government, in which case each situation must be analyzed in its particular circumstances and in connection with the responsibilities of the company’s Board of Directors and officers.

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Tax

Manuel Rajunov

The global COVID-19 pandemic has wreaked havoc on the global economy. Analysts are equating the devastating effects of this crisis to that of the Great Depression of the 20th century. Global unemployment has risen exponentially, and while the markets have been flooded with liquidity, the business community remains, for the most part, shut down. In addition, access to customers, markets and consumers has been heavily restricted.

With this backdrop, global taxing authorities have been divergently reacting to the situation. Some have swiftly provided business and individual taxpayers with relief and incentives, while others have been either slow to react to reality or, worse, have chosen to ignore the situation and expect taxpayers to remain compliant despite the overwhelming challenges they are facing.

Examples of some actions taken by taxing authorities around the world to alleviate the pressures of taxpayers during these times, include¹:

- Allowance to carry back net operating losses to prior tax years, for speedy tax refunds or offsets to inject liquidity to the business community;
- Accelerated process of refunds for indirect taxes, such as the widely used value added tax or goods and services tax;
- Deferment of filing and payment obligations for 2019 annual tax returns;
- Temporary elimination of special taxes, such as stamp and other excises;
- Temporary elimination of value added tax, as well as other consumption or indirect taxes within certain activities or sectors of the economy;
- Global off-set of tax obligations, such as, the ability to off-set employee withholding payments from tax refunds due to the taxpayer;
- Suspension of auditing processes;

- Delivery of one-time tax stimulus payments to all qualifying individual taxpayers; and
- Exempting certain debt forgiveness from taxable income, provided the loans forgiven are used to pay employee salaries and other payroll protection costs

While the specific implementation of the measures outlined above has varied from country to country, it is clear that their objective is to allow businesses to remain viable and to lessen individuals' burden from the uncertainty the pandemic has created.

Sadly, the Mexican tax authorities, other than granting limited relief for individuals, have decided to ignore the effects that the COVID-19 pandemic has had on the Mexican economy. In fact, Mexico has publicly declared that tax collection is an essential activity of the State, which in these times of economic challenges should be enhanced.

As a consequence, except in certain states that have allowed for limited tax relief (e.g. gross payroll and property taxes), Mexican tax authorities have refused to grant business taxpayers any kind of relief or incentive to allow them to remain viable. Tax refund claims are still allowed, but processing and delivery remain slow and, in some cases, challenging.

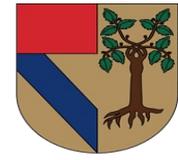
“Analysts are equating the devastating effects of this crisis to that of the Great Depression of the 20th century.”

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¹. McDermott Will & Emery's COVID-19 Country by Country Guide to Tax Measures (<https://www.mwe-com/insights/covid-19-country-by-country-tax-measurements/>)



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All of these actions are contrary to those suggested by the business community and by other taxation thought leaders.

Further, as part of purported employment and public finance measures, Mexican tax authorities announced a heightened audit and verification environment and threatened businesses that failed to comply with tax obligations with potential criminal prosecution.

Notably, Mexican tax authorities did offer individual taxpayers the option to defer their 2019 annual tax payments for up to six months, with periodical installment payments, until October 30, 2020. However, deferred payments will be subject to an adjustment factor that increases month-to-month. In other words, while the individual taxpayers may choose to pay their personal income tax in installments, selecting this option will result in additional costs, potentially negating any benefit such deferral may create.

“Sadly, the Mexican tax authorities, other than granting limited relief for individuals, have decided to ignore the effects that the COVID-19 pandemic has had on the Mexican economy”

Although several Mexican business advocacy groups continue to lobby the federal government to enact actual incentives and relief measures, so far, the reaction has been dismissive, and fiscal policy has not been modified in the current circumstances. One concrete example illustrates exactly how out of touch Mexican taxation authorities are in these challenging times: new impending taxes on digital platforms will cause increased costs to users of popular online streaming services, like Netflix.

