

Dispute Resolution Newsletter - Supply Chain on COVID-19

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1. Effects on litigation.

- **How COVID-19 affect ongoing litigation?**
 - Ongoing litigation will be affected by the measures that courts and superintendence are taking to prevent the spread of COVID-19 in Colombia.
 - Some of the measures taken so far are summarized in the chart below:

Type of facility	Dates the facilities are going to be closed (and the days will not count towards the deadlines)
National Courts* (Accord PCSJA20-11532) (Accord PCSJA20-11526) (Accord PCSJA20-11517) (Accord PCSJA2011521)	17 March 2020 - 26 April 2020
Superintendence of Companies (Only applicable to Jurisdictional Processes) (Resolution 100-000938)	17 March 2020 - 22 March 2020
High Council of the Judiciary (Only applicable to some Administrative Proceedings) (Accord PCSJA2011528)	24 March 2020 - 12 April 2020
Superintendence of Companies (Only applicable to Administrative and Disciplinary Processes) (Resolution 100-000978)	18 March 2020 - 8 April 2020 25 March 2020 - 31 March 2020

(Resolution 100-001026) (Resolution 100-001101)	
Comptroller General** (Resolution No. 0063 of 2020)	16 March 2020 - 31 March 2020
Industry and Commerce Superintendence (Only applicable to Jurisdictional Proceedings) (Resolution No. 11790 of 2020)	17 March 2020 - 30 April 2020
Industry and Commerce Superintendence (Sanction and Disciplinary Administrative Proceedings) (Resolution No. 1269 of 2020)	1 1 April 2020 - until the national emergency decree is lifted
Financial Superintendence (Only applicable to Jurisdictional Proceedings) (Resolution No. 001 of 2020)	17 March 2020 - 30 April 2020
Inspector General's Office (Procuraduría) (Disciplinary Proceedings)	Two weeks starting 17 March 2020
Constitutional Court (Only regarding the review of fundamental right actions -acciones de tutela-) (Accord PCSJA20-11517)	17 March 2020 - 20 March 2020
DIAN (Only regarding administrative proceedings related to taxation law, customs and securities and exchange law) (Resolution No. 00022)	19 March 2020 - 3 April 2020

*This applies to all courts, except for supervisory judges (*jueces de control de garantías*) and criminal courts that have hearings with people in prison. Fundamental rights proceedings (*acciones de tutela*) are also exempted.

** The Comptroller General's office will receive complaints, petitions and queries within the term of suspension.

Additionally, you should take into account the following policies:

- The Ministry of Justice and Law decreed the continuity of mediation, arbitration, and other ADR proceedings through virtual media (Decree 491 of 2020)
- The **Chamber of Commerce of Bogotá** will not provide its facilities for conducting hearings until further notice. The arbitration center will schedule virtual hearings. The arbitration center will receive the filing of complaints online and develop all the other activities such as the appointment of arbitrators and the conduction of initial hearings. All documents should be sent to radicaciondocumentosCAC@ccb.org.co

- The **International Chamber of Commerce** will have all of its offices in operation and strongly advise all the communications with the Secretariat to be conducted by email. Requests for arbitration should be filed at arb@iccwbo.org and emergency arbitrator requests should be submitted to emergencyarbitrator@iccwbo.org

Furthermore, the measures can be updated at any time, so we recommend checking for updates.

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2. Special rules for administrative proceedings, suspension of terms, and toll of the statute of limitations in the context of COVID-19: Decree 491

On March 28, the Colombian Ministry of Justice enacted Law Decree No. 491 of 2020 (the "Decree").

Through said Decree, the Colombian Government regulated some administrative and jurisdictional proceedings under the Economic, Social and Ecological Emergency, declared on March 17, 2020.

Provisions contained in this decree apply to the public authorities in Colombia (including judicial, executive and legislative authorities) and to private entities that perform public functions.

The following are the main aspects regulated by the Decree.

2.1. Requests before Public Authorities

Authorities able to provide services by virtual meanings will have the obligation to inform about the institutional communication channels and the technological tools that will be used to register and respond requests, in their official web pages.

