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Chile

FORCE MAJEURE

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This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Chile.

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CHILE

FORCE MAJEURE



1. May *force majeure* be relied on by a party to a contract, even if the parties have not included a *force majeure* clause?

Force majeure is defined in Article 45 of the Civil Code as “an unforeseen event that cannot be resisted”. This definition and its consequences apply to any contract, even if the parties did not expressly included clauses.

2. If so, please explain in which circumstances *force majeure* may be relied on.

If an event meets the requirements of the definition -an unforeseeable event whose consequences are irresistible- it may be qualified as *force majeure* and invoke its effects.

3. Is the concept of *force majeure* enshrined in legislation?

Yes. Apart from its legal definition, as explained in answer number 1, it has also been developed by scholars and case law.

4. If so, may the parties agree to derogate from the provisions of this legislation?

Yes. The parties may derogate the effects of *force majeure* and make themselves liable under any circumstance.

5. What is the approach taken to drafting *force majeure* clauses in your jurisdiction?

When included, *force majeure* clauses may provide a more specific definition, or even a different one, than that established in the law, or may specify the effects that follow the occurrence of the event.

6. Is it common practice to include *force majeure* clauses in commercial contracts?

It is common in more sophisticated contracts. Standard commercial contracts do not necessarily include these types of clauses.

7. Would the courts be willing to imply *force majeure* terms into contracts?

When parties do not include *force majeure* clauses, the legal definition and its consequences apply. Therefore, if no terms are provided courts will apply legal regulation.

8. How do courts approach the exercise of interpretation in relation to *force majeure* clauses?

In general, courts tend to be highly strict when analysing and checking the unforeseeable and irresistible feature of the *force majeure* event.

Courts in Chile operate on a case-by-case basis and tend to understand that the impossibility feature of the event needs to be absolute and objective for any person who is in that same situation, although there is a tendency to switch to more flexible criteria.

9. Are there any legislative or statutory controls on the use of *force majeure* clauses?

No, just a legal definition. Therefore, insofar as the parties do not distort the nature of *force majeure* (in which case their precise will should be interpreted and followed), they may modify or specify the boundaries of the concept of *force majeure* to be used in one specific contract or alter its effects in whatever way is suitable for their interests.

10. Must an event have been unforeseeable at the time of the contract to permit a party to rely on it as *force majeure*?

Unless parties agree otherwise, yes, the event to be qualified as *force majeure* must be unforeseeable at the time of the contract.

11. What types of events are generally recognized by courts of your jurisdiction as being *force majeure*?

Article 45 of the Civil Code explicitly mentions as examples shipwrecks, earthquakes, capture of enemies and acts of authority executed by a public official. Nonetheless, its characterization and ability to be considered as something impossible that cannot be resisted depends on the specific case (an earthquake may be considered *force majeure* in a context, but not in others). Likewise, acts of authority such as a quarantine, have often been considered as *force majeure*.

12. What types of events have been dismissed by courts of your jurisdiction as not being *force majeure*?

There is no consistency as for what events are not considered *force majeure*. Each individual case must be analysed. To this end, if the parties have not stipulated anything in the contract, the party alleging the unforeseen event must prove that the requirements of *force majeure* have been met.

13. Have courts recognized the COVID-19 pandemic as *force majeure* in your jurisdiction?

So far, there have been only few cases decided on COVID-19 and *force majeure* but only on a first instance level and in very specific topics such as lease contracts. Therefore, it cannot be stated that courts are definite and consistent on this matter.

14. Would a governmental decision or announcement that an event is a *force majeure* influence courts of your jurisdiction (e.g. *force majeure* certificates provided by the Chinese Government to Chinese companies during the covid19

pandemic)?

No. Courts are independent from government to determine if an event counts as *force majeure* and, in any case, this is analysed on a case-by-case basis.

15. Does *force majeure* allow a party to suspend its obligations? If yes, for how long?

If the contract does not provide a specific consequence, in principle, *force majeure* is legally regulated as an exoneration of liability. This means that if one party suffers an event of *force majeure*, said party will not be liable for damages caused by it. However, scholars and case law have established that *force majeure* also allows a party to suspend its obligations for as long as the *force majeure* event lasts.

