Linklaters

COVID-19: Contract and employment issues in Colombia

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This guide highlights key contractual, labor and other considerations that may affect business operations in Colombia due to the COVID-19 outbreak

With the help of leading firms in each of the main jurisdictions in Latin America, we have prepared this note setting out the key aspects of the framework in each such jurisdiction. This is obviously a rapidly evolving situation that we are following closely.

How is the applicable law determined by the courts in the case of commercial contracts?

Colombia regulates contract law theory under statutory provisions set forth in the Colombian Civil Code and the Colombian Commercial Code. General principles and rules on contracts, obligations and liability resulting from non-compliance are set forth in the Civil Code, whereas provisions applicable to commercial contracts are regulated under the Commercial Code. Thus, commercial contracts are regulated in the Commercial Code and all aspects that are not expressly regulated thereunder are supplemented by provisions of the Civil Code.

The Commercial Code applies to what is denominated as acts of commerce, which include agreements between corporate entities, banking operations and insurance activities, among others.

In addition, Colombian law follows the principle of "territoriality" of the law, which implies that Colombian law is applicable to: (i) Colombian nationals and foreign parties resident in Colombia (article 18 of the Colombian Civil Code); and (ii) to property located in Colombia or property in which the Colombian State has rights or interests, even if its owners are foreign and reside outside Colombia, without prejudice to the parties' agreement contained in valid contracts executed in a foreign country. However, such contracts will be subject to Colombian law if these have effects in Colombia or affect the interest of the Colombian State (article 20 of the Colombian Civil Code).

Therefore, under Colombian civil law and the Colombian Arbitration Statute, the parties' choice of a foreign law will be upheld only if: (i) the contract is subject to international arbitration; or (ii) the contract is executed and performed in a foreign country.

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According to the Colombian Arbitration Statute (Law 1563 of 2012), a contract is subject to international arbitration if: (i) it contains a valid arbitration clause; and (ii) when one of the following criteria is met:

- The parties to an arbitration agreement have, at the time of the execution of that agreement, their domiciles in different countries;
- The place where a substantial part of an obligation is to be performed or when the place with which the subject-matter of the dispute is most closely connected is situated outside the country in which the parties have their domicile; or
- The dispute submitted to arbitration affects the interests of international trade (which implies cross border transactions of good and services).

If the contract is not subject to international arbitration, the parties' choice of law will be upheld only if the contract is executed and performed in a foreign country, pursuant to the interpretation of article 869 of the Commercial Code.

In this case, Colombian courts maintain jurisdiction over the dispute but will apply the foreign law chosen by the parties, subject to the parties' proof of the foreign law.

In all other cases, Colombian courts and arbitral tribunals will apply Colombian law, regardless of the parties' choice of law.

Are there any statutory provisions relating to *force majeure*?

Under Colombian contract law principles, no person is under the obligation to perform an obligation that is deemed impossible. This principle establishes the basis for the institution of *force majeure* under Colombian regulation. Colombian law contemplates a general statutory provision for *force majeure*, established in article 64 of the Colombian Civil Code, which states that any unforeseeable event or any event that is not possible to resist, shall be interpreted as a *force majeure* or fortuitous case (providing examples such as shipwrecks, earthquakes, imprisonment of enemies and acts exercised by a public authority).

The effect of *force majeure* is that it constitutes an exemption of liability due to the breaking of the causal link between the breach and the party's conduct, resulting in not having to indemnify the affected party for the damages caused by the breach.

For an event to be understood as a *force majeure* and thus limit a party's liability, it needs to be ruled by a competent judge who must determine if such an event was: (i) unpredictable; (ii) irresistible; and (iii) caused by an external event.

The analysis of *force majeure* events must be applied to the particular circumstances of each case, meaning that for a party to invoke *force majeure* to limit its liability, the party must prove that it carried out all activities aimed at preventing the event from happening, but was unable to prevent it, as well as proving that it acted with the level of diligence required to execute its obligations.

Additionally, the difficulty of performance of a specific obligation or the additional amounts incurred in the performance of any obligation, in principle, does not constitute a *force majeure* event. However, these situations may allow the parties to reassess the value of the contract or apply the theory of unpredictability or hardship (*teoría de la imprevisión*).

