Force majeure in Brazil

Introduction

In Brazil, force majeure (or act of God) can be claimed to exonerate a debtor from civil liability for non-compliance with civil obligations (contractual or not). Therefore, if a force majeure event occurs, the debtor may be released from the civil obligation he assumed, without being required to redress any ensuing losses and damages. This is so because the force majeure event makes the assumed obligation impossible to fulfill.

The legal regulation of force majeure in Brazil is mostly dealt with in article 393 of the Brazilian Civil Code:

> "Article 393. The debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly assumed liability therefor.
> Sole Paragraph. A fortuitous event or force majeure is an inevitable fact the effects of which were impossible to avoid or prevent."

The gist of the force majeure event is, therefore, its inevitability. Unpredictability, although a common feature of force majeure events, is not essential to its characterization. Hence, even if the event was foreseeable, the exonerating effects of force majeure can still be enforced if the effects of such event were inevitable.

Furthermore, the event cannot have been caused by the debtor's action or inaction. The debtor's absence of negligence is an essential element to characterize a force majeure event.

Force majeure clauses

Under Brazilian law, the parties may exclude the application of article 393 of the Brazilian Civil Code by creating their own mechanism to verify the occurrence of a force majeure event.

Depending on the type of force majeure clause, the contractual obligation affected by the event may be suspended or extinguished. In addition, such clauses generally impose various duties on the debtor, such as the duty to mitigate damages, the compulsory pursuit of other means to fulfill the obligation, etc. Further, the debtor is usually required to notify the creditor forthwith about the force majeure event. Finally, the parties may rely on the national legal framework to create different requirements for the debtor's exoneration from liability.

In this sense, it is imperative to carefully analyze the contract in question and its requirements for characterization of a force majeure event, as well as to verify the actions expected from the parties in this context.

Duty to mitigate damages

In fact, in order to determine whether the breach of obligation was inevitable, it will be necessary to investigate whether or not it could have been avoided or prevented. In this sense, if the debtor, by action or inaction, could have avoided the breach of obligation, the force majeure event may not be characterized and, as such, the debtor *could* be held liable for the ensuing losses and damages.

Therefore, the debtor must do everything in his power to avoid a breach of obligation and only then, in the face of the impossibility of fulfilling the agreement, plead force majeure as a reason for exoneration. Clearly, the debtor is not required to accept an undue hardship to avoid default; acting in accordance with the standards of diligence expected of an average person is enough.

Even in the face of the impossibility of fulfilling the agreement, the debtor must act diligently to mitigate the damage caused, just as the creditor must seek to mitigate the damage suffered, all of which in keeping with the principle of good faith enshrined in article 402 of the Brazilian Civil Code.

Burden of proof

In addition, to qualify for exoneration from civil liability, the debtor must prove that the alleged force majeure event (i) was inevitable (and that all measures necessary to prevent it or mitigate its effects were taken, in accordance with the standards of diligence of the average person); and (ii) made fulfillment of the obligation as originally agreed impossible or excessively burdensome.

COVID-19 pandemic

In this sense, the COVID-19 pandemic and the ensuing economic fallout around the world could *in principle* be considered a force majeure event, depending on the specific case. Whilst the pandemic impacts the market as a whole, its effects will only qualify as a force majeure event based on the analysis of the specific case.

If the matter is taken to court, the judge will investigate, on a case-by-case basis, whether the debtor, in view of the effects of the COVID-19 pandemic, could have acted in a way to avoid the breach of his obligation. Therefore, the pandemic does not operate *prima facie* as a force majeure event.

Hence, it is not possible to assert that the COVID-19 pandemic *may* cause harmful effects on the contractual relationship in the *future* so as to have the occurrence of a force majeure event recognized *now*. The effects must have already been felt, inescapably leading to the impossibility of fulfilling the obligation - only in this scenario will the debtor be released from his obligations.

Disputes over the declaration of force majeure on account of the COVID-19 effects have already been taken to the Brazilian courts. In general, the courts have acted cautiously and analyzed, in the specific case, whether the effects of the pandemic have indeed made the relevant obligation impossible to fulfill or not.

Final remarks

The force majeure event is an extraordinary legal remedy in the Brazilian legal system. The debtor is only released from his obligations when the force majeure requirements explained above have actually been met.

Furthermore, when the force majeure is declared within the context of a contract, the contractual relationship is terminated in most cases, and the virtuous link for the economic

relations between the parties ceases to exist.

In this sense, especially in the current context of the new coronavirus pandemic which has disrupted markets around the world, the Brazilian judiciary, like the São Paulo State Higher Court, has encouraged mediation and conciliatory measures to resolve contractual conflicts before taking the dispute to court.

Right now, the cold solution of the law (*win or lose*) may not always be adequate, as it ends up terminating contractual relations that could still generate countless positive externalities for the market. Therefore, the renegotiation of contractual terms is encouraged in the sense of changing obligations and compliance terms to preserve the relationship in general.

However, if an amicable solution is impossible, litigation will be the only way out, where, as seen, it must be proven that the effects of the alleged force majeure event completely prevented the fulfillment of obligations, and that such effects could not have been avoided by the debtor.