

COVID-19 and force majeure in Spanish contracts

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This article provides guidance on the issues to consider when analysing the impact of 2019 novel coronavirus disease (COVID-19) on force majeure clauses in Spain.

Force majeure is regulated in the Spanish Civil Code as an exception or limit to the general principle of the obligatory nature of contracts (that is, that agreements that are legally binding must be performed).

Article 1,105 states that:

"Apart from the cases expressly mentioned in the law, and those where the obligation requires it, no one shall be liable for events which cannot be foreseen, or which, if foreseen, are unavoidable".

Article 1,105 of the Spanish Civil Code refers to both force majeure and *cas fortuit*. The distinction between them is mainly academic in the sense that force majeure usually emphasises the unavoidability of the event that excuses a party from fulfilling its contractual obligations, as agreed with the counterparty. (*Supreme Court judgment of 30 September 1983 [RJ 1983, 4688]*).

The force majeure exception can apply even if the parties to a contract have not included a force majeure clause. According to Article 1,105 of the Spanish Civil Code and its further development in Spanish case law, the requirements for an event to be considered as force majeure are:

- The event must be unforeseeable, or if foreseeable, unavoidable.
- The event must be beyond the control of the parties and, therefore, not attributable to either of them (*Supreme Court judgment (First Chamber, Civil) no. 185/2001 of 2 March [RJ 2001, 2590]*; *Supreme Court judgment (First Chamber, Civil) of 5 November 1993 [RJ 1993, 8970]*).
- The event must result in one or all of the parties to the contract not being able to comply with their obligations (*Supreme Court judgment (First Chamber, Civil) no. 741/2014 of 19 December [ES:TS:2014:5347]*).

The application of force majeure by the Spanish courts depends on the specific facts of each case and the specific terms of the contract.

Pandemics

If pandemic is not expressly listed in the force majeure clause, the intention of the parties would need to be determined. That is, whether the intention was to expressly exclude a pandemic being considered a force majeure

event, or to limit the application of force majeure to those events expressly agreed, therefore excluding the general regime established by the Spanish Civil Code. Unless the clear intention of the parties was to exclude pandemics, they could still be considered force majeure events, if the relevant requirements are met.

Spanish case law on epidemics and force majeure is rather scarce and has dealt more with administrative measures taken by the government.

While the impact of the 2019 novel coronavirus disease (COVID-19) has brought about an unprecedented situation in Spain, the most similar health crisis that the Spanish courts have seen was the swine flu outbreak in 2009, which the World Health Organization (WHO) declared to be a pandemic. At that time, it was understood that the outbreak could meet the requisites to be considered a force majeure event in relation to air transport and tourism packages (although the extent and impact of the swine flu pandemic are not comparable with the more significant consequences of COVID-19).

It follows that the COVID-19 pandemic could certainly affect the performance of certain contracts and be considered as a force majeure event in certain situations.

The concept of an "Act of God" is unfamiliar in Spanish law but, depending on the circumstances of the case, it can be included in the concept of force majeure. To determine the specific consequences of a force majeure event, it is essential to consider the terms and conditions of the relevant contract.

Notification requirements

Spanish law does not establish specific legal requirements relating to time limits for notifying a force majeure event or the content of any notification.

However, it is advisable for any party that wishes to rely on it to notify the counterparty of the occurrence of the force majeure event as soon as it occurs; or, at the latest as soon as the affected party becomes aware that the event will have an impact on the performance of the contract such that it will prevent the fulfilment of a specific contractual obligation.

If that notice is not sent on time, the performing party could be entitled to request:

- That the non-performing party fulfil its obligations.
- The termination of the contract.

In both cases the performing party can claim for damages.

Consequences of force majeure

To successfully claim that an event prevents fulfilment of a contractual obligation due to force majeure, it is essential that:

- Objectively, it is not possible to perform the obligation.
- If the specific force majeure event is expressly provided under the terms and conditions of the contract, that that event has effectively occurred.

- A causal relationship exists between the non-performance and the force majeure event.

It is advisable for the terms of the contract to include a specific liability regime in the event of a contractual breach due to force majeure which covers the following:

Whether neither, one, or all parties to the contract, jointly and severally, assumes or assume the consequences of the breach of contract.

Whether the time limits for fulfilling the specific obligation are extended.

Whether the occurrence of a force majeure event entails the termination of the contract.

In the absence of an express agreement by the parties on the liability regime, the general legal rule is that the party that does not perform the specific obligation will not be liable for non-performance. In this situation, the non-performing party will:

- Be released temporarily from its obligation to perform, therefore delaying performance of the obligation.
- Be released permanently from its obligation to perform, depending on the circumstances.

Spanish case law has established that the impossibility of performance must be final in order for the debtor to be released from performance of an obligation (*Supreme Court judgment (First Chamber, Civil) of 11 November 1987 [RJ 1987\8372]*). Otherwise, the force majeure event will only have a suspensory effect.

Also, there is a general obligation to mitigate damages in application of the good faith principle that applies to the interpretation and performance of contractual obligations.

The burden of proof of a force majeure event lies with the person or entity who has directly suffered the consequences of such event and is therefore alleging that a force majeure event has occurred to avoid having to fulfil a specific obligation.

Consumers

Article 86 of Spanish Royal Decree 1/2007, which approves the Act on the Protection of Consumers and Users, provides that contractual clauses which limit or deprive the rights of consumers or users which are recognised by mandatory or statutory regulations will be considered as unfair clauses and could therefore be declared null and void.

Further, section 7 of Article 86 states that clauses that impose a limitation or exclusion of the consumers' rights will be considered as unfair.

In accordance with Spanish case law, contractual clauses that exclude the application of a force majeure event, to the detriment of the consumers' rights, are unfair and should be declared null (*Appeal Court of Barcelona judgment no. 363/2013 of 21 October [AC 2013, 1860]*). For example, where, due to a force majeure event, the injured consumer is prevented from terminating the contract even if the counterparty is not able to fulfil its obligation (generally the provision of a service to the consumer). Such an exclusion would amount to a waiver of rights which is contrary to the applicable legal rules on the protection of consumers.

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