Under Colombian statutory provisions, parties may regulate the nature of their obligations. In principle, provisions over contractual liability are not imperative (and may be agreed otherwise by the parties). Generally, the occurrence of a *force majeure* event will excuse performance of an obligation unless the parties have specifically agreed otherwise.

Depending on the particular circumstances of a contractual relationship, the existence of the COVID-19 virus could be considered in some cases as an event that constitutes *force majeure*, to the extent that the invoking party can prove that such event prevented it from performing its obligation, and that such event was in fact unpredictable and irresistible. Moreover, it should be noted that the party that invokes *force majeure* in order to excuse its non-performance must demonstrate that it was diligent and therefore took corresponding precautionary measures aimed at resisting and anticipating the event.

In conclusion, each specific case must be studied separately by considering the type of contract and nature of the services that were not performed to determine if the existence of a specific event could be deemed as a *force majeure* event under the specific contract, which could lead to the limitation or exclusion from liability of a party.

How are *force majeure* clauses in commercial contracts applied and interpreted in practice?

As a general rule, *force majeure* clauses excusing a party's non-performance of any obligation may be included in any agreement in order to permit the temporary non-performance or the termination of any contract. Therefore, the performance of a valid obligation may be excused by the existence of *force majeure* unless the contract provides otherwise (that the non-performing party will be liable even under the occurrence of a *force majeure* event).

In general, if the contract provides for *force majeure* as an excuse for non-compliance, the clause will be narrowly construed by the Colombian courts.

The Colombian Civil Code defines *force majeure* generally as an event that is unpredictable and impossible to resist.

Recent court precedents indicate that courts require that the event be both unpredictable and irresistible in order for it to constitute a *force majeure* event and that the party has acted with diligence and care prior to its occurrence. Only under such circumstances will the party be exempted from liability for non-performance of the contract.

However, the application of article 64 of the Colombian Civil Code and the determination of whether a specific event will be considered as *force majeure* will depend on the underlying facts and circumstances of each case.

Finally, it is important to note that in accordance with Colombian law, any situation that may constitute grounds for termination or suspension of a particular contract should guarantee due process for its termination or suspension. These measures are required in order to avoid the violation of the right to due process and in order to prevent any contractual disadvantage that may be deemed an abuse of any of the parties' rights by generating a disadvantage or by affecting the principles of good faith.

In the absence of statutory provisions and/or contractual arrangements on *force majeure*, which instruments are available to avoid the performance of contractual obligations?

There are certain applicable statutory provisions that regulate the effects associated to the non-performance of particular contractual obligations as follows:

Theory of Unpredictability or Hardship (*Teoría de la Imprevisión*)

In the absence of a contractual arrangement of *force majeure*, the parties of a contract could resort to the Theory of Unpredictability or Hardship contained in article 868 of the Colombian Commercial Code.

Under this theory, commercial contracts may be reviewed if supervening and unforeseeable events occur after the execution of the contract that alter or aggravate the conditions for the specific performance of a future obligation of one of the parties.

This doctrine of Theory of Unpredictability or Hardship is based on the underlying principle of *rebus sic stantibus* by virtue of which agreements are concluded with the implied condition that they are binding only as long as there are no major changes to the circumstances which existed at the time of execution.

However, the Theory of Unpredictability or Hardship does not apply automatically. The affected party seeking review or modification of the terms of the contract must prove before a competent judge that:

- The contract is a successive, periodical performance agreement or an agreement in which the parties have altered performance after execution;
- The equilibrium between the rights and obligations initially drawn by the parties was altered;
- That it would be excessively burdensome for the party to perform its contractual obligation under such circumstances;
- That the events which altered the contractual equilibrium were supervening and occurred after the execution of the contract;

- That the events are extraordinary, unforeseeable and cannot be attributed to negligence of the party seeking review;
- Such events were not risks assumed by the party seeking review;
- The performance of the obligation under review is still pending;
- The contract is not aleatory, meaning that its performance is not contingent upon the occurrence of a particular uncertain event beyond the parties' control; and
- The supervening disequilibrium must be serious, essential, enormous or with undoubted significance.

Upon resolving the dispute, the courts or arbitral tribunals have the authority to review or modify the terms of the contract in such a way that the initial equilibrium of the contract can be guaranteed. If the equilibrium cannot be re-established, or performance of the obligation becomes impossible, the courts or arbitral tribunal can declare the termination of the contract.

