

FORTUITOUS EVENT AND FORCE MAJEURE

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The purpose of this study is to analyze the scope of the concepts specified in our legislation as Fortuitous Event and Force Majeure for purposes of their application in contracts or agreements that are governed and interpreted in accordance with the laws of the Republic of Panama.

According to article 1105 of our Civil Code; contract or agreement "is an act by which one party agrees with another to give, do or not do something. Each party may be one or many people. Subsequent article 1106 of our Civil Code provides that the contracting parties may establish the covenants, clauses and conditions that they deem convenient, provided that they are not contrary to law, morality and public order".

In other words, in our Panamanian private law, the principle of the autonomy of the will or contractual freedom governs, whereby the parties can establish the covenants, clauses and conditions that they deem convenient. In turn, according to article 976 of the Civil Code, it is established that "obligations arising from contracts hold the force of law between the contracting parties and must be fulfilled in accordance with the same", that is, all contracts are law between the parties.

Likewise, Article 1107 *ibid*, prescribes that "the validity and fulfillment of contracts cannot be left to the discretion of one of the contracting parties."

The purpose of citing the articles referred to in the preceding paragraph is to support the fact that the parties must respect and honor the agreement and therefore no third party or any party to a contract, can unilaterally modify or cancel a contract without the consent of the other party.

Currently, many of us are asking two questions that are correlated with each other, these are: Can all contracts of a civil and commercial nature that are governed and interpreted according to the laws of the Republic of Panama be suspended, modified or even canceled unilaterally by a third party or by one of the contractual parties by reason of a Fortuitous Event or Force Majeure?

Is the fact that the Government of Panama declared a State of National Emergency and imposed a quarantine throughout the entire national territory with the exception of some

institutions, persons, activities and companies a valid and legal justification for any of the contractual or third parties to unilaterally allege a Fortuitous Event or Force Majeure is cause for breach of contractual obligations?

The Civil Code of the Republic of Panama, under article 34D defines Force Majeure as a "situation resulting from man-made acts, which have not been possible to resist, such as acts of authority exercised by public officials, capture by enemies, and similar" and Fortuitous Event is defined as "the one that results from events of nature that could not have been foreseen, such as a shipwreck, an earthquake, a conflagration and others of the same or similar nature."

Likewise, article 990 of our Civil Code is related to the concept of Fortuitous Event by establishing that "outside of the cases expressly mentioned in the law, and of those so declared by the obligation, no one will be responsible for events that could not have been foreseen, or that, foreseen, were inevitable".

On the other hand, article 688 of the Judicial Code of Panama, establishes that Fortuitous Event and Force Majeure can be argued or asserted during the process as an exception to the fulfillment of the obligation.

In addition, said article indicates that the facts that prevent or extinguish the claim in whole or in part or modify it constitute exceptions. Article 690 of the same code establishes that Force Majeure and Fortuitous Event are common exceptions, among others.

In this regard, the Supreme Court of Justice of Panama has repeatedly ruled on whether there is any responsibility by any of the parties for breaching obligations arising from any Fortuitous Event or Force Majeure, but these rulings have historically varied because there are a series of elements that must be taken into account to determine if the Fortuitous Event and/or Force Majeure do indeed exist.

In other words, these concepts have a certain subjectivity that, in order to justify non-compliance, must satisfy certain specific elements that must be analyzed on a case-by-case basis. The concepts of Fortuitous Event and Force Majeure cannot be applied in a general way and for everyone equally, each case and each contract must be analyzed and viewed independently and if an agreement is not reached between the parties, it must be resolved by a competent authority.

Some jurisprudential conclusions that I can highlight, and I agree with are: i) "If the impediment resulting from the force majeure is transitional, once the excusable obstacle has been overcome, the enforceability of the obligation is revived". In other words, the transitional impediment that has been caused does not exempt that the party, once the obstacle has been overcome, complies with its obligation. ii) "If the circumstances change subsequent to the contract, is alien to the debtor's activity and also irresistible, that is, insurmountable, we are facing a case of force majeure that will free the debtor, since no one is obligated to the impossible". (iii) "The Force Majeure assumption is defined as the anonymous, unpredictable and irresistible event that prevents fulfilling the obligation. The burden of proof of the event corresponds to the debtor".

Conclusions:

Due to the current situation in Panama and the world, there are many cases where it could be argued that there is no liability for breach of contract due to Fortuitous Event or Force Majeure, nevertheless, this exception or justification for non-compliance does not apply generally to all cases. Each contract must be interpreted, as we previously stated, individually, taking into account each and every one of the elements constituting the force majeure. (“No one is obligated to the impossible”).

There are contracts entered into whereby the parties agreed to the actions to be taken when facing a Fortuitous Event or Force Majeure, in this sense, it would be necessary to verify if the contract established and regulated the Fortuitous Event or Force Majeure as an exemption from liability.

As previously stated, by law, no third party or any party to a contract can unilaterally modify or cancel a contract without the consent of the other party, therefore, if there is no consent between the parties, it will be up to the Courts of Panama or the Conciliation and Arbitration Center of Panama, as competent authorities) (as established in the contract) to elucidate the controversy and determine whether or not there is an impediment to the Fortuitous Event and Force Majeure.

The Fortuitous Event and/or Force Majeure must be proven before the competent authority and the burden of proof is borne by the one who alleges and justifies its non-compliance based on those impediments.

Any party may allege non-compliance by reason of a Fortuitous Event and/or Force Majeure, but not necessarily has to be accepted by the other contractual party, since just as one party may make such allegation for the purpose of non-compliance, the other party has the right to not be in agreement (private law that arises from the contract) and if there is no mutual consent, the controversy arises, which must be resolved by the Competent Authority.

Finally, it is important to highlight that good intentions by the contracting parties for effects of contract interpretation is fundamental in passing judgment. Good intentions by the contracting parties is shown through contemporaneous and post-contract acts. In this sense, it would be convenient for the party alleging noncompliance on the grounds of the Fortuitous Event and/or Force Majeure, to first do everything possible to negotiate and amicably modify the contract by means of addenda or temporarily suspend it, while the causes resulting in non-compliance subsist, before decisions are taken, such as unilaterally rescinding the contract.

Sincerely,

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