

# OPINIO JURIS *in Comparatione*

## Studies in Comparative and National Law

Impact of Coronavirus Emergency on Contract Law

Special Issue

The Impact of Covid-19 in Mexican Contract Law  
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# The Impact of Covid-19 in Mexican Contract Law

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## I. Introduction

This report will briefly examine the impact that the pandemic of Covid-19 is having on Mexican contract law in three levels: business to business (B2B), consumer to consumer (C2C) and business to consumer (B2C) transactions. Section II of this report will focus on new regulations enacted, particularly from some administrative agencies, as well as measures taken, in particular by banks and financial institutions, to deal with the circumstances brought by Covid-19 and their possible impact on current contracts<sup>1</sup>. And finally, section III will analyze whether Mexican contract law, in its different statutes and case law, could be applied to deal with those new circumstances.

The health crisis is putting pressure on Mexican law aiming at addressing impediments to perform existing contracts. Mexican law endorses the principle of *pacta sunt servanda*, whereby contracts must be followed irrespective of any change in circumstances affecting their performance. However, Mexican regulatory agencies and important private stakeholders have issued different directives and guidelines that would allow the postponement or modification of some current contractual terms. Similarly, some rules of exception exist, under Mexican contract law, that may release one party from liability due to impediments to perform under doctrines of force majeure, fortuitous event or hardship.

## II. Administrative regulations enacted and private stakeholders' initiatives to encourage or force contract performance in times of Covid-19

Except for the State of *Baja California Norte*<sup>2</sup>, there has not been statutory law changes in Mexico to deal with the circumstances brought by Covid-19. This lack of legislation has been contrasted with other legal systems<sup>3</sup>. However, some regulatory agencies have enacted special directives that will be examined relevant to the performance of existing contracts. Also, some important private stakeholders' in Mexico's economy have voluntarily made concessions in order to promote contract performance. We will analyse these public and private measures in the following subsections.

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<sup>1</sup> The report is updated until 15 July, 2020.

<sup>2</sup> Baja California Norte's State Congress approved a reform in a transitory article 1986 of the Civil Code of said state, to establish the suspension of payments in housing and business leases, during the months of April and May 2020.

<sup>3</sup> Lexlatin, 'Resumen Legal Covid-19 Latinoamérica: 13 de julio de 2020', <<https://lexlatin.com/noticias/medidas-legales-covid-19-latinoamerica>> accessed 14 July 2020.

## 2.1. The main Federal Directive by the Federal Health Secretariat

By Directive dated 24 March 2020, the General Health Secretariat considered the epidemic caused by Covid-19 in Mexico as a serious disease of priority and enacted different measures of preparation, prevention and control of the epidemic<sup>4</sup>. The General Health Secretariat announced that its Department of Health would be responsible for defining the modalities, dates and territorial cooperation with other Secretariat of the Federal Government and the Federal Legislative and Judicial Branches. In addition, it urged the governments of the 32 Mexican States to establish hospital reconversion plans and immediate expansion of capacity, in order to guarantee timely attention to patients in need of hospitalization. It is noted that in Mexico, the Department of Health is the federal public administration unit that plays the most important role in contingencies and is entrusted with the vast majority of decisions.

On 30 March 2020, the Mexican Federal Government declared a “Health Emergency due to Force Majeure” caused by Covid-19<sup>5</sup>. It confirmed that the Department of Health of the Health Secretariat was to be responsible for determining all actions that may be necessary to address the emergency<sup>6</sup>. Since then, the country has transited through all three phases of contagion and the number of infections and death continues to increase<sup>7</sup>. Among the measures for contenting the spread of Covid-19, the Federal Government announced the start of a contingency program called *Jornada de la Sana Distancia* (healthy distance journey)<sup>8</sup>. This program provides for a temporary suspension of non-essential activities of the public, social and private sectors, during the period from 23 March until 15 June 2020<sup>9</sup>. As in other countries, this contingency program has caused a considerable deficit in the

<sup>4</sup> Official Journal of the Federation ‘Acuerdo por el que el Consejo de Salubridad General reconoce la epidemia de enfermedad por el virus SARS-CoV2 (Covid-19) en México, como una enfermedad grave de atención prioritaria, así como se establecen las actividades de preparación y respuesta a dicha epidemia’, <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590161&fecha=23/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590161&fecha=23/03/2020)> accessed 16 April 2020.

<sup>5</sup> Official Journal of the Federation ‘Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-CoV2 (Covid-19)’, <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590745&fecha=30/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020)> accessed 16 April 2020.

<sup>6</sup> Inter-American Human Rights Commission, ‘Resolución 1/2020 Pandemia y Derechos Humanos en las Américas’ <<https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf>> accessed 17 April 2020; indicates that in terms of containment measures to confront and prevent the effects of the pandemic, the IACHR has observed that some rights have been suspended and restricted, and in other cases ‘states of emergency’, have been declared through presidential decrees in order to protect public health and avoid an increase in contagion. In addition, measures of various kinds have been established that restrict the rights of freedom of expression, the right of access to public information, personal freedom, the inviolability of the home and the right to private property; and it has been required to use surveillance technology to track the spread of coronavirus, and the storage of data on a massive scale.

<sup>7</sup> Data as of 15 July 2020, see Government of Mexico, ‘Covid-19 México- Mapa Municipal’ <<https://coronavirus.gob.mx/fHDMMap/mun.php>> accessed 14 July 2020.

<sup>8</sup> Government of Mexico ‘Jornada Nacional de Sana Distancia’ <[https://www.gob.mx/cms/uploads/attachment/file/541687/Jornada\\_Nacional\\_de\\_Sana\\_Distancia.pdf](https://www.gob.mx/cms/uploads/attachment/file/541687/Jornada_Nacional_de_Sana_Distancia.pdf)> accessed 18 April 2020.

<sup>9</sup> Forbes, ‘Se extiende cuarentena por coronavirus hasta el 30 de mayo: López-Gatell’ <<https://www.forbes.com.mx/noticias-cuarentena-hasta-30-mayo-coronavirus-covid-19/>> accessed 17 April 2020.

economy; companies have gone bankrupt or/and breached their contracts due to cash flow problems and unexpected expenses.