The Colombian Supreme Court of Justice has stated that the application and effects of the Theory of Unpredictability or Hardship must be construed on a case-by-case basis since there is no general rule regarding the degree of alteration of the initial equilibrium and/or the excessively burdensome performance of obligations.

Reestablishment of economic terms of the contract (*Restablecimiento de la ecuación contractual*)

In government contracts, a contract's financial equation may be altered due to the implementation of new regulation or by the implementation of extraordinary decrees associated with extraordinary circumstances. This implies that these situations may cause the performance of contractual obligations to become more onerous for a party, thus generating a breakdown of the economic balance of the contract. In this case, the reassessment of contractual provisions may be carried out either by means of comprehensive compensation for damages or by placing the party in a point of no loss, recognizing the higher value of its performance.

Exemption of non-performed contract (*Excepción del contrato no cumplido*)

In contracts with reciprocal obligations, as a general rule, the parties must perform their obligations for the contract to be considered duly executed. If one of the parties does not perform its obligation, the other party, by proving that at least it carried out its best efforts to perform its obligations, may abstain from its performance. This exemption expressly implies that none of the parties may be deemed in default in performance of their obligations if the other party does not perform its obligations thereunder or does not carry out its best efforts to do so. This mechanism operates as a judicial defense mechanism, meaning that its certainty can only be declared by a judge in the event of a judicial proceeding.

What else needs to be considered by clients that are party to a contract which is affected by COVID-19?

Under Colombian law, the analysis of whether COVID-19 is a *force majeure* event must be considered separately for each contractual relationship. Additional considerations will depend on the terms of the specific contracts and the particular facts and circumstances of each case, including the specific industry involved.

Since COVID-19 is still developing and its effects are yet to be determined, no court or authority up to this date has concluded that it constitutes an event of *force majeure* in Colombia. In fact, there are no court precedents on whether a pandemic constitutes *force majeure* since an event of this magnitude has never occurred in Colombia.

As of this date, Colombian authorities have taken extraordinary measures such as: (i) suspension of judicial terms; (ii) suspension of notary services and attention of the public; (iii) cancellation of classes in private and public schools and universities; (iv) declaration of public calamity in some cities; and (v) suspension of legislative sessions, all of which can contribute to demonstrate that the event was unforeseen and irresistible.

In fact, on March 17, 2020, the Colombian President declared a State of Economic Emergency based on article 215 of the Colombian Political Constitution, which states that when circumstances disturb or threaten to seriously and imminently disturb the economic, social or ecologic order of the country, or that constitutes public calamity, the President may declare the State of Emergency for periods up to 30 days, without exceeding 90 days in a calendar year.

Parties to an agreement must analyze the possibility of their contractual performance upon COVID-19. The nature of each obligation has to be considered in each case in order to avoid any future liability that may arise, analyzing if the rise of a pandemic disease can or cannot constitute a breach of contract. In any case, parties to a contract are always under the obligation to take all appropriate measures to mitigate damages upon the occurrence of a *force majeure* event and to properly notify the other party of any circumstance which will result in delay performance or non-performance.

Also, it is advisable for parties to analyze any contractual provisions that may describe a procedure that needs to be followed in events of *force majeure* in order to proceed with the suspension of the particular contract or with its eventual termination. However, contracts executed at this time which do not provide for any specific provisions to excuse their non-performance cannot resort to the statutory *force majeure* provision contained in article 64 of the Colombian Civil Code since the event would no longer be unforeseen.

What restrictions do laws of your jurisdiction place on an employer that wants to require employees to work remotely or from home during the COVID-19 outbreak?

As a general rule and under normal circumstances, employers in Colombia must comply with telecommuting (*teletrabajo*) requirements that allow for employees to work remotely. Allowing an employee to work remotely means that its employer must comply with the following minimum requirements: (i) granting a monthly allowance to contribute to the employee's connection and utilities expenses; (ii) checking the work site to verify the health and safety at work conditions; and (iii) providing work tools necessary to perform their work remotely.