The Decree extended deadlines to respond to requests filed before Public Authorities:

- The general term to respond to requests increased from 15 days to 30 days.
- The Term to respond to information requests increased from 10 days to 20 days.
- The term to respond requests related to general questions ("*peticiones de consulta*") increased from 30 to 35 days.

2.2. Notification of administrative decisions

Public Authorities must serve their decisions by virtual means. Therefore, citizens have to inform the Authorities of their e-mail address in order to be served of said decisions. The Decree regulates different ways for the citizens to provide their e-mail address, depending on the stage of the administrative proceeding:

- When beginning the proceeding: When filing an administrative proceeding, citizens must include an email address in the filing. Said filing will be understood as an authorization to receive notifications through electronic means.¹
- During an administrative proceeding: Citizens must inform the Authority of an email address.

When serving a citizen of an administrative decision, the Authority has to include the following information in the electronic message:

- The message must mention the administrative decision to be served.
- The message must contain a copy of said administrative decision.
- The message must mention the ways in which the administrative decision can be challenged (remedies that apply), the authorities before whom remedies can be filed, and the term granted to file remedies.

2.3. Legal terms in administrative or jurisdictional proceedings conducted by administrative authorities.

The Decree grants Public Authorities the power to suspend legal terms in the administrative or jurisdictional proceedings during the Economic, Social and Ecological Emergency.

Considering this is a power given to the Authorities and not a binding obligation, it is advisable to refer to each authority's guideline on the matter, in order to determine if terms are suspended or not.

2.4. Settlements before the *Procuraduría General* and toll of the statute of limitations while settlements are suspended.

Regarding settlements that must be carried out before the *Procuraduría General*, the Decree states that hearings may be carried out through virtual means, or through successive emails exchanged between the parties to the settlement.

The Decree also granted the *Procurador General de la Nación* the power to suspend the filing and/or the processing of requests for convening settlements in civil, family and commercial matters that are carried out in the conciliation centers of the *Procuraduría General*, as well as the out-of-court settlements in administrative litigation matters conducted by agents of the Public Ministry.

Such suspension tolls the statute of limitations for the respective cause of action.

2.5. Arbitration, mediation, and conciliation.

The Decree ordered that (i) arbitration (ii) out-of-court conciliation proceedings (iii) mediation and (i) insolvency of a non-merchant person, must continue through virtual means.

¹ Art. 56 of the Colombian Administrative Procedural Code (L.1437/2011) states that citizens must accept to be served through virtual means.

Said proceedings must be carried out in accordance with the instructions given by the arbitration and conciliation center or the public entity before which the respective proceeding is being carried out.

The Decree empowers the aforementioned entities to notify and hold hearings and meetings virtually.

Also, the Decree extends some of the terms established by the Conciliation Law (Law 640 of 2001) and by the Arbitration Statute (Law 1563 of 2012), as follows:

- The duration term of the out-of-court conciliation proceeding increased from 3 to 5 months.
- The term that the arbitration courts have to issue the award increased from 6 to 8 months.

2.6. Suspension of the Statute of Limitation.

The last paragraph of article 10 of the Decree establishes that "During the Health Emergency, the statute of limitations shall not run"

This suspension of the statute of limitation will be in force only during the Economic, Social and Ecological Emergency and does not imply an interruption of the terms but a suspension thereof. Therefore, the terms that started running before the Economic, Social and Ecological Emergency was declared, will resume once the Emergency ends.

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3. The Pandemic as a cause of Force Majeure in Contracts

- **Am I exempted from fulfilling my contractual obligations under an agreement due to COVID-19?**

Under Colombian law, force majeure or acts of god can temporarily exempt a party from fulfilling its contractual obligations as long as the force majeure event has not disappeared.

- **Could COVID-19 be considered as force majeure/acts of god under the Colombian regulation?**

It is possible that events derived from the measures taken to prevent the spread of COVID-19 in Colombia could be construed as force majeure. Under Colombian law, force majeure or fortuitous event is an unforeseen and irresistible incident, such as a shipwreck, an earthquake, a war, the capture by an enemy, or some acts of the authorities.