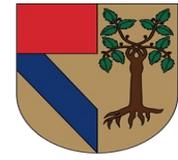
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Banking And Finance

Andrés Nieto

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The ongoing pandemic of coronavirus disease (COVID-19) has caused an unprecedented human and health crisis, and a widespread concern and economic hardship across the globe. The measures necessary to contain the virus (SARS-CoV-2) have triggered an economic downturn¹. International Monetary Fund's (IMF) Global Financial Stability Report shows that the financial system has already felt a dramatic impact, and a further intensification of the crisis could affect global financial stability.²

To preserve this stability and to support the local and global economies, central banks and regulators across the world have proactively intervened to calm the markets and set measures to control or minimize the economic consequences of the pandemic. In the following, we refer to some of the measures adopted by the Mexican financial authorities in response to COVID-19.

Mexico's Central Bank

In an attempt to fight the negative economic consequences of COVID-19 and the drop on oil prices, Mexico's Central Bank ("*Banco de México*"), mirroring some of the decisions made by the U.S. Federal Reserve and other central banks, recently (i) cut the federal funds rate by 50 basis points; (ii) intervened to provide additional liquidity to the financial system to improve the functioning of internal markets; (iii) strengthened credit granting channels; and (iv) promoted the orderly behavior of the debt and exchange markets.³

These decisions were taken to reduce the possibility that financial institutions become procyclical. There were also taken to help financial intermediaries provide financing to the economy, especially for micro, small, and medium-sized companies, as well as household that have seen a temporary reduction in their sources of income.

¹ Unfortunately, COVID-19 arrived at Mexico when our economy was already showing signs of a slowdown and even recession

² <https://www.imf.org/en/Publications/GFSR/Issues/2020/04/14/global-financial-stability-report-april-2020>.

³ <https://www.banxico.org.mx/publicaciones-y-prensa/miscelaneos/%7B1E8E5322-7086-9563-570C-412659ECB292%7D.pdf>

Regulated financial sector

Mexican financial regulators have also taken various measures in response of COVID-19 pandemic.⁴ In this section, we will discuss measures adopted by the Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores – CNBV*) related to financial institutions (primarily banks).

a) Special accounting treatment for banks

On March the 25, the CNBV, at the request of the Mexican Banks Association (*Asociación de Bancos de México*), issued special and temporary accounting criteria in respect of consumer, housing, and commercial loans. Such measures are intended to allow banks to avoid classifying as “non-performing” those loans that receive specific payment support benefits associated with the health emergency.

In general terms, the temporary measures allow (i) the partial or total deferral for a period of four months of principal and interest payments on existing loans⁵, with the possibility of extending such period for two additional months and (ii) the freezing of balances for existing loans, without interest charges, so long as such loans were in place and in full compliance as of February 28, 2020. The measures provide that loans receiving these benefits will not to be considered as non-performing loans, so credit institutions will not be required to constitute reserves that would otherwise be required.

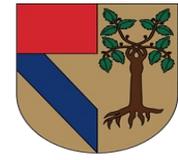
⁴ For more information about the measures taken to protect the consumers of financial services and products please see <https://www.condusef.gob.mx/index.php?p=contenido&idc=1347&idcat=3>

⁵ The above measures may apply to mortgage-backed housing loans, revolving and non-revolving loans granted to individuals such as automotive loans, personal loans, payrolls loans, credit card, microcredit, as well as commercials loans granted to legal entities or individuals with business activities, including agricultural loans.

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b) Temporary and extraordinary measures and suspension of some terms

On March 26, 2020, the CNBV issued an official communication establishing temporary and extraordinary measures and suspending some deadlines for financial institutions and individuals due to the COVID-19 health emergency.