Given the COVID-19 situation, the Colombian Ministry of Labor along with other authorities recently issued circulars 17, 18 and 21 of 2020, in which they have highly encouraged employers to use a work-from-home strategy to protect employees from the virus. However, under Circular 21, the Ministry of Labor expressly stated that working remotely during the COVID-19 crisis will not constitute a telecommuting status for employees as long as it is a temporary and exceptional measure. Therefore, as long as working remotely during the COVID-19 outbreak is deemed by the Colombian Ministry of Labor as a temporary and exceptional measure, employers are not under the obligation to provide their employees with the minimum requirements and tools that applicable labor law requests under a telecommuting status.

May employers in your jurisdiction require employees to use their vacation time during a COVID-19 outbreak?

In Colombia, employers can require their employees to use accrued vacation with a 15-day prior notice. Given that the COVID-19 situation is expected to last at least for a couple more weeks, if the employer decides to send its employees on vacation leave, it is advisable that the employer provide such 15-day prior notice to each employee as soon as possible.

However, note that Colombian labor law allows employers to skip the 15-day prior notice to the extent that the employer and each employee expressly agree on the date in which the employee is allowed to enjoy the accrued vacation days.

Are there any restrictions on putting employees on unpaid leave for limited periods of time during the COVID-19 outbreak?

In Colombia, unpaid leave cannot be unilaterally decided by the employer. These situations require an express agreement between the employer and the employees as during this period no salary or fringe benefits will be paid.

Section 1 of article 51 of the Colombian Labor Code states that in a *force majeure* event/act of God scenario, employment agreements can be suspended with prior notice to the Ministry of Labor. In such case, no salary payment will be made. However, under Colombian labor law, the existence of a *force majeure* event cannot be applied to all industries, and when it is available, it requires

evidence of the irresistibility and unpredictability of the events that led to suspension of the employment agreement. Therefore, a case-by-case analysis must be made before adopting this type of measure.

Are there any other key considerations for foreign companies operating in your jurisdiction relating to COVID-19?

Corporate considerations

The Colombian Ministry of Commerce, Industry and Tourism (*Ministerio de Comercio, Industria y Turismo*) recently issued Decree 398 of 2020, under which it regulated, in light of the upcoming ordinary meetings of corporate bodies that must be held prior to March 31, the rules required for conveyance, quorum and required majorities for corporate bodies, as well as the regulation for remote meetings, applicable to all corporations in Colombia.

This Decree introduces a series of temporary amendments applicable to remote meetings. by regulating article 19 of Law 222 of 1995, which applies to meetings that allow the physical and virtual presence of members of any ordinary shareholders assembly or meeting of the board of directors. Also, the Decree allows for companies to convey to members of ordinary assemblies up to one day before the actual occurrence of the initially conveyed meeting that the meeting is to take place by means of a simultaneous communication or as a remote meeting.

In addition to the foregoing, the Colombian Superintendency of Corporations (*Superintendencia de Sociedades*) recently modified External Communication (Circular Externa) No. 201-000008 dated November 22, 2019, indicating that as a precautionary measure, the date set for the performance of the statutory obligation to file financial statements before the Superintendency of Corporations would be extended for all corporations.

Data Protection

The Colombian Government, by means of the Ministry of Health, under communication dated March 18, 2020, indicated that in order to prevent the nationwide spread of COVID-19, information of patients diagnosed with COVID-19 would be contemplated under data protection regulation as public information. In order to prevent future propagation of the disease, the recollection of sensitive information from employers could be carried out without their express authorization, including the request for information related to prior international travels, health and possible contact with infected persons. Such a request for information must be limited exclusively to determining if a particular employee may possibly be affected by the virus or has possibly had any contact with it.

Jaime Cubillos
Partner
Posse Herrera Ruiz
jaime.cubillos@phrlegal.com

Carolina Posada
Partner
Posse Herrera Ruiz
carolina.posada@phrlegal.com

Conrado Tenaglia
Partner
Linklaters
conrado.tenaglia@linklaters.com

Matthew Poulter
Partner
Linklaters
matthew.poulter@linklaters.com

Gabriel Silva
Partner
Linklaters
gabriel.silva@linklaters.com

Alejandro Gordano
Counsel
Linklaters
alejandro.gordano@linklaters.com

Christian Albanesi
Head of Latin American Arbitration
Linklaters
christian.albanesi@linklaters.com

For general enquiries please contact

Linklaters LLP
1345 Avenue of the Americas
New York, NY 10105

Tel: (+1) 212 903 9000
Fax: (+1) 212 903 9100

linklaters.com