The catalogue of essential activities included only basic supplies and inputs, private and public security, financial and collection systems, public transport and telecommunications, shelters and emergency services, and medical and funeral services<sup>10</sup>. Most micro, small and medium businesses were unable to operate during the contingency, and many people had to stay at home<sup>11</sup> and comply with health measures. This caused both temporary and permanent problems, since a large part of employment and economy in the country has already been suffering the consequences of economic recession<sup>12</sup>. Consequently, on 14 May 2020, the Federal Government issued a resolution establishing a strategy for the reopening of social, educational and economic activities, through a system of ‘traffic lights’ by regions to weekly evaluate the epidemiological risks related to the reopening of activities in each state<sup>13</sup>. However, the possibility to reopen the economy and to what extent to do so is currently being discussed, and new emergency measures are being considered to combat the spread of the virus. For example, the implementation of an ‘emergency button’ by the governor of the State of Jalisco, which would stop all economic activities in the State for a 14-day period if hospital occupancy reaches 50%<sup>14</sup>.

## 2.2. Real estate and business loan contracts with banks

In April 2020, Mexico’s National Banking and Securities Commission (CNBV) and the main banks and financial institutions agreed on the issuance of provisional measures to address the contingency caused by Covid-19 on loans. Under the package of measures, banks agreed to the partial and/or total deferral of capital and interest payments for up to four months, with the possibility of extending it for an additional two months, with respect to the total amount due including accessories. In addition, balances would be frozen with-

<sup>10</sup> Official Journal of The Federation, ‘Acuerdo por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2’ <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590914&fecha=31/03/2020&print=true](https://www.dof.gob.mx/nota_detalle.php?codigo=5590914&fecha=31/03/2020&print=true)> accessed 17 April 2020.

<sup>11</sup> Department of Health, ‘Quédate en casa’ <<https://coronavirus.gob.mx/quedate-en-casa>> accessed 17 April 2020.

<sup>12</sup> National Institute of Statistics and Geography, ‘INEGI presenta resultados de la Encuesta Nacional sobre Productividad y Competitividad de las Micro, Pequeñas y Medianas Empresas (ENAPROCE) 2018. Comunicado de prensa núm. 448/19. Septiembre 2019’, <<https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2019/especiales/ENAPROCE2018.pdf>> accessed 17 April 2020.

<sup>13</sup> Official Journal of the Federation, ‘ACUERDO por el que se establece una estrategia para la reapertura de las actividades sociales, educativas y económicas, así como un sistema de semáforo por regiones para evaluar semanalmente el riesgo epidemiológico relacionado con la reapertura de actividades en cada entidad federativa, así como se establecen acciones extraordinarias’, <[https://dof.gob.mx/nota\\_detalle.php?codigo=5593313&fecha=14/05/2020](https://dof.gob.mx/nota_detalle.php?codigo=5593313&fecha=14/05/2020)> accessed 14 July 2020.

<sup>14</sup> El Informador, ‘El gobernador activará el Botón de Emergencia’, <<https://www.informador.mx/ideas/El-gobernador-activara-el-Boton-de-Emergencia-20200714-0025.html>> accessed 14 July 2020.

out interest as long as the credit was classified as current and there was no delay in the monthly payments<sup>15</sup>.

The supporting measures were to be applicable to housing loans with mortgage as security, revolving and non-revolving loans addressed to individuals, such as automobile loans, personal loans, payroll loans, credit cards and microcredits<sup>16</sup>; as well as business loans addressed to legal entities or individuals with business activities in different modalities, including agricultural ones<sup>17</sup>. On the other hand, loan contracts with public housing organisms such as INFONAVIT continue to offer credits with the aim of boosting the real estate market; the possibility of contracting exists, however derived from the uncertainty in the general economy, there was reticence from people to hire new loans<sup>18</sup>.

The above measures proved to be necessary in light of the already difficult economic scenarios forecasted for Mexico. Mexico is expected to experience an economic drop of 10.5% in its GDP by the end of 2020 by the International Monetary Fund<sup>19</sup>. Mexico's Federal Government has invested a very low percentage of its annual budget in a containment plan to tackle the health crisis<sup>20</sup>. Therefore, even with postponement of interest payments in housing and business, many people in this country will be unable to meet their contractual obligations in the near future.

### 2.3. Housing and business lease agreements

Many parties to a lease contract, both in C2C and B2B relationships, have been seriously affected during the health crisis. No specific legislative measures have been taken by the Federal or State Governments to support or to stabilize the rental real estate market dur-

<sup>15</sup> Government of Mexico, 'Medidas implementadas por diversas autoridades financieras en beneficio de la situación económica de los usuarios de Productos y Servicios Financieros', <<https://www.gob.mx/condusef/articulos/diversas-autoridades-financieras-implementan-medidas-en-beneficio-de-los-usuarios-de-productos-y-servicios-financieros?idiom=es>> accessed 18 April 2020.

<sup>16</sup> Official Journal of The Federation, 'Acuerdo por el que se adicionan los transitorios de las Reglas de Operación del Programa de Microcréditos para el Bienestar 2020', <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5591656&fecha=15/04/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5591656&fecha=15/04/2020)> accessed 18 April 2020.

<sup>17</sup> Mexican Bank Association, 'Medidas de Apoyo en la Banca Mexicana en beneficio de acreditados afectados por COVID-19', <<https://www.abm.org.mx/sala-de-prensa/comunicados-prensa.htm>> accessed 17 April 2020.

<sup>18</sup> Official Journal of The Federation, 'Reglas de Operación del Programa de Vivienda Social 2020' <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5585435&fecha=04/02/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5585435&fecha=04/02/2020)> accessed 18 April 2020; CONEVAL highlights that approximately 73.6 million Mexicans are practically excluded from the formal housing market by not receiving household income equivalent to more than five minimum wages.

<sup>19</sup> International Monetary Fund, 'World Economic Outlook Update, June 2020', <<https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020>> accessed 14 July 2020.

<sup>20</sup> El Financiero, 'Gobierno triplica gasto en salud para atender COVID-19', <<https://www.elfinanciero.com.mx/economia/gobierno-triplica-gasto-en-salud-para-atender-covid-19>> accessed 14 July 2020. However, it still remains among the 5 countries in Latin America with the least resources allocated to contain the crisis by Covid-19. See El Financiero, 'México está entre los 5 países de Latinoamérica que menos recursos destina a contener crisis por Covid-19', <<https://www.elfinanciero.com.mx/economia/mexico-esta-entre-los-5-paises-de-latinoamerica-que-menos-recursos-destina-a-contener-crisis-por-covid-19>> accessed 14 July 2020.

ing the pandemic<sup>21</sup>; except for Congress in the State of Baja California Norte, where article 1986 of the local Civil Code was amended in order to establish the suspension of payments in housing and business leases during the months of April and May 2020<sup>22</sup>.

The lack of measures in the rental market has caused a considerable deficit in the economy. Companies have gone bankrupt or temporarily closed their businesses after firing some or all of its employees. Some businesses have identified the fixed rental costs of their premises and the lack of cash flow from sales as the major elements that cause them to breach their payment obligations under lease contracts. The **excessive onerosity** in performing the payment obligation under many lease contracts could be assessed pursuant to State civil codes' provisions on hardship. However, most State courts remain closed from mid-March to this date, making it impossible for affected parties to seek remedies, renegotiation or adaptation of those lease contracts in State statutory laws.