The official communication set forth that during the period from March 23 to May 30, 2020,⁶ inclusive, (i) deadlines are suspended for hearings, procedures in progress and new procedures and (ii) information and reports that must normally be physically filed with the CNBV may be filed electronically.⁷

c) Payment of dividends, repurchase of shares, and other benefits of stockholders of banks

To enhance the financial position of banks vis-a-vis potential losses due to the COVID-19 pandemic and to ensure more resources to support the economy, on March the 31 the CNBV issued a recommendation⁸ to banks to refrain from paying dividends, repurchasing shares and/or granting other benefits to its stockholders.⁹6.8.9

d) Temporary exemptions to banking liquidity requirements

On April the 8, the Banking Liquidity Regulation Committee¹⁰ approved certain exemptions to the General Rules on Banking Liquidity Requirements (Disposiciones de Carácter General sobre los Requerimientos de Liquidez para

para las Instituciones de Banca Múltiple) (the General Rules). These exemptions are summarized below:

a. Exemptions on statutory liquidity coverage ratios

Banks may register liquid assets considered as eligible liquid assets (activos líquidos elegibles) under the General Rules, up to February 28, 2020, to be compliant with liquidity coverage ratios. This exemption will allow banks to account for liquid assets that may have no longer qualified as eligible liquid assets that may no longer qualified as eligible liquid assets under the General Rules due to their decrease in value from the beginning of March, as result of the health emergency.

b. Exemptions on calculations of liquidity reserves

Banks may exclude their March 2020 information from calculations of statutory liquidity reserves associated with potential margin calls or fluctuations in derivatives portfolio values.

c. Exemptions on corrective measures

Temporary exemptions to certain corrective measures associated with a bank's failure to keep its liquidity coverage ratio have come in effect, along with extraordinary classifications in different scenarios depending on their liquidity coverage ratio.¹¹

Essentially, these exemptions seek to address important challenges that the financial system is facing as a result of the current health emergency and economic downturn; in particular by (i) keeping credit availability for businesses, households and other sensitive sectors; (ii) maintaining adequate liquidity conditions in both national and foreign currencies;

¹¹ These exemptions will be in effect for six months (starting on February 28, 2020), and may be extended for an additional period of six months if the Central Bank and the CNBV deem it necessary.

⁶ Has the conditions have developed, the first suspension term was set forth up to April the 19th, and then extended to April 30, and then to May 30

⁷ The documentation that should have been physically sent during that period, may be delivered to the CNBV within the following, 15 business days counted from the business day following the suspension period.

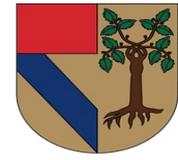
⁸ These measures are consistent with those adopted by the European Central Bank and the central banks and regulators of Sweden, Italy, Russia, Argentina, Canada, Great Britain, Belgium, Austria, Denmark and Japan, among others, that have established several recommendations for financial institutions to abstain from paying dividends, repurchasing stock or increasing variable compensation of their stockholders and employees.

⁹ Any bank or financial group that doesn't intend to follow such recommendations shall notify the reasons in writing to the CNBV (signed by the CEO of the financial institution), and such decision, and the motives behind it, shall be made public.

¹⁰ Compromised of representatives of the Ministry of Finance (*Secretaría de Hacienda y Crédito Público*), the CNBV, and the Mexican Central Bank.



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(iii) fostering adequate conditions for the operation of foreign exchange and fixed income markets; (iv) enabling intermediaries to adequately manage market and credit risks; and (v) maintaining the functioning of payment systems.

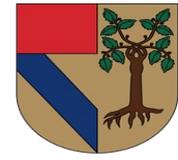
As the situation develops, more actions may be required by central banks, regulators, and governments, which would necessitate quick coordination at the national and international levels.

Banks, other financial institutions, and capital markets must remain hypervigilant. They will have to consider the short and medium-term financial, risk, and regulatory compliance implications that will result from the continuing uncertainty around COVID-19. Of course, any action taken will depend on the specific context of the organization and its unique circumstances derived from its exposure to the pandemic.

