The Legal 500
Country Comparative Guides

Brazil
FORCE MAJEURE

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This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Brazil.

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1. May force majeure be relied on by a party to a contract, even if the parties have not included a force majeure clause?

Yes. Considering that Brazil is under a civil law system, the concept of force majeure set forth in article 393 of Federal Law no. 10,406 issued on January 10, 2002 – the Brazilian Civil Code (BCC) – will automatically apply to all contracts when the parties have not included a force majeure clause in these contracts.

It should be noted, however, that the BCC set forth an opt-out system which allows parties to partially or entirely repeal the extension and/or effects of the concept of force majeure provided in the BCC in a particular contract (for instance, by inserting a clause that holds a party liable for losses and damages arising from force majeure events, something which would not generally occur as per article 393 of the BCC).

For this reason, in the absence of specific clauses concerning force majeure in a contract, the entirety of the provisions in article 393 of the BCC are implied to apply to the contract. On the other hand, if specific clauses regarding force majeure are included in a contract, they may either ratify the entirety of these provisions or, alternatively, repeal or modify them wholly or partially (that is, opt out of the concept of force majeure set forth in article 393 of the BCC) according to the parties’ will.

2. If so, please explain in which circumstances force majeure may be relied on.

The sole paragraph of article 393 of the BCC reads as follows: “[a] fortuitous event or force majeure is an inevitable fact the effects of which were impossible to avoid or prevent”. Moreover, the main section of article 393 of the BCC states that “[t]he debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly undertaken liability for these events”.

Based on these provisions, Brazilian courts and legal scholars generally agree that the concept of force majeure (as well as “fortuitous events” or acts of God provided in article 393 of the BCC which, for all practical purposes, entail the same legal effects as force majeure events and are therefore equated with force majeure events for the purposes of this article) applies to cases in which a party was adversely affected and the following 3 (three) conditions are simultaneously present: (a) absence of fault (i.e., the party which claims the existence of a force majeure event and seeks to rely on this concept has not contributed to the occurrence of this event); (b) unavoidability of the event and its adverse effects (i.e., such party could not avoid or prevent the occurrence of the event as well as its adverse effects); and (c) the party that seeks to rely on the concept of force majeure is not liable for the event and its adverse effects (i.e., legislation and the contract do not hold the party liable even if there is absence of fault and if the event and its effects are unavoidable).

3. Is the concept of force majeure enshrined in legislation?

Yes. Pursuant to the answers to Questions 1 and 2 above, the concept of force majeure is enshrined in the sole paragraph of article 393 of the BCC: “[a] fortuitous event or force majeure is an inevitable fact the effects of which were impossible to avoid or prevent”. The main section of this article sets forth the legal effects arising from the application of this concept: “[t]he debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly undertaken liability for these events”.

4. If so, may the parties agree to derogate from the provisions of this legislation?

Yes. Pursuant to the answers to Questions 1 and 2 above, the BCC set forth an opt-out system which allows parties to partially or wholly repeal the extension and/or effects of the concept of force majeure provided in the BCC in a particular contract (for instance, by inserting a
clause that holds a party liable for losses and damages arising from force majeure events, something which would not generally occur as per article 393 of the BCC). Thus, specific clauses included by the parties in a contract may repeal or modify the provisions of article 393 of the BCC, wholly or partially.

The opt-out system is based upon the parties’ freedom of contract (the principle of pacta sunt servanda) which is a cornerstone of the Brazilian legal system, especially in contracts entered by and between private individuals (actual or legal persons) which are subject to the private law regime. This principle has been recently reinforced by Federal Law no. 13,874, issued on September 20, 2019, which added article 421-A to the BCC according to which “in private contractual relations, the principle of minimum intervention and the exceptionality of the contractual review shall prevail”.

It is worth noting that, in the specific case of administrative contracts (i.e., contracts entered with the Government or State-owned or controlled entities), the concept of force majeure provided in article 393 of the BCC is the basis for other closely related legal provisions that apply specifically to administrative contracts and which cannot be derogated by the parties’ will (since the contracting Government or State-owned or controlled entities are required to strictly abide by the relevant rules and requirements provided in law). In this sense, and most notably, the Brazilian public procurement legal framework provides that: (a) the occurrence of a force majeure event which prevents the performance of the administrative contract will entail its termination; and (b) administrative contracts may be reviewed (i.e., modified) to preserve the original economic and financial balance between the obligations undertaken by the parties when contracts were signed (so that a party will not take on more or less obligations with economic and financial implications than initially expected) in view of supervening circumstances, that is, if force majeure and/or other similar events take place (such as acts of God or acts of Government - fait du prince).