In practice, tenants have appealed to the magnanimity of landlords to renegotiate their lease agreements on the basis of the force majeure or acts of God circumstances brought by the spread of Covid-19 and the consequential measures taken by the government to protect the health of the population. Many tenants, advised by their lawyers, have relied on existing case law, specifically *tesis aislada* number 2020827 by a Collegiate Circuit Court, that upheld the possibility in State civil codes to terminate the lease without liability for the parties or to request a reduction of rents in cases of acts of God or force majeure; however, such precedent is not yet binding in other courts<sup>23</sup>.

#### 2.4. Medical and Unemployment Insurance Agreements

Insurance contracts are regulated in Mexico by the Insurance Contract Act. Due to the fact that about half of Mexico's population lives in poverty<sup>24</sup>, the standard cost of medical and

<sup>21</sup> El Sol de México, 'Buscan dar prórroga a renta habitacional y empresarial ante Covid-19: Sheinbaum' <<https://www.elsoldemexico.com.mx/metropoli/cdmx/buscan-dar-prorroga-a-renta-habitacional-y-empresarial-cdmx-ante-covid-19-coronavirus-claudia-sheinbaum-5051140.html>> accessed 18 April 2020; the Head of Government of Mexico City, called on the landlords to make extensions at these times when people need them and to allow people and companies not to have this additional pressure to what is being experienced by the lower income that many families are receiving because of the Coronavirus: .

<sup>22</sup> Congress of Baja California, Legislative Branch, 'Decreta Congreso suspender obligaciones de pago de arrendamiento de vivienda y negocios de servicios al público para los bajacalifornianos', <<https://www.facebook.com/congresobc.poderlegislativo/photos/a.523519737768139/2819191394867617/?type=3>> accessed 18 April 2020.

<sup>23</sup> Semanario Judicial de la Federación, 'Arrendamiento Inmobiliario. La acción de rescisión procede sin responsabilidad para ninguna de las partes cuando la cosa arrendada se ve afectada por un hecho fortuito o causa de fuerza mayor', Tribunales Colegiados de Circuito, Tesis Aislada 2020827, Libro 71, October 2019, Tomo IV. <[<sup>24</sup> With some 120 million inhabitants, official numbers from 2018 indicate that there are 52.4 million people living in poverty in Mexico and 9.3 million in extreme poverty. See Consejo Nacional de Evaluación de la Política de Desarrollo Social, 'Pobreza en México', <<https://www.coneval.org.mx/Medicion/Paginas/PobrezaInicio.aspx>> accessed 14 July 2020.](https://sjf.scjn.gob.mx/sjfsist/paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=arrendamiento%2520inmobiliario.%2520Caso%2520fortuito&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2020827&Hit=1&IDs=2020827&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=> accessed 18 April 2020.</a></p>
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unemployment insurance is not affordable for all citizens. In fact, a low percentage of the population holds a private health insurance<sup>25</sup>. Still, on 26 March 2020, the National Insurance and Bonding Commission (CNSF) and the Mexican Insurance Institutions Association (AMIS) entered into an agreement whereby an extension of deadlines for compliance with AMIS' regulatory obligations was granted by the CNSF so that the former could focus on the attention of their policy holders during Covid-19 times. CNSF granted several concessions to AMIS in return for AMIS' inclusion of coverage of illness derived from the Covid-19 in their insurance policies and the extension of deadlines for the payment of insurance fees by loyal and vulnerable policyholders without penalty or cancellation of policies<sup>26</sup>.

On 31 March 2020<sup>27</sup>, CNSF released a series of recommendations to insurance companies aiming the continuing of their role to support the economy during the Covid-19 pandemic. CNSF requested insurance companies to stop any payment of gains and profits to their shareholders, as well as any mechanism that would entail a transfer of capital benefits to them or an irrevocable commitment to pay any amount for the fiscal years 2019 and 2020, including the distribution of reserves, or to carry out share buybacks or any other mechanism aimed at rewarding shareholders. It is important to mention that such guidelines are not mandatory; therefore, it is up to the insurance companies to follow the suggestions made by the Commission.

Upon CNSF's recommendation, some insurance companies announced a full coverage for medical expenses caused by Covid-19, except if the policyholder would move to a place considered a State of Emergency by the World Health Organization<sup>28</sup>. Others announced that they would cover the illness caused by Covid-19 but subject to the insurance plan contracted by the policyholder, which could have been of multiple costs and categories<sup>29</sup>. In conclusion, CNSF has offered different concessions to insurance companies in consideration of Covid-19 being covered in individual policies. However, the current eco-

<sup>25</sup> Puentes-Rosas, E., Sesma, S., Gómez-Dantés, O. 'Estimación de la población con seguro de salud en México mediante una encuesta nacional', *Salud Pública de México*, <<http://saludpublica.mx/index.php/spm/article/view/4685/5157>> accessed 14 July 2020.

<sup>26</sup> Government of Mexico, 'Comunicado No. 30 CNSF informa facilidades regulatorias temporales para instituciones de Seguros por Contingencia del Covid-19', <<https://www.gob.mx/shcp/prensa/comunicado-no-030-cnsf-informa-facilidades-regulatorias-temporales-para-instituciones-de-seguros-por-la-contingencia-del-covid-19>> accessed 18 April 2020.

<sup>27</sup> Government of Mexico, 'Comunicado No. 032 CNSF informa las recomendaciones realizadas a Instituciones de Seguros y de Fianzas derivadas de la contingencia Covid-19', <<https://www.gob.mx/shcp/prensa/comunicado-no-032-cnsf-informa-las-recomendaciones-realizadas-a-instituciones-de-seguros-y-de-fianzas-derivadas-de-la-contingencia-covid-19>> accessed 18 April 2020.

<sup>28</sup> For instance, Allianz Mexico, AXA, METLIFE, PAN-AMERICAN and *Plan Seguro*, see Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <[https://www.gob.mx/cms/uploads/image/file/576905/APOYO\\_ASEGURADORAS\\_8\\_abril.jpg](https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg)> accessed 17 April 2020.