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Legal Consequences For The Mexican Energy Sector Due To COVID-19

Edmond Grieger

In an effort to diminish the effects of the pandemic generated by the SARS-CoV-2 virus, on March 31, 2020, the Mexican Ministry of Health issued a resolution ordering the suspension of all activities considered non-essential (the “**Activity Suspension Agreement**”).¹ Later, on April 21, 2020, the Activity Suspension Agreement was modified to establish that the suspension of non-essential activities last until May 30th, 2020.²

The Activity Suspension Agreement excluded the oil and electricity sectors, which meant that public entities such as the Ministry of Energy, the National Commission of Hydrocarbons (“**CNH**”), the Security, Energy and Environment Agency (“**ASEA**”), the National Energy Control Centre (“**CENACE**”) and the Energy Regulatory Commission (“**CRE**”) could continue with their activities. However, after the publication of the Activity Suspension Agreement, these governmental entities published resolutions declaring the suspension of legal and procedural terms until May 30, meaning that any request or writ submitted within said suspension would be considered filed until June 1, 2020.

Oil market and the impact on supply

Due to the COVID-19 pandemic and the price war between the Organization of the Petroleum Exporting Countries (“**OPEC**”) and Russia, oil prices have fallen more than 60% worldwide since the beginning of 2020. Therefore, on April 12, the OPEC+ alliance agreed to reduce oil output by 9.7 MMbd.

As a result, Mexican president Andres Manuel Lopez Obrador announced the temporary closure of oil wells until crude oil prices rose, and afterwards, he announced the rehabilitation of several oil wells and the construction of the *Dos Bocas* refinery. These actions, alongside the critical economic situation of *Petroleos Mexicanos*, have complicated the oil outlook in the country.

¹ *Agreement establishing extraordinary actions to address the health emergency by the SARS-CoV2 virus*. Published in the DOF, on March 31, 2020

² *Agreement that modifies the term that was established to attend the health emergency generated by the SARS-CoV2 virus*. Published in the DOF, on April 21, 2020

In the meantime, the Federal Electricity Commission (“**CFE**”) and other governmental entities in the energy sector, as well as affiliated entities like CF Energia, have continued to call for bidders for the supply of natural gas and liquefied petroleum gas, which is a good sign for the market.

Under the Regulations of the Hydrocarbons Law, fuel supply to end users could be legally suspended, as a result of the pandemic fortuitous cause or force majeure due to COVID-19. However, it is likely that supply will continue to be guaranteed according to the Activity Suspension Agreement, despite a likely significant reduction in the price of gasoline/diesel in the country.

In any case, under the fortuitous cause or force majeure due to the COVID-19 pandemic, individuals and companies may look to the CRE for remedies if they suffer damages arising from decreased sale or distribution of gasoline/diesel, lack of quality in these products or the impossibility of complying with contractual obligations as permit holders for commercialization, storage transportation or public supply of hydrocarbons.

Uncertainty for renewable energy sources

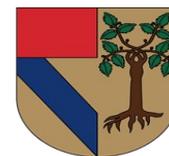
The Activity Suspension Agreement declared the electrical sector as an essential activity, therefore power supply should not be interrupted and the competent authorities shall take all the necessary measures to guarantee that the activities related to the generation, transmission and distribution of electricity continue on a regular basis.

However, on April 29, the CENACE published a highly questioned "Agreement to guarantee the efficiency, Quality, Reliability, Continuity and security of the

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National Electric Grid, under the epidemic caused by the disease SARS-CoV2 virus” (“Electrical Continuity Agreement”). This agreement –although not mandatory since it has not been published in the Federal Official Gazette (“DOF”)–allows the CENACE to take measures to guarantee the continuity of the National Electric Grid during the COVID-19 pandemic and the decrease of electrical consumption.