For this reason, it is generally understood by Brazilian courts and legal scholars that administrative contracts which are subject to the public law regime, while also subject to the doctrine of force majeure, cannot contain clauses that seek to derogate these public procurement rules mentioned above. Thus, for example, a clause in an administrative contract may hold a party liable for losses and damages arising from a force majeure event (and therefore partially derogate the doctrine provided in article 393 of the BCC), but it cannot derogate the parties’ right to review the contract in order to preserve its original economic and financial balance (notwithstanding the possibility of setting forth clauses that restrict the instances in which the occurrence of force majeure events will warrant such review by holding a party liable for the adverse effects arising from some of these events). If clauses that oppose the compulsory legal provisions set forth in the public procurement legal framework do exist within such administrative contracts, then they are null and void and therefore not subject to enforcement by the parties or courts.

Nevertheless, notable exceptions to this limitation upon the parties’ freedom of contract to derogate the force majeure provisions in the Brazilian public procurement legal framework are administrative contracts entered by State-owned or controlled companies (i.e., public companies, mixed economy companies and their subsidiaries) that are unrelated to public utilities and therefore subject to the private law regime which allows freedom of contract to its fullest extent in this regard (as per article 68 of Federal Law no. 13,303 issued on June 30, 2016, which regulates procurement by State-owned or controlled companies).

Finally, it should be emphasized that derogation of the provisions regarding force majeure set forth in law will only occur if this is expressly carried out by the parties by including specific clauses in this sense in the contract, since the parties must opt out of the force majeure doctrine provided in article 393 of the BCC (conversely, in the absence of such specific clauses in the contract, the entirety of the provisions set forth in law will therefore automatically apply to the contract).

5. What is the approach taken to drafting force majeure clauses in your jurisdiction?

Pursuant to the answer to Question 1 above, parties may adopt either of the following 2 (two) approaches when drafting force majeure clauses: (a) ratify the entirety of the provisions regarding force majeure provided in article 393 of the BCC; or, alternatively, (b) repeal or modify them wholly or partially (that is, opt out of the concept of force majeure set forth in article 393 of the BCC) according to the parties’ will (freedom of contract).

Since article 393 of the BCC provides a generic, nonspecific definition of force majeure events which may prove difficult to interpret and apply to specific cases and circumstances arising from the contract (either by the parties themselves or by courts), parties may opt to avoid this risk by setting forth a list of the events that will, or not, qualify or be considered as force majeure events. This list may also be exhaustive or not, according to their will.

It is also common for parties to include clauses that further develop the concept of force majeure provided in
article 393 of the BCC to reflect the quasi-unanimous opinion of Brazilian courts and legal scholars alluded in the answer to Question 1 above, that is, the opinion that *force majeure* doctrine applies to cases that simultaneously meet the 3 (three) following conditions: (a) absence of fault of the party adversely affected by the event; (b) unavoidability of the event and its adverse effects; and (c) the party that seeks to rely on the concept of *force majeure* is not liable for the event and its adverse effects.

Thus, parties may include clauses that reflect this widely accepted interpretation of the *force majeure* doctrine, such as, for instance, a clause that sets forth that a given event will not be considered to be a force majeure event if it results from prior nonperformance of a contractual obligation by the party adversely affected by the event (which is a logical conclusion arising from the presence of fault in this scenario and that prevents the first condition mentioned above from being met). This is also reinforced by article 399 of the BCC which asserts that “*the debtor in default is liable for impossibility of performance, despite arising out of a fortuitous event or force majeure, if any such event takes place during the delay, unless the debtor evidences that such nonperformance was not caused through its fault or that damage would be caused even if the obligation had been performed in due time*”.

A similar clause concerning *force majeure* which is usually included in contracts is one that sets forth that *force majeure* events that adversely affect a party’s ability to perform its contractual obligations will not automatically entail the termination of the contract if this situation can be overcome by alternative means (such as the modification of the affected party’s obligations within the contract). This reflects the provisions of articles 