<sup>29</sup> For instance, on the other hand, the insurance companies Preve Seguros, *Seguro Ve Por Más*, *Seguro Integral Salud Nova*, *Seguros Monterrey*, *Seguros Sura* and Zurich, see Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <[https://www.gob.mx/cms/uploads/image/file/576905/APOYO\\_ASEGURADORAS\\_8\\_abril.jpg](https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg)> accessed 17 April 2020.

conomic recession continues to be an obstacle for the access to high quality health services. Most people in Mexico hold public health insurance. In 2018, around 42.2 percent of the Mexican population was covered by the public health insurance program called “*Seguro Popular*”, while almost 37 percent were insured with the Mexican Social Security Institute (IMSS), including its “*Prospera*” program. This public health insurance is, nevertheless, insufficient to protect the health of the population.

### 2.5. Domestic service contracts

In Mexico, persons who carry out paid care, cleaning, assistance or any other activity inherent to a household on a permanent basis are entitled to the benefits and rights afforded under the Federal Labour Act, including a written collective labour contract, access to medical services by the IMSS and support for housing by the Workers’ Housing Fund Institute, etc. In addition, persons who provide support for household cleaning only sporadically and occasionally must sign a domestic service contract, which is regulated by section 2,605 of the local State civil codes.

The Directive<sup>30</sup> and the Decree<sup>31</sup> of 24 March 2020 contained rules for the prevention of Covid-19 affecting domestic workers and providers of domestic services. The rules provide for the temporary suspension of activities involving the transit or displacement of persons, mainly those who are 65 years old, pregnant women or women who are breastfeeding, and who suffer from chronic diseases such as high blood pressure, pulmonary disease, renal failure, lupus, cancer, diabetes *mellitus*, obesity, liver or metabolic failure, heart disease, or any disease or drug treatment that suppresses their immune system. It should be mentioned that while these rule are applicable to persons engaged in other types of activity, domestic helpers are mostly exposed when travelling on public transport and are required to come into contact with surfaces that could contain the virus.

The underlying problem with this rule is that it cannot be easily enforced against employers. In Mexico, the labour or civil relations for this type of activity are rarely formalised in a document with evidential value. Sometimes, no reliable evidence exists to prove the scope or terms of the labour or service relationship. On this matter, empirical experience has shown that during the pandemic transit restrictions, some vulnerable household workers continue to attend their jobs fearing to lose them in case of absence, though such an absence would be justified under the Government’s directive and decree. On the other hand, some employers simply dispense with the services of their domestic employees fear-

<sup>30</sup> Official Journal of The Federation, ‘Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (Covid-19)’, <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590339&fecha=24/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590339&fecha=24/03/2020)> accessed 16 April 2020.

<sup>31</sup> Official Journal of The Federation, ‘Decreto por el que se sanciona el Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (Covid-19)’, <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590340&fecha=24/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590340&fecha=24/03/2020)> accessed 18 April 2020.

ing to get infected by them, suspending their payment obligations at will or because the employers had also been economically affected by the pandemic.

### III. General Contract Law

The Mexican Government's Declaration of Health Emergency due to Force Majeure meant that many businesses, channels of communication, the transport of goods and other society's stakeholders would temporary stop, or at least slowdown, their activities.<sup>32</sup> Contracts, which performance was expected to take place in the weeks or months to come after such Declaration, were affected by uncertainty. Jurists in the country, as elsewhere as around the world, immediately focused their attention at the provisions on impediments to perform in different statutory laws and the scared public precedents on the matter. In this section, we will present the current rules that govern unexpected impediments and change of circumstance in the performance of contracts in Mexico and their potential application in times of Covid-19. There are four different layers of statutes relevant to this question in Mexico, which application depends on the type of parties involved, either Consumer to Consumer (C2C), Business to Business (B2B), Business to Consumer (B2C) or international traders. We will address them in turn.

#### 3.1. C2C domestic contracts and impediments to perform

Mexico is a Federal Republic composed of 32 independent States<sup>33</sup>. Each State of the Federation has an exclusive prerogative to legislate on civil matters, including C2C contract law, family law, property law, personal status, etc., through their own Civil Code<sup>34</sup>. For instance, contracts of lease between a landlord who may not be constantly in the leasing business and a tenant of property for personal or family use is considered a C2C contract governed by a local Civil Code. The same applies to the sale of land or goods between two individuals who are not regularly in the real estate business or trade for profit. The State civil codes in Mexico contain general provisions on the law of obligations and govern different types of contracts like sale, lease, turnkey, barter, service, etc.

All States' Civil Codes contain the traditional rule on force majeure and fortuitous event that excuse a party from liability due to impossibility to perform its obligations. For instance, Article 2111 of the Civil Code for the State of Mexico City provides that "no party is bound to perform in case of fortuitous event, except when it has contributed to it or

<sup>32</sup> Official Journal of the Federation 'Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-CoV2 (Covid-19)', <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590745&fecha=30/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020)> accessed 16 April 2020.

<sup>33</sup> Mexico City is the Capital of Mexico, where the Government hosts the powers of the union, that is the executive, legislative and judicial branches. Political division of Mexico consists of 32 states.

<sup>34</sup> In Mexico there are as many civil codes as Federated States.

when it has expressly accepted such risks or when the law imposes such risks on it”<sup>35</sup>. This provision was influenced by former Article 1148 of the French Civil Code of 1804<sup>36</sup>. In addition, Article 2431 of the Civil Code for the State of Mexico City provides that “[i]f, by fortuitous event or force majeure, the tenant is totally prevented from using the leased object, no rent will be incurred for the duration of the impediment, and if it lasts more than two months, he may request the termination of the contract”.

In view of the lack of definition of “fortuitous event” and “force majeure” in these and similar statutory provisions, Mexican courts have been drawing the contours of these notions throughout the years. Today, there is consensus that “fortuitous event” and “force majeure” are synonymous to the extent that both relate to an absolute impossibility to perform since “it is not enough that performance of obligations is made more difficult”<sup>37</sup>.

In that regard, Mexican courts have considered that:

“[i]rrespective of the doctrinal understanding that may be adopted regarding the concepts of force majeure and fortuitous event, it cannot be denied that their essential elements and their effects are the same. They refer to incidents of the nature or human conduct, unknown by the debtor, that affect him in his legal relationships; that prevent him, temporally or definitively, to perform, partially or totally, an obligation; being such fact non-imputable, directly or indirectly, to his fault, and which effects cannot be avoided with the means that his social environment would provide him with, in order to prevent the event or to oppose it and resist it”<sup>38</sup>.

Mexican law requires that the impossibility appears after the formation of the contract and from an unforeseeable event<sup>39</sup>. This means that if the performance of the obligation was already impossible before the contract’s formation, the rule of fortuitous event or force majeure does not apply but rather that on initial impossibility that renders the contract void. It also means that within the ordinary understanding of an average man, it was not possible to foresee at that time that the event would occur. In addition, it must be an event insurmountable or irresistible. This means that the same event or fact impedes the debtor or any other person to perform under all circumstances. In spite of such a case law evolu-

<sup>35</sup> Article 2110 Civil Code for Mexico City: “Nadie está obligado al caso fortuito sino cuando ha dado causa contribuido a él, cuando ha aceptado expresamente esa responsabilidad, o cuando la ley se la impone”.