Among other things, under this resolution, the CENACE can interrupt the pre-operational tests of the photovoltaic and wind power plants, which are in the process of initiating commercial operations, and can deny new requests to carry out these tests. In connection with this provision, CENACE alleged that the intermittence of these renewable sources compromises the continuity and reliability of the National Electric Grid. Several entities, including the Business Coordinating Council, have argued that the CENACE does not have an authority to issue such a resolution, because under article 132 of the Electricity Industry Law, the CRE is the competent authority to issue regulatory agreements and not the CENACE.

Additionally, the Electrical Continuity Agreement is ambiguous with regards to its duration, as it does not clearly specify when the measures will be lifted, thus leaving open the possibility for the CENACE to maintain such measures even after the COVID-19 pandemic is over.

The Federal Economic Competition Commission has recently advised on the risks of the Electrical Continuity Agreement,³ warning that it may indefinitely prevent new wind and photovoltaic power plants from participating in the market and may generate uncertainty about the possibility of dispatching for wind and photovoltaic plants that already operate in the market and that usually have lower production costs than conventional plants.

On May 12, the National Commission of Regulatory Improvement informed the Ministry of Energy that the Electrical Continuity Agreement must be subject to the regulatory improvement procedure as well as a Regulatory Impact Analysis, given that the regulatory proposal generates compliance costs for individuals.⁴

If the Electrical Continuity Agreement were to be published in the DOF in the form in which it was drafted, it would deter investment in renewable energy in Mexico. In addition, foreign investors and their affiliates, from States with which Mexico has signed a Bilateral Investment Treaty or a Free Trade Agreement with an Investment Chapter, might submit claims.

The Mexican Association of Solar Energy signaled that Mexico may lose 6,400 million USD of direct investment in the electrical sector in 2020. Therefore, these restrictive measures may result in not only an increase in the price of electricity, but also in reduced international investment and an even more dramatic collapse in the national economy.

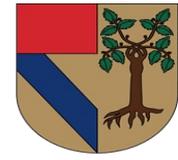
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³ COFECE issues recommendations regarding the CENACE Agreement. Published by the COFECE, on May 7

⁴ Writ issued by CONAMER on May 12 forwarded to the Ministry of Energy



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Importance Of Personal Data Protection In Relation To E-Commerce During COVID

Sofía Salmón

The Coronavirus “Covid-19” pandemic has highlighted that E-Commerce is an effective channel for advertising, offering and selling products and services. No one could have imagined how this pandemic would entail a significant shift in our lifestyle and create everlasting implications, as more than half of the planet’s population has experienced a period of required isolation or reduced close-contact interaction.

Covid-19 revealed an already-existing trend towards online shopping, instead of the classic retail physical or offline shopping. Now, the health crisis requires that easy activities be even easier, and this has served as a catalyst for E-Commerce to play a key role not only in contacting merchants and clients but also as an effective strategy to prevent businesses from bankruptcy.¹

The pandemic has also revealed new consumption habits, the necessary use of video conferencing platforms for business and social interactions, and an increase in spare time to surf the internet. These new behaviors have increased personal data interchange and the risks associated with the improper use of data. We all know that some industries, like delivery, packaging and digital streaming, have benefited from this sanitary emergency. However, other businesses are benefiting from the pandemic in a way that might not be so obvious—such as data base integrators, which have been able to collect large amounts of consumer information. This is especially true, given that with the mobility restrictions, some consumers will use an E-Commerce platform for the first time, but will probably never use it again once the pandemic is over.²

In view of the common marketing quote “When something online is free, you’re not the customer, you are the product”, it is important to understand what Mexican law says about consumer and merchant responsibilities, rights and obligations when providing and processing personal data

through E-Commerce platforms. In this regard, it will be important to consider the following:³