16. Does *force majeure* allow a party to totally or partially avoid liability for failure or delay in performing its obligations?

This may be regulated by the parties in a contract. If not, *force majeure* does allow a party to avoid liability for both failure and delay in performing its obligation insofar said liability is a direct consequence of the event of *force majeure*.

17. Does *force majeure* give a party the potential right to terminate the contract?

If the contract does not provide anything specific, *force majeure* might allow the party who did not suffer its consequences to terminate the contract based on the failure or delay of performance of the other party's obligation. The party who suffers the consequences of the event of *force majeure* may not terminate the contract but, as said, may avoid liability and suspend its obligation.

18. On whom would the burden of proof lie when attempting to rely on *force majeure*?

The party who claims a *force majeure* event as an excuse for failure or delay in performing its obligation is required to prove it.

19. What would a party seeking to rely on *force majeure* be required to show?

In general, it should prove the event itself (unless it is a

public and notorious fact), and that the event was unforeseen and irresistible.

However, a criterion of reasonableness also tends to operate, mainly in more sophisticated commercial contracts, where these assumptions have been more regulated and the parties often incorporate clauses regulating cases of force majeure and their effects, with *force majeure* often referring to consequences that cannot reasonably be avoided.

20. To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?

In general terms, there is a principle in our legislation to mitigate the effects of *force majeure*, that derives from the general principle of good faith that parties must observe. This is also related to reasonableness, and in more sophisticated contracts the parties expressly regulate it as an obligation to mitigate the damages that can reasonably be expected. For the affected party, it is quite possible that the contract contains an obligation to mitigate the effects of force majeure, and even if it does not, given the principles of good faith it is advisable to do so. For the same reason, a proactive and collaborative attitude is always convenient.

21. Are there any applicable notice requirements which an affected party would be required to comply with before invoking force majeure?

When regulated in the contract, it is usual to include a notice requirement when a *force majeure* event occurs. When not, the law does not provide for any notice requirement, but scholars and case law have stated that said notice is required based on good faith and as a form of meeting the burden of mitigating losses.

22. What is the consequence of failing to comply with such notice requirements?

When regulated in the contract, the consequence is the one agreed by the parties. When not, in case such failure notice is considered as a bad faith behaviour, then the party that does not give notice may be deemed responsible for its own damage, or even be liable for the damages caused to its counterparty if any.

23. What would be the impact of force

majeure on any prepayments made under contractual arrangements?

In general, if prepayments were made by the party not affected by force majeure, it may claim the restitution of said payments.

24. What contractual remedies are available to affected parties, other than force majeure?

The party not affected by *force majeure* may suspend the performance of its own obligation based on the failure or delay of the other's. If the failure or delay is material, the party not affected by *force majeure* may claim the termination of the contract.

25. What effect does force majeure have on consumer contracts? When can a producer or retailer effectively rely on this concept?

In our consumer protection law, force majeure is not expressly regulated, so the general rules of the Civil Code apply. However, because of Covid-19, the National Consumer Service

issued an instruction on good practices to protect the interests of consumers. In addition, the National Consumer Service has issued other resolutions to protect consumers during the health crisis, including, for example, suspension of warranty periods, information duties, regulation of distance contracts, risk prevention and protection of consumer life and health.

26. What type of insurance policy could cover force majeure events in your jurisdiction?

In general terms, there is no specific type of policy for this as it depends on each individual insurance policy.

However, as for the coronavirus it is possible to distinguish mainly two areas for analysis in this matter:

With respect to life insurance, the determining factor will always be the coverage and exclusions contained in the respective policies, without prejudice to the fact that it is typical on this type of insurance that a deterioration in health or even the death of a person as a result of a virus is included in the coverage.

With respect to damage insurance, although there is a

presumption of coverage in these insurances, the exclusions contained in the policies are also decisive, since it is possible that epidemics or pandemics are excluded from coverage in certain insurances.

27. Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation

(both for the short-term and long-term), to assist parties with *force majeure*, given the recent COVID-19 pandemic?

Yes. There are some bills which intend to explicitly recognize material adverse effects ("*Teoría de la Imprevisión*", in our legal tradition), since it is a matter not regulated in the Law, which has been applied only exceptionally in our case law.

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