<sup>36</sup> Former Article 1148 of the French Civil Code: *‘Il n’y a lieu à aucuns dommages et intérêts lorsque, par suite d’une force majeure ou d’un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit’*.

<sup>37</sup> Collegiate Circuit Tribunals, Registry: 197162, Source, *Semanario Judicial de la Federación*, Vol. VII, January 1998, Thesis: II.Io.C.158 C, pag.1069.

<sup>38</sup> Supreme Court of Justice, Auxiliar Chamber, Registry: 245709, Source, *Semanario Judicial de la Federación*, Volumen 121-126, p. 81.

<sup>39</sup> Mexico Collegiate Tribunals, *Novena Época*, Registry 197162, SFJ VII, January 1998, at 1069.

tion on the notion and elements of force majeure and fortuitous event, parties are free to redefine these concepts and by assuming certain risks under their contract<sup>40</sup>.

Under Mexican law, the effect of a 'legitimate' impossibility under force majeure or fortuitous event discharges the debtor of his obligation to perform. The impossibility extinguishes the contracted obligations and releases the debtor from any liability for breach of contract<sup>41</sup>. The consequence is clearly stated in Article 1847 of the Civil Code of Mexico City whereby a penalty clause cannot be enforced, and other damages cannot be claimed, when the debtor was unable to fulfil his obligations under the contract due to fortuitous event or insurmountable force<sup>42</sup>. On the basis of a contractual relationship, the unwinding of the contract operates automatically and retroactively. The restitution of the already performed obligations is then due and subject to the rules on unjustified enrichment. Judicial intervention only takes place if one of the parties refuses to give back the received performance.

In addition, fourteen of the 32 States' Civil Codes contain a rule addressing change of circumstances that occurred after the conclusion of the contract that make performance excessively onerous or difficult (*teoría de la imprevisión*)<sup>43</sup>. For instance, Article 1787 of the State of Jalisco's Civil Code allows for the review or termination of contracts in civil matters when extraordinary, unforeseeable events beyond the parties control arise that unbalance the agreement, making it more burdensome to comply with its obligations<sup>44</sup>.

A party whose performance of obligations in a C2C contract has been affected by an absolute impediment may rely upon the force majeure and fortuitous event provisions in the different States' civil codes. An example may be the factory of non-essential products or services that has been forced to close by the Federal Government's Decree. In addition, a party in a C2C long term contract which has become too unbalanced, may explore the possibility to claim readjustment of its terms under the doctrine of hardship.

<sup>40</sup> Collegiate Tribunals, *Novena Época*, Registry 197163, SJF VII, January 1998, at 1069.

<sup>41</sup> Mexico Supreme Court, *Séptima Época, Tercera Sala*, SJF 139-144, Part 4, at 80.

<sup>42</sup> Mexico Collegiate Tribunals, *Novena Época*, Registry 173722, SJF XXIV, December 2006, at 1378.

<sup>43</sup> See the civil codes of Aguascalientes (arts. 1733-1734), Chihuahua (art. 1691 a-f), Ciudad de México (arts. 1796-1797), Coahuila (arts. 2147-2159), Estado de México (arts. 7.35-7.36), Guanajuato (art. 1351.III), Jalisco (arts. 1787-1788), Sinaloa (Arts. 1735 Bis-Bis B), San Luis Potosí (arts. 1633.2-.3) and Tamaulipas (art. 1261); see also the civil codes of Veracruz, Quintana Roo, Guerrero and Morelos; see also Fausto Rico Álvarez, Patricio Garza Bandala, 'Teoría de la Imprevisión' [2010] *Revista Mexicana de Derecho* <<https://revistas-colaboracion.juridicas.unam.mx/index.php/rev-mexicana-derecho/article/view/14083/12572>> accessed 18 April 2020; the authors point out that the principle *pacta sunt servanda* determines the obligatory nature of legal conventions. 'Agreements are made to be kept', the original purpose of which was to compel the parties to honour their word even when it was not covered by the formalities required by the legal system. The principle or clause *rebus sic stantibus* authorises the non-observance or alteration of an agreement under the law when the conditions existing at the time of its fulfilment are significantly different from those prevailing at the time of its conclusion.

<sup>44</sup> Article 1787 Civil Code of Jalisco: "when in long-term or successive deal businesses, extraordinary events arise breaking with the reciprocity, equity or good faith of the parties, a party may claim the rebalance of the terms and if the does not agree, may choose to terminate the contract.

### 3.2. B2B domestic contracts and impediments to perform

A contract is categorized as B2B, when as such it constitutes an act of commerce, within the definition established by the Federal Code of Commerce, irrespective of the type of persons performing such acts<sup>45</sup>. Generally, an act of commerce pursues a goal of economic speculation or a profit purpose<sup>46</sup>, which does not need to be expressed in the contract but which is rather assessed on a case by case basis<sup>47</sup>. In practice, most transactions passed between traders or companies are B2B and hence primarily governed by the provisions of the Code of Commerce<sup>48</sup>. Ordinarily, traders are defined as persons and/or commercial companies that make commerce their ordinary profession<sup>49</sup>. But even though contracts passed between traders are presumed to be B2B ones, a trader may be able to demonstrate that he did not pursue a goal of economic speculation or intended a profit purpose for a particular transaction, so that the transaction can be characterized as C2C or B2C.

B2B issues are considered Federal matters under Mexico's Constitution and, accordingly, the Code of Commerce applies throughout the country's territory to contracts made between traders. As the Code of Commerce is not comprehensive regarding all matters that can arise under a contractual relationship, a Federal Civil Code supplements it. The Federal Civil Code also contains provisions identical to Articles 2111 and 2431 of the Civil Code for the State of Mexico City<sup>50</sup>. The case law reviewed above about the notions of force majeure and fortuitous event also applies to the Federal Civil Code. This is true with regard to its requirements and consequences: only impossibility releases a party from its obligations and exempts it from damages for failure to perform.

Neither the Code of Commerce nor the Federal Civil Code contain provisions on hardship. Accordingly, it has been considered that one of the general principles of B2B deals in Mexico is that the circumstances that modify the economy of the contract do not affect its validity or enforceability<sup>51</sup>. In other words, the parties are bound by the obligations agreed upon during and until the complete fulfilment of the B2B contract, irrespective of any change of the circumstances<sup>52</sup>.