- i. The Mexican Data Protection framework is mainly comprised of the Data Protection Law (*Ley Federal de Protección de Datos Personales en Posesión de los Particulares*) and the Data Protection Rules (*Reglamento de la Ley Federal de Protección de Datos Personales en Posesión de los Particulares*) (together, the “Data Protection Provisions”). The main purposes of the Data Protection Provisions are to protect personal data held by private entities or individuals, to regulate the treatment of personal data (within or outside of Mexico), and to guarantee the privacy and the right to information self-determination. As defined by the Data Protection Law, any information relating to an identified or identifiable individual is considered personal data.⁴

In order to process personal data, informed consent must be received, which is to include:

- (i) the identity and address of the collector; (ii) the purposes of the information being processed; (iii) the potential options for limiting use of the collected information; (iv) the transfer of information to be undertaken, if applicable; and (v) the procedure and means that the collectors shall use to communicate modifications to the privacy notice.⁵

³ In terms of the banking and financial laws, Mexican banks and other supervised and regulated entities are subject to additional bank secrecy provisions that would not allow them to disclose information of clients or transactions of the clients unless authorized by the client or when it is required by a judge or Mexican supervisory Authority

⁴ Article 3, Data Protection Law

⁵ Article 16, Data Protection Law 7. Arun Arora and others, “Building an E-commerce business: Lessons on moving <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/building-an-e-commerce-business-lessons-on-moving-fast>.”

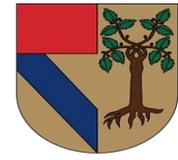
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¹ Nick De Mey, Philippe de Ridder, “Shifts in the Low Touch Economy”, <https://www.bardofinnovation.com/low-touch-economy/>

² Susan Meyer, “Understanding the COVID-19 Effect on Online Shopping Behavior”



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This consent may be express or implied. Express consent may be given verbally, in writing, electronically, or by unequivocal signs. Implied consent results from non-objection to a privacy notice provided to the individual from whom information is being collected.

The owners of the personal data have the following rights:

- a. access to their personal data;
 - b. rectify incorrect or incomplete personal data;
 - c. request the cancellation/withholding of their personal data;
 - d. have their personal data deleted;
 - e. oppose the use of their personal data; and
 - f. revoke their consent at any time without retroactive effects being attributed thereto.
- ii. Sanctions and penalties may be imposed for breaching the Data Protection Provisions, which may vary from a warning notice to fines ranging from 100 to 320,000. Units of Measure and Updates (*Unidades de Medida y Actualización*, UMA).⁶ In addition, under the Federal Civil Code, collectors might be subject to liability arising from willful misconduct in the misuse of personal data.
- iii. The National Institute of Transparency, Access to Information and Personal Data Protection (*Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*) is entrusted with enforcing the Data Protection Provisions.

These unprecedented times have not only shown companies the importance to building and strengthening their web presence⁷ and E-Commerce capabilities. The pandemic will also increase the number of players in the E-Commerce space, transforming it into a more competitive market. As companies strive to beat their competitors and gain market share, policies related to personal data protection will be important.

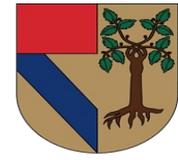
⁶ Article 64, Data Protection Law

⁷ Arun Arora and others, “Building an e-commerce business: Lessons on moving fast”, <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/building-an-e-commerce-business-lessons-on-moving-fast>.

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Insolvency

Enrique García & Vanessa Romero

In Mexico, as in the rest of the world, the emergence of COVID-19 and the measures that governments have taken to prevent its spread have financially affected individuals and merchants at different magnitudes. Some have been so deeply affected that they have been unable to meet their obligations to their creditors.

In relation to the above, a brief explanation of how Mexican laws deal with insolvency and bankruptcy.

OUT-OF-COURT RESTRUCTURING.

Out-of-Court restructuring refers to situations in which a debtor may freely negotiate and enter into an agreement with creditors to modify the debt payment terms of the performance of obligations.

