

Force majeure and breach of contracts in Argentina

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Delfina Calabró
Beccar Varela, Buenos Aires
dcalabro@beccarvarela.com

Pedro Nicholson
Beccar Varela, Buenos Aires
pnicholson@beccarvarela.com

In Argentina, the National Civil and Commercial Code (the 'CCC') defines the concept of force majeure. It describes force majeure as an event which may not be foreseen, and if foreseen, may not be avoided. We accordingly believe that the Covid-19 pandemic is clearly within the typical parameters of a force majeure situation.

Further to the force majeure concept, there are some specific rulings in Argentina's CCC which must be borne in mind when analysing how force majeure may impact ongoing agreements during an exceptional period such as the current Covid-19 crisis (which is still in full effect in Argentina). Among them, the following is highlighted:

- Article 955 of the CCC foresees that the impossibility of fulfilment of the contractual obligations in a contract caused by force majeure extinguishes the obligation, without liability to any party.
- Article 956 of the CCC foresees temporary impossibility of fulfilling the obligations in a contract. This impossibility extinguishes the agreement when the obligation is an essential term, or when its duration irreversibly frustrates the creditor's interest.
- Article 1090 of the CCC establishes that the definitive frustration of the purpose of a contract authorises the damaged party to terminate the agreement, if the frustration has its cause in an extraordinary alteration of the circumstances existing at the time of its termination, which is alien to the

parties and exceeds the risk assumed by the affected party. The termination is operative when this party communicates to the other its intent to terminate the contract. If the frustration of the purpose is temporary, there is a right to termination only if the timely fulfilment of an obligation, which time of execution is essential, is prevented.

- Article 1091 of the CCC foresees the widely known theory of unforeseen circumstances. If in an agreement with obligations outstanding for both parties, the fulfilment by one of the parties becomes excessively onerous due to an extraordinary alteration of the circumstances existing at the time of its execution, caused by causes beyond the control of the parties and the risk assumed, the party has the right to claim extrajudicially, or to request before a judge, the total or partial termination of the contract, or its adaptation to the new situation.
- Article 1203 of the CCC specially regulates force majeure in lease agreements, as frustration of the use or enjoyment and establishes that if by an unforeseen event or force majeure, the tenant is prevented from using or enjoying the property, or it cannot serve the purpose of the agreement, the tenant may request the termination of the contract, or the cessation of payment of the rent for the time that they cannot use or enjoy the property. If the unforeseen event does not affect the property itself, the tenant's obligations shall not be affected.

Clearly, as per the terms of the CCC, not only the existence of a plain force majeure event should be examined when analysing a contract in Argentina.

As mentioned above, the authors believe that the Covid-19 crisis fits in the definition of a force majeure event. Having said that, since the enactment of the CCC in August 2015^[1], there has been no major jurisprudence on force majeure in Argentina and, for that reason, it may not be fully foreseeable how the jurisprudence may rule these cases in the future since the Covid-19 crisis is a worldwide emergency without precedent. It is worth further noting that, in these cases, force majeure usually affects both parties to an agreement and not just one of them. Although, as mentioned above, there are no comparable precedents to this situation. In 2001 Argentina suffered one of the worst economic crises in the modern history of the world, where all parties had major losses. In that scenario, the judges ruled that the parties should share the cost of the losses of the agreements that were unable to be fulfilled because of such economic crisis. During the current Covid-19 pandemic, the parties in commercial agreements will be in a situation similar to that in 2001 and this will undoubtedly trigger huge damages for all the parties involved; it is highly likely that judges will rule in a similar way and have the parties share the damages between them.

Each case depends on what the parties have agreed beforehand. Many commercial agreements usually waive some of the CCC sections summarised above: the theory of the unforeseen circumstances is often waived by parties taking into account that an unstable (or unpredictable) economic situation in Argentina should not – unfortunately, but realistically – have been considered as unforeseen by the parties in long-term commercial agreements in recent years. Covid-19 is, however, a completely unusual situation (even in Argentina), and it is highly unlikely that any contract that was executed in the past would have specially waived a pandemic situation which could cause the obligations in a specific commercial agreement not to be fulfilled. Therefore, the authors understand that the CCC will protect the parties from being unable to fulfil their obligations, but judges will have to measure in each case which solutions may result most beneficially for the economy in general.

[1] Prior to the CCC, Argentina had a Civil Code and a Commercial Code which ruled the lives of Argentineans for a period of 150 years.