Therefore, in the face of unforeseeable circumstances brought by Covid-19 that make performance impossible, a party in a B2B contract may claim an exemption to perform under

<sup>45</sup> Article 75 Code of Commerce.

<sup>46</sup> Articles 75 (I, II, II), 371 Code of Commerce.

<sup>47</sup> Collegiate Tribunals, *Novena Época*, Registry 174773, SJF XXIV, July 2006, at 1169.

<sup>48</sup> Collegiate Tribunals, *Novena Época*, Registry 186332, SJF XVI, August 2002, at 1256.

<sup>49</sup> Art. 3(I) Code of Commerce.

<sup>50</sup> Articles 2111 and 2431 Federal Civil Code.

<sup>51</sup> Mexico Supreme Court, *Séptima Época, Tercera Sala*, Registry 240782 SJF 139-144, part 4, at 29; Mexico Collegiate Tribunals, *Novena Época*, Registry 195622, SJF VIII, September 1998, at 1217; Mexico Collegiate Tribunals, *Novena Época*, Registry 195621, SJF VIII, September 1998, at 1149.

<sup>52</sup> Collegiate Tribunals, *Novena Época*, Registry: 186972, Source: Semanario Judicial de la Federación y su Gaceta, Tomo XV, may de 2002, Tesis: I.8o.C. J/14, p. 951.



the rules on force majeure and fortuitous event in the Federal Civil Code. However, an unforeseeable unbalance or excessive onerousness in a B2B Contract may be insufficient to be exempted, since the theory of hardship does not apply in B2B transactions governed by Mexican law.

### 3.3. B2C domestic contracts and impediments to perform

B2C issues are considered Federal matters under Mexico's Constitution and, accordingly, the Federal Act for Consumers' Protection applies throughout the country's territory. As the Act for Consumers' Protection is not comprehensive regarding all matters that can arise under a B2C contract relationship, the Federal Civil Code supplements it. The Federal Civil Code also contains provisions identical to Articles 2111 and 2431 of the Civil Code for the State of Mexico City. The case law reviewed above, regarding the notions of force majeure and fortuitous event, also applies to the Federal Civil Code. The same is true with regard to the requirements and consequences: only impossibility releases a party from its obligations and exempts it from damages for failure to perform.

Accordingly, in the face of unforeseeable circumstances brought by Covid-19 that make performance impossible, a party in a B2C contract may claim an exemption to perform under the rules on force majeure and fortuitous event in the Federal Civil Code. However, an unforeseeable unbalance or excessive onerousness in a B2C Contract may be insufficient to be exempted, since the theory of hardship does not apply in B2C transaction governed by Mexican law.

### 3.4. International Sale of Good Contract (CISG) and impediments to perform

The Mexican Government Directive dated 24 March 2020<sup>53</sup>, foresaw the conclusion of Government contracts that allow for the acquisition, at a national or international level, of medical equipment, diagnostic agents, surgical and curative material and hygiene products, as well as all types of goods that are necessary to deal with the contingency.

The implementation of this measure is essential, since the health system needs to have sufficient medical supplies to manage the contingency; in this regard, it has been identified that on 10 April 2020, the second shipment was received with medical supplies from China, consisting of one million nine hundred thousand surgical masks and one hundred and eighty thousand KN95 masks, which were intended to supply the Institute of Health for Welfare<sup>54</sup>.

<sup>53</sup> Official Journal of The Federation, 'Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir la enfermedad grave de atención prioritaria generada por el virus SARS-CoV2', <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590673&fecha=27/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590673&fecha=27/03/2020)> accessed 18 April 2020.

<sup>54</sup> Government of Mexico, 'Frente a COVID-19, llega a México segundo embarque con equipo de protección para personal de salud', <<https://www.gob.mx/presidencia/prensa/frente-a-covid-19-llega-a-mexico-segundo-embarque-con-equipo-de-proteccion-para-personal-de-salud?idiom=es>> accessed 18 April 2020.

In addition to these international contracts aim at acquiring goods to tackle the pandemic, other existing deals could have been affected by Covid-19. A global pandemic like Covid-19, an earthquake, a flood, a terrorist attack, may suddenly increase import tariffs in one of the production countries, force the producer to resort to countries with much higher production costs; import or export bans due to Covid-19 may hinder the envisaged flow of goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract may make the performance by the seller unduly burdensome or may devalue the contract performance for the buyer. Unexpected changes of circumstances may constitute one of the major problems parties face in international trade, especially for those in long term or complex contracts. Covid-19 has augmented the likelihood for greater imponderables given the involvement of multiple actors and elements from different countries. The 1980 UN Convention on the International Sale of Goods (CISG) does not contain a specific provision dealing with questions of hardship. Article 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control.

However, the terms of the contract should be the starting point to determine whether impediments to perform exist and their consequences. The parties may expressly or impliedly agree upon the allocation of the risk of events leading to force majeure or hardship. They may also agree upon the relevant threshold of impediments and the remedies that the aggrieved party may be entitled to. Different hardship model clauses are available for this purpose<sup>55</sup>, including the 1985, 2003 and 2020 editions of the ICC Force Majeure Hardship Clause<sup>56</sup>. This determination is done by contract interpretation pursuant to Article 8 CISG. The CISG Advisory Council Opinion No. 7 already determined that Article 79 CISG covers both force majeure and hardship situations<sup>57</sup>. Opinion No. 7 addresses the drafting history of Article 79<sup>58</sup>, where the question whether economic difficulties should give rise to an

<sup>55</sup> See for example, Clause 16.3 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clause 9.4 of the International Long-Term Supply of Goods, by International Trade Centre (ITC), 'Model Contracts for Small Firms: Legal Guidance for Doing International Business' [Geneva: ITC, 2010] 54, 55, 70, 71, <<http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603>> accessed 14 July 2020; See clauses in Patrick Ostendorf, 'International Sales Terms' [München: Hart Publishing, 2014] 121; and Ulrich Magnus 'Application of Boilerplate Clauses under German Law', in Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and Applicable Law* (London: Cambridge University Press, 2011) 206, 07.

<sup>56</sup> ICC, Force Majeure and Hardship, Paris 1985 [ICC Publ No. 421]; ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, Developed by the ICC Commission on Commercial Law and Practice, Draftsman-in-chief: Charles Debatista, ICC Publication No. 650, ICC Publishing, 2003 (ICC Force Majeure and Hardship Clause 2003); 'ICC Force Majeure And Hardship Clauses March 2020', <<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>> accessed 14 July 2020.

<sup>57</sup> CISG AC Opinion No. 7, 'Exemption of Liability for Damages Under Article 79 of the CISG', Rapporteur: Professor Alejandro Garro [12 Oct 2007], Rule 3.2. Comment para. 38.

