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Nitrosamines, storms and climate change, coronavirus… What do the law and the courts say on force majeure?

It's happening...

In recent times we live surrounded by many extraordinary events which have a very significant impact in our lives and in the activity of companies.

In 2019, the crisis of nitrosamines led the Committee for Medicinal Products for Human Use at the European Medicines Agency (EMA) to adopt measures to avoid the presence of nitrosamines in manufacturing processes for active ingredients. As a result, various manufacturers have not been able to meet their obligations to supply and several companies have had to suspend the commercialization of their products.

The so-called Gloria, an east wind storm of very high magnitude had an impact on beaches, promenades and also in agricultural fields, causing a lot of damage and losses. Many suppliers of agricultural products could not meet their commitments.

The cancellation of the Mobile World Congress a few days before its opening, as a result of the fact that many companies had decided not to come has resulted in cancellation of many contracts and important losses.

In light of these events, it is not strange that we ask ourselves if in these cases the rule that applies a party not to meet its obligations or even cancel a contract on the ground of force majeure applies or not.

What does the law say?

In Spain, the Civil Code states, in article 1105 the following: "Other than in cases expressly contemplated in the law and in those cases where the obligation so states, nobody will respond for events that were not foreseeable or which if foreseen were inevitable".

Anyone, therefore, may get released from responsibility if he cannot fulfil an agreement because of the occurrence of "events that were not possible to foresee or which if foreseen were inevitable", unless a special law or a signed contract foresees the contrary.

As an example of special laws we may refer to those that govern the electric sector. Suppliers of electricity are obliged to take all necessary measures to guarantee service to end consumers and the law does not allow to consider force majeure "the meteorological events that are common or normal in each geographical zone, in accordance with available statistical data".

The value of contracts

As regards contracts, it is common that they include clauses exonerating parties of responsibility if compliance is not possible because of force majeure. Frequently, we pay little attention to these clauses which normally appear at the end of the contracts. The first idea that it is important to convey at the present times is that both lawyers and clients should dedicate a little bit more time to force majeure clauses.

Whenever a special event appears the contract will have the force of law between the parties and the manner how force majeure has been defined will be relevant.

When negotiating and drafting this clause, it will be important not to fall under the prohibition of article 1255 of the Civil Code, clauses under which fulfillment of the contract is left to the will of one of the parties are null and void. If the parties agree to include in the clause of force majeure some examples those must always refer to situations that do not depend on the will of the parties.

Clauses under which one party agrees not to claim responsibility in the event of willful misconduct of the other are also null because they are against the equilibrium that must exist in all contracts. On the other hand, as the civil code states, the parties may agree that none of them may get protection from a force majeure clause in order not to comply with its obligations and therefore that liability will exist even if the breach is due to force majeure.

In any event, it is important to recall that the burden of the proof of the existence of force majeure rests with the party that relies on this as an excuse not to fulfill the contract. This same party shall have to prove that there is a cause-effect relationship between the force majeure event and the breach.

What about if a force majeure clause is not included in the contract?

In the contracts where Spanish law applies the existence of force majeure will be determined in accordance with the provisions of the civil code and of the jurisprudence. This leads us to a second idea that is important: more attention should be given to the applicable law clauses, and in contracts which are of special relevance it is important to know well how such applicable law governs issues such as force majeure. This is relevant because the applicable law will be the one under which the force majeure clause will be interpreted if this has been included in a contract.

In Spain, the case-law considers force majeure events those that are independent of the will of the parties and that are not foreseeable or that are inevitable and it allows a party to be released from responsibility if there exists a reasonable cause-effect relationship between the force majeure event and the breach of the contract. It is also necessary that the force majeure event has happened after the contract has been executed.

Individual analysis

Both Spanish jurisprudence and the case law of the European Court of Justice state that this is an area where it is difficult to establish general rules and that in order to determine whether an event was foreseeable or inevitable or not and in order to decide whether there exists a cause-effect relationship between the event and the breach it is necessary to carefully consider all applicable circumstances.

It seems evident that solving discrepancies that may appear in relation with these matters will not be easy. The prove that the conditions that allow one party to rely on force majeure exist will always be difficult and it will force a debate about whether the event was foreseeable or not, if it was preventable or not of if such event is really a valid cause for not fulfilling a contract. For sure these will be cases where a bad settlement may be better that a good case.