

COVID-19: Contract and employment issues in Argentina

March 2020



This guide highlights key contractual, labor and other considerations that may affect business operations in Argentina 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?

Articles 2605, 2650 and 2651 of the Argentine Commercial and Civil Code (“CCC”) allow the contracting parties to decide on choice of forum and applicable law.

Pursuant to Article 2651, the law chosen by the parties governs its validity, nature, effects, rights and obligations. Consequently, courts will generally enforce choice of law provisions.

However, Article 2651 also provides that the principles of Argentine public policy (“orden público internacional”), the Argentine overriding mandatory rules (“normas internacionalmente imperativas”) or overriding mandatory rules of third countries with relevant economic contacts with the case will be applicable to the contractual relationship between the parties, regardless of the foreign law chosen to govern an agreement.

Further, Article 2651 provides that agreements executed in Argentina to circumvent overriding mandatory rules of a third country that are necessarily applicable to the case will have no effect.

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

Section 1730 of the CCC defines *force majeure* as an unforeseeable event that is beyond the reasonable control of the parties. The CCC provisions refer to unforeseeable events and *force majeure* concepts as synonyms. Under this provision, the non-performing party will not be liable for damages and interest caused to the counterparty because of lack of performance of the obligation.

Legal scholars have identified some requirements under Argentine law for *force majeure*, including that the event must be:

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- > Unforeseeable, taking into account the nature of the expected performance, the parties' intentions (representations) and relevant circumstances;
- > A total, unexpected impossibility of reasonable performance;
- > Currently occurring, therefore excluding potential facts; and
- > Beyond the control of the parties, meaning that it must not be connected in any way with the party claiming *force majeure*.

Section 1733 of the CCC provides that, even in the event of *force majeure*, the non-performing party will be held liable if:

- > The parties have agreed on contractual performance by a contractual provision even in case of such event;
- > If by a legal provision, the non-performing party is not exonerated from liability in such event; or
- > If the event would have occurred because of the non-performing party's fault or would have occurred when already in default, even if the default had not been motivated by such fortuitous event or *force majeure*.

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

Force majeure clauses are narrowly construed under Argentine law and questions relating to the interpretation of such clauses will depend on the specific contractual language and the underlying facts and circumstances.

In order to rely on a *force majeure* clause, the non-performing party must demonstrate that the event was:

- > Unforeseeable, taking into account the nature of the expected performance, the parties' intentions (representations) and relevant circumstances;
- > Unexpected, by showing the impossibility of reasonable performance; and
- > Not connected in any way with the party claiming *force majeure* (for example, a strike restricted to the personnel of the non-performing party cannot be the basis for reliance on *force majeure*, while a general strike or a revolutionary strike could).

Although certain *force majeure* clauses may specifically identify epidemics or pandemics as events that would excuse a party's performance, there is little precedent in Argentina examining such provisions. With respect to COVID-19, in the event of government-imposed quarantines or other restrictions, *force majeure* clauses with language relating to "acts of government" could be invoked to excuse a party's non-performance, depending on the specific circumstances. Otherwise, a broad catch-all provision may apply, subject to the limitations discussed above.

Invoking a *force majeure* clause may allow either the non-performing party or both parties to terminate the entire agreement. Alternatively, parties may

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temporarily suspend performance of the contract, and limit the scope and duration of the suspension, in the hopes that the *force majeure* event can be resolved, and the contract can remain in force. Because of the potentially drastic consequences of invoking *force majeure*, parties may wish to explore alternative options to maintain the contract and the business relationship.

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

In the absence of a *force majeure* clause or if the parties have agreed to perform obligations by a contractual provision even in case of such event, the parties could attempt to rely on the doctrines of impossibility or frustration of purpose to excuse their contractual performance. These doctrines can be raised either as a defense in a pending proceeding or via a judgment action, where the party asserting the defense seeks a ruling on whether contract performance may be excused.

Impossibility

Section 1732 of the CCC provides that the non-performing party will not be liable to the counterparty due to lack of performance of the obligation resulting from an objective and absolute impossibility that is not attributable to the non-performing party.

The impossibility must be extraordinary, beyond the control of the parties and absolute (i.e., barring any possibility of performance, excluding the application of impossibility if the performance could have been achieved by extraordinary means and costs).

Frustration of purpose

Section 1090 of the CCC allows an aggrieved party to terminate the entire agreement due to frustration caused by an extraordinary event that alters the underlying reasons for performing the contract. Although literal performance under the contract is still technically possible, the frustration of the purpose of the contract would leave no reason to want performance.

The frustration must be substantial, and the triggering event must be extraordinary, unforeseeable and beyond the parties' control.

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

Generally, a party seeking to rely on a *force majeure* clause must give proper and timely notice of the *force majeure* event (subject to the terms of applicable contract or by provision of Section 1078 of the CCC). Notice provisions may require parties to provide additional information, such as specific details about the event, its effects and its expected duration.

In any case, the aggrieved party may have a duty to use reasonable efforts to mitigate the effects of a *force majeure* event, in light of the bona fide principle

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governing Argentine Contract Law (Section 9 and 961 of the CCC), which requires good faith efforts to amend or modify the contract to compensate for the effects of a *force majeure* event.

Furthermore, Section 1011 of the CC establishes a special duty of cooperation in long-term contracts, with respect to the reciprocal commitments, by giving the other party a chance to renegotiate in good faith.

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?

There are no legal restrictions. As a matter of fact, emergency resolutions issued as a consequence of the COVID-19 outbreak encourage all employers to adopt temporary home office schemes as far as possible. The implementation of these schemes shall not, in principle, lead to salary reductions for employees.

Within the home office work scheme, employers are only required to provide notice to their occupational hazard risk insurance companies of the employees assigned to this scheme, their domiciles and their expected working hours.

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

Yes, provided that the offer is accepted by the employees in which case they can use their vacation time immediately.

If the employer mandates use of vacation time in a unilateral manner, it must notify each employee of the date on which the vacation will commence, at least 45 days in advance. The general rule is that this vacation assignment can only be made for the period between October 1 and April 30.

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

Suspending employment contracts without pay is difficult under Argentine law. Generally, doing so would require either:

- > Agreement with the employee unions based on financial crisis grounds or *force majeure*: These agreements must be approved by the Secretariat of Labor and may not exceed 75 days in a given year. They are also limited to a minor percentage of the payroll (between 5% and 15% depending on the number of employees) and during the suspension, a negotiated amount with non-salary compensation is usually paid.
- > Use of the Crisis Prevention Procedure (“CCP”): There are no restrictions on the percentage of suspensions (or possibly dismissals with payment of reduced compensation) that an employer may carry out but, the CCP procedure is a complex process that is rarely authorized by the Secretariat of Labor. Furthermore, approval by the Secretariat of Labor does not guarantee that there will not be subsequent judicial claims by affected employees.

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

Since the outbreak started, several emergency regulations were issued by the Executive Branch establishing (i) exemptions to employees in at-risk groups (over 60 years old, pregnant or immunosuppressed) from performing tasks on the employer's premises; (ii) special leave for employees who must care for their children due to the nationally imposed school suspension; and (iii) mandatory exemption from performing tasks for 14 days for employees who have re-entered the country from other countries considered at high risk of contagion (currently China, Japan, South Korea, the United States, Brazil, Chile, China, Iran and all of Europe) or have had close contact with possibly infected persons.



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