<sup>58</sup> CISG AC Opinion No. 7, *op. cit.*, Rule 3.1. Comment paras. 29 and 30. See also Christoph Brunner, 'Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration', 216; Yeşim Atamer, 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods – Commentary* [2nd ed., München: Hart Publishing, 2018] 1088, para. 78.



exemption was highly controversial<sup>59</sup>. This background led some scholars to argue that there was no room to consider hardship under Article 79 CISG<sup>60</sup>, specially during the first years after the coming into force of the Convention<sup>61</sup>. Yet, there was no clear exclusion of hardship among the events leading to exemption under Article 79 CISG<sup>62</sup>.

Today, however, it is more or less unanimously accepted in court and arbitral decisions<sup>63</sup>, as well as in scholarly writings<sup>64</sup>, that Article 79 CISG governs different types of impediments to perform, including hardship. Accordingly, there are no legal grounds to resort to domestic concepts of force majeure or hardship<sup>65</sup>, as there is no gap in the CISG regarding the debtor's invocation of economic impediments<sup>66</sup>.

Article 79(1) CISG provides that a party is exempted from liability for damages only if the failure to perform is due, first, to an impediment beyond its control, second, that it could

<sup>59</sup> See Brunner, *op. cit.*, 1088, para. 78.

<sup>60</sup> CISG AC Opinion No. 7, *op. cit.*, Rule 3.1. Comment para. 26, citing Barry Nicholas, 'Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods', in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, § 5.02, 5-4, Parker School of Foreign and Comparative Law, Columbia University, Galston N.M., Smit, H. (eds.), [1984], <<http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html>> accessed 14 July 2020 .

<sup>61</sup> Scholars taking this view include: Bernard Audit, 'La Vente Internationale de Marchandises. Convention des Nations Unies du 11 avril 1980', [Paris, LGD], 174,75 cited by Brunner, *op. cit.*, 216, fn. 1100; Nicholas, *op. cit.*, 5-4; Denis Tallon, in Michael Bianca-Bonell, *Commentary on the International Sales Law*, [Giuffrè: Milan, 1987], para. 3.1.2, <<http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html>> accessed 14 July 2020.

<sup>62</sup> The Norwegian delegation proposed that paragraph 3 of Article 65 of the 1978 UNCITRAL Draft Convention should be changed in the following way: "[...] Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable". See the Norwegian proposal (A/CONF.97/C.1/L.191/Rev.1) in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 [Official Records, New York, 1981] 381.

<sup>63</sup> However, courts have often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was non-existent. See Bulgarian Chamber of Commerce and Industry, [12 February 1998], CISG-online Case No. 436; Rechtbank van Koophandel, Hasselt, [2 May 1995], CISG-online Case No. 371; Tribunale Civile di Monza, [29 March 1993], CISG-online Case No. 102; Cour d'Appel de Colmar, [12 Jun 2001], CISG-online Case No. 694; Hof van Cassatie, [19 June 2009], CISG-online Case No. 1963 granting a right to renegotiate the contract to a seller for a 70% price increase in steel after the conclusion of the contract, Separate Award, SCC Arbitration No. V2014/078/080, [31 May 2017], CISG-online Case No.4683. para.2662

<sup>64</sup> In addition to CISG AC Opinion No. 7 see Ingeborg Schwenzer, 'Article 79', *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed., Oxford University Press [2016], 1142, para. 31; Peter Schlechtriem, Petra Butler, 'UN Law on International Sales at 203, para. 91; Brunner, *op. cit.*, 213; Atamer, *op. cit.*, 1088, para. 79; John Honnold, Harry Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edition, Kluwer Law International, 627, para. 432.2; John Lookofsky, *Understanding the CISG*, 4th ed., [Law & Business: Wolters Kluwer, 2012] 150, para. 6.32; Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', [Pace International Law Review 331 2018], 364, 65.

<sup>65</sup> Honnold & Flechtner, *op. cit.* 615, 27, paras. 425, 32.2; Schwenzer, 'Article 79', *op. cit.*, 1142, para. 31; Separate Award, SCC Arbitration No. V2014/078/080, [31 May 2017], CISG-online Case No.4683. para.2662 (as an argument of the Respondent [Gazprom] that the Arbitral Tribunal neither contradicted nor expressly accepted).

<sup>66</sup> Harry Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', 97; taking a different view see Tribunale Civile di Monza, [14 January 1993], CISG-online Case No. 540.

not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract and, third, to have avoided or overcome it or its consequences<sup>67</sup>. Hardship may be regarded as a special type of “impediment” under Article 79 CISG; all that is added on the level of prerequisites is a clarification of the term impediment. The mere fact that performance has been rendered more onerous than could reasonably have been anticipated at the time of the conclusion of the contract does not exempt a party from performing the contract<sup>68</sup>.

Pursuant to Article 79(4) CISG, a party failing to perform shall provide timely notice of the impediment and its effect on his ability to perform<sup>69</sup>. This requirement is an expression of the underlying principle of cooperation in CISG contracts; it is intended to alert the other party on whether it should itself take remedial action, reduced damages and/or – when a fundamental breach exists – avoid the contract<sup>70</sup>. This notice requirement applies to hardship situations and follows the same objectives as other types of impediments<sup>71</sup>.

Article 79(5) CISG relieves the disadvantaged party only from the obligation to pay damages<sup>72</sup>. Other CISG principles, including reasonableness of performance (Articles 46 and 48 CISG) and the need to interpret in good faith the remedies available to the parties (Article 7(1) CISG)<sup>73</sup> may also have an impact on releasing the disadvantaged party from its obligation to perform the contract while the impediment exists. Among the remedies not affected by an exemption under Article 79 CISG are the other party’s right to suspend performance (Art. 71 CISG), reduce the contract price (Art. 50), avoid the contract (Arts. 48(1) and 64(1) CISG) or any of its installments (Art. 73 CISG), claim interest (Art. 78 CISG) or expenses incurred in the preservation of the goods (Arts. 85 and 86 CISG)<sup>74</sup>.

As stated in CISG-AC Opinion No. 7, if the non-performance is due to an impediment under Article 79 CISG, the disadvantaged party is relieved, first and foremost, from its obligation to pay damages during the time such impediment exists<sup>75</sup>. The same damages’

<sup>67</sup> Regarding force majeure, Art. 7.1.7(1) UNIDROIT PICC; Art. 8:808(1) PECL; Art. III – 3:104(1) DCFR are practically identical to Article 79(1); Art. 89 PLACL. The same holds true for the ICC Force Majeure Clause. However, the latter gives a list of events that may amount to an impediment.

<sup>68</sup> Ewan Mckendrick, ‘Article 6.2.1’ in Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, 2015, 812, para. 1; Schwenger, ‘Article 79’, *op. cit.*, 1135, para 15.

<sup>69</sup> CISG AC Opinion No. 7 *op. cit.*, Comment para. 1.

<sup>70</sup> Atamer, *op. cit.*, 1077, para. 95; Brunner, *op. cit.* 342.

<sup>71</sup> Ingeborg Schwenger, Pascal Hachem, Christopher Kee, *Global Sales and Contract Law*, Oxford University Press [2012] 672, para. 45.108.

<sup>72</sup> Flechtner, *op. cit.*, 201.

<sup>73</sup> Diana Akikol, ‘Article 46’, in Benjamin Gottlieb, Christoph Brunner (eds.), *Commentary on the Un Sales Law* [The Netherlands: Wolters Kluwer, 2019] 348, para. 14; Atamer, *op. cit.*, 1053, para. 39.

<sup>74</sup> Schwenger, ‘Article 79’, *op. cit.* 1151, para. 56; Honnold & Flechtner, *op. cit.*, 640, para. 435.4; Brunner, *op. cit.*, 366.

<sup>75</sup> CISG AC Opinion No. 7 *op. cit.*, Rule 1. Comment para. 6; Brunner, *op. cit.*, 345; Atamer, *op. cit.*, 1060, para.13; Schwenger, ‘Article 79’, *op. cit.*, 1148, para. 50; Schwenger, *Global Sales, op. cit.*, 663, para. 45.60. One author asserts that express exemption to pay damages was not necessary because an impediment under article 79 CISG would fall under the cat-

exemption should follow from a court's or arbitral tribunal's determination of hardship<sup>76</sup>. As stated in CISG-AC Opinion No. 10, the exemption to pay damages under Article 79 CISG includes an exemption to pay the so-called "agreed sums", *i.e.* penalty clauses or liquidated damages (if they are at all valid under the governing domestic law), unless the parties have agreed otherwise in their contract<sup>77</sup>.

Whether the exemption under Article 79 CISG also extends to the right to request performance has been a subject of considerable debate because of the wording of Article 79(5) CISG<sup>78</sup>. This provision states that nothing prevents either party from exercising any right other than to claim damages under the Convention<sup>79</sup>. The wording of 79(5) CISG would suggest that a party to the contract may claim, in principle, specific performance in spite of the impediment endured by the other. At the Vienna Conference, a proposal by the German delegation aimed at clarifying that performance could not be insisted on in case of a continued impediment was rejected<sup>80</sup>. It was considered that no problem would arise in practice in case the disadvantaged party suffered actual impediments, whereas the categorical removal of the right to performance could impair the accessory rights of the other party<sup>81</sup>. Nowadays it seems to be undisputed that performance cannot be demanded as

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egory of unforeseeable damages under 74 CISG, see Ishida, *op. cit.*, 340. However, Ishida seems to miss the point that the foreseeability requirement in Article 74 CISG regards the damages as a possible consequence of the breach rather than the breach itself or the impediment causing the latter. He also forgets that the CISG remedies system follows the strict liability approach and that Article 79 works as an exoneration of liability rather than a damages' limitation provision.

<sup>76</sup> Regarding the UNIDROIT PICC some authors seem to have a different view. Commenting Article 6.2.3 PICC, McKendrick considers that hardship does not in itself exclude the defendant's liability for non-performance, see McKendrick, *op. cit.*, 821, para. 10. He cites a CAM Arbitral Award, holding that Article 6.2.3 PICC does not provide the remedy of damages' exemption but a duty to renegotiate, the remedy of contract adaptation or termination by the Tribunal; and since the breaching party did not request any of those remedies, the Tribunal decided not to exempt it from damages, skipping a determination of whether hardship had taken place. In spite of such incorrect understanding, it seems clear that once hardship is found and a court or tribunal decides to adapt a contract or terminate it upon a party's request, the latter should be exempted to pay any damages arising out of the contract modification or termination, see Arbitral Award [30 November 2006], Centro de Arbitraje de México, para. 251, UNILEX, <<http://www.unilex.info/case.cfm?pid=1&do=case&id=1149&step=FullText>> accessed 14 July 2020.

<sup>77</sup> CISG-AC Opinion No. 10, 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts', Rapporteur: Dr. Pascal Hachem, [2012], Rule 5; see also Pascal Hachem, 'Agreed Sums Payable Upon Breach of an Obligation: Rethinking Penalty and Liquidated Damages Clauses', *International Commerce and Arbitration*, Eleven International Publishing, 2011, 138; Brunner, *op. cit.*, 346, 47.

<sup>78</sup> Atamer, *op. cit.*, 1061, paras. 16, 17; Schwenger, 'Article 79', *op. cit.*, 1050, para. 53.

<sup>79</sup> Article 8:101(2) PECL clearly states that where a party's non-performance is excused, alongside with the right to claim damages, the right to performance is likewise excluded. See Article 8:101 PECL '(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.'

<sup>80</sup> Ishida, *op. cit.*, 343, 44.

<sup>81</sup> See Document A/CONF.97/C.1/L.191/Rev.1 in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 (Official Records, New York, 1981) 381. Schwenger, 'Article 79', *op. cit.*, 1050, para. 53.

long as the impediment exists<sup>82</sup>. The same consequences should follow in case of hardship, which is a type of impediment<sup>83</sup>.

## IV. Conclusion

As of today, no drastic combat measures have been issued in Mexico for Covid-19, such as the absolute closure of borders (either land, sea and/or air, as other countries in the region have done), or restricting the transit and freedom of Mexicans through, for example, a suspension of individual constitutional guarantees. However, the Federal Government's Decree that temporarily limited the production, commerce and social events with a catalogue of essential and non-essential activities could have impaired the ability of many parties to perform their obligations under existing contracts. At an international level, similar or more drastic measures from other governments (such as border closure or mandatory quarantine) could also directly affect the performance of contracts under Mexican law, including the CISG. Complications derived from these measures could be considered as impediments under Mexican law, either under the notions of force majeure, fortuitous event or hardship depending on the availability of each doctrine for the type of transaction, *i.e.* C2C, B2B or B2C.

In light of the current situation, where Governments' around the world are enacting emergency directives or new measures to stop, again, the spread of Covid-19, new extraordinary circumstances may justify the update of a "hardship" also for B2B contracts in Mexico. As the law stands today, each contract must be analyzed and determined whether it is affected by impediments under Mexican law on a case-by-case basis. Perhaps the most prudent advice is to carry out an exhaustive review of the Covid-19 effects on current business relationships and negotiate a way out that is favorable to all affected contractual parties.

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