The Supreme Court of Justice and the Council of State have stated that force majeure is considered an event that cannot be overcome and like a contingency that supersedes the will of the parties.

Traditionally, jurisprudence has proposed the existence of three main characteristics of force majeure:

1. The event must be irresistible. This means that it was objectively impossible for the affected party to avoid the consequences arising

out of the unforeseen event. An event will be resistible if there are any measures that the party, regardless of their reasonability, could have taken to prevent the force majeure event or its effects.

2. The event must be unforeseeable. The party must not be able to anticipate the occurrence of the event.
3. The event must be external to the party. The event has to be external, and therefore cannot be a regular activity of one of the party's business.

- **Could the force majeure cover breach of payment of monetary obligations be covered by force majeure?**

It is unlikely that a force majeure clause would cover a breach in the payment of monetary obligations since the affected party would have to prove that there was no means by which the party could have gathered the money to pay the obligation.

- **Is it possible to invoke force majeure, even if the agreement does not expressly include such clause, or if there is no written agreement?**

Yes. A force majeure event can be invoked even if it is not established in the relevant agreement. The force majeure does not require for it to be stipulated in the applicable contract.

- **Is there a minimum period to be complied with prior to invoke force majeure?**

Although there is not a minimum legal period to be complied with, either party must inform the other immediately upon the occurrence of the force majeure event.

It should be borne in mind that in each agreement the parties may have agreed on a period of time within which the force majeure must be invoked; this is a provision that is recommended to be fulfilled by the interested party invoking the force majeure.

- **Could either of the parties to an agreement terminate the agreement arguing coronavirus as an event of force majeure?**

No. If the agreement does not expressly establish the termination as a result of a force majeure event and either party terminates the agreement arguing such grounds, this will likely be considered a termination without cause and the affected party could claim damages. The termination as a result of force majeure must be expressly established in the agreement to be just cause for termination.

- **What happens if an agreement becomes excessively onerous due to the COVID-19 situation?**

According to Colombian law, if a contract becomes excessively onerous due to a specific situation, the affected party may invoke the theory of unforeseen events.

- **Could COVID-19 measures fall under the theory of unforeseen events?**

It is possible that events arising from the measures taken to prevent the spread of COVID-19 in Colombia could fall under the theory of unforeseen events. Pursuant to Colombian law, parties to a contract of continuing

performance oblige themselves to fulfill their obligations under the existing circumstances at the time the agreement was concluded. If the circumstances vary due to extraordinary or unforeseeable events and these events make the fulfillment of the obligation excessively difficult or onerous, the parties can modify the agreement, or a party can request a judge to do so.

This theory applies to agreements with state entities.

Traditionally, the doctrine has proposed the existence of five main characteristics for the recognition of the applicability of the theory of unforeseen events:

1. The event must be unforeseeable. This means that at the time the agreement was entered into, the parties could not have reasonably foreseen the event.
2. The event must produce that fulfillment of the obligations has become extremely onerous. The event must be of such magnitude that it is clear to any objective person that the change in the conditions produces a significant economic change not included in the inherent risks of the contract. The party that invokes this theory should prove that it used all the available mechanisms to prevent excessive damage.
3. Supervening event. The event must be prior to the conclusion of the agreement.
4. The event must be irresistible. The party that invokes this theory could not have prevented the event from happening, and for the party it must be relatively impossibility to resist the consequences of the event.
5. The event must be external. The party that invokes this theory should not have produced or aggravated the event.

- **Is it possible to invoke the theory of unforeseen events even if the agreement does not expressly include such a clause or if there is no written agreement?**

Yes. The theory of unforeseen events can be invoked even if it is not established in the relevant agreement. The theory of unforeseen events is not required to be stipulated in the applicable agreement.

- **Is it possible to invoke the theory of unforeseen events in any agreement?**

No. The theory of unforeseen events only applies to contracts of continuing performance. Therefore, it cannot apply to concluded agreements or to contracts that completely performed at the time of contraction.

Please note that the information provided here is general and, therefore, the analysis of whether the force Majeure or the theory of unforeseen events applies to a particular case has to be assessed on a case-by-case basis taking into account all the specific circumstances of the case.

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