Mexican law facilitates out-of-court restructuring in a variety of ways, including, but not limited to: (i) by reducing debt remissions, as a total or partial reduction of the credit; (ii) by extending the payment terms of the credit; and (iii) by allowing for payment in kind through assignment by the debtor of assets to the creditor.

In addition, debtors may obtain new credits, renegotiate existing credits and grant new guarantees to their creditors.

AMICABLE COMPOSITION.

The process known as amicable composition is provided for in Article 312 of the Mexican Bankruptcy Law (*Ley de Concursos Mercantiles*) and takes the form of an agreement between the debtor and creditors, without intervention of the judicial authority.

There are two ways to initiate this procedure. The first is that the merchant debtor goes to the Federal Institute of Specialists in Bankruptcy Proceeding (*Instituto Federal de Especialistas de Concursos Mercantiles*) to choose a conciliator to act as an amicable composer between the merchant debtor and creditors. The second is that any creditor who has in its favor a credit due and unpaid goes to the Institute to raise the issue and to request the list of conciliators.

Once the procedure has been initiated, the Federal Institute of Specialists in Bankruptcy Proceeding will notify the applicant in writing, within 15 calendar days from the date of the corresponding request, of the list of conciliators (whose fees will be charged to the applicant).

ORDINARY JUDICIAL CONCILIATION.

Ordinary judicial conciliation, also provided for in the Mexican Bankruptcy Law, is aimed at preserving the merchant debtor's business.

This process begins either at the request of the merchant debtor or when one or more creditors file a lawsuit before a federal judge with jurisdiction over the debtor's domicile.

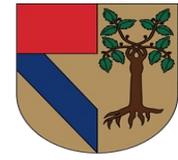
After the notification of the bankruptcy judgment, the Federal Institute of Specialists in Bankruptcy Proceeding appoints a conciliator, who ensures that creditors and debtor reach an agreement. This agreement will be sanctioned by the judge. In a bankruptcy settlement, the parties can agree to any of the following possibilities: (i) a waiting period with capitalization of ordinary interest; (ii) a reduction of the principal balance and unpaid accrued interest; or (iii) a combination of the two.

An ordinary judicial conciliation takes the form of an agreement between the merchant debtor and recognized creditors (which acquire "recognized" status by virtue of the judgment on acknowledgment, grading and claims priority).

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In any of the foregoing situations, some payments take precedence over others, depending on the type of creditor. For example, claims in favor of employees for wages or salaries accrued in the last year will take precedence over any other in cases of bankruptcy or insolvency.

Finally, if a merchant reaches bankruptcy, it must sell its business and productive units or goods to pay creditors. From the moment the bankruptcy judgment is issued, the assets that make up the merchant's bankrupt estate will be occupied, immobilized and disowned, and, if applicable, the company will be managed by an administrator who will dispose of the estate's assets and rights, trying to obtain the greatest possible proceeds from their disposal (preferably through public auction).

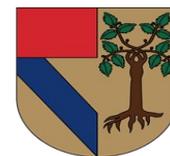
With respect to this last stage, Article 146-B of the Federal Tax Code (*Código Fiscal de la Federación*) provides that in the case of taxpayers who are subject to an insolvency or bankruptcy proceeding, tax authorities may partially write off the tax credits relating to contributions that should have been paid prior to the date on which the proceeding was initiated.

In order to implement any of the strategies or solutions mentioned above, it is important to analyze the specific scenario to determine, in each case, the best way to proceed.

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Pro Bono Legal Guide COVID-19

Andrés Nieto

The ongoing pandemic of coronavirus disease (COVID-19) has caused an unprecedented human and health crisis, particularly to the most vulnerable segments of society.

In response, the “Estándares Pro Bono México”, the “Fundación Barra Mexicana, A.C.”, the “Fundación Appleaseed México, A.C.”, and the “Centro Mexicano Pro Bono, A.C.”, with the participation of the Mexican legal community and several law firms, worked closely on a pro bono basis to prepare a guide to address legal issues arising from COVID-19 (“Legal Guide COVID-19”).

The Legal Guide COVID-19 offers the general population and non-governmental organizations (NGOs) clear and concise legal information on twenty different legal questions, situations, or problems that they may face as a consequence of the sanitary emergency.

The Legal Guide COVID-19 was conceived as a “living document” that will be revised and updated as new circumstances arise. To facilitate access to the Legal Guide COVID-19 for members of vulnerable populations, and those NGO’s that serve these populations, the guide is located on an electronic platform— with thanks to the collaboration of the Institute of Legal Research (Instituto de Investigaciones Jurídicas), of “UNAM” and of the “Consejo General de la Abogacía Mexicana” (CGAM).

Through various alliances, educational institutions, NGOs, and other public and private entities, we have been disseminating the Legal Guide COVID-19 with the intention that it reach the largest possible population. Thus, we graciously thank the Mexico Committee of the ABA SIL and its members for contributing to this effort.

This important project is a reflection of the solidarity of the organized legal community in Mexico. Like the community’s response to the 2017 earthquakes in Mexico, during which we joined efforts to support the most vulnerable populations, we hope that this will generate a positive impact in our country.

Following is a link to the updated Spanish version of the Legal Guide COVID-19:

<https://asesoria.juridicas.unam.mx/>

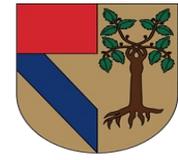
Thank you!



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Mexico Committee – Special Edition Newsletter – Legal Impact of COVID-19 in Mexico

Laura M. Nava

CONCLUSIONS

As we all know the world has been seriously impacted by COVID-19. Each country within its legal framework and system is dealing with the many legal implications and consequences of this pandemic. This *Special Edition Newsletter* is proudly presented by our Mexico Committee to provide the most relevant, updated and important information related specifically to the legal impact of COVID-19 in Mexico.

The unprecedented circumstances surrounding this pandemic have challenged most legal systems and have generated creative legal analyses, considerations and solutions to handle and solve the many situations and issues that are arising from, among other matters, the stay-at-home rules, social distancing, suspension of business activities, customer safety, shoring-up cash and liquidity, reorienting operations and economic implications of all those actions. The collection of articles that we include in this *Special Edition Newsletter* was prepared by attorneys that are members of our committee and are specialized and experienced in the specific areas of law that are covered.

They each addressed the most relevant legal problems and conditions that companies and individuals are facing currently in Mexico as a result of this challenging and difficult global situation. The topics that are covered include: employment and dealing with the workforce for domestic and foreign owned Mexican companies, foreign trade and manufacturing operations, real estate including acquisitions and sales, as well as, leases of facilities facing suspension of activities, taxation aspects for Mexican and foreign companies and individuals, corporate governance and compliance, civil and commercial contracts and the breach of obligations by the parties, banking and finance to deal with economic implications, energy and related infrastructure, data protection and e-commerce, as well as, insolvency that will be the ultimate consequence of companies unable to survive the economic and legal problems caused by this COVID-19 pandemic.

Our intention is for this *Special Edition Newsletter* to serve as a legal tool and resource that provides a general understanding of the legal aspects and impact in Mexico of COVID-19 in each of the areas of law that we cover.

We offer a very special **thank you** to each one of the authors for their time and efforts. We also thank the ABA Section of International Law for its continued and unconditional support of this publication and all the work and activities that our Mexico Committee proudly undertakes to enhance and strengthen the practice of law in Mexico and the relationship between attorneys across the borders of our legal community.



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MEXICO UPDATE

American Bar Association Section of International Law

The Mexico Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Mexico and Mexican law, who are fellow American Bar Association members.

The Mexico Committee welcomes any suggestions, ideas or contributions to enhance this periodic publication.

If you are interested in participating actively with the Committee and in joining its steering group, please contact any member of the Committee leadership.

COVID-19: Its Impact on International Law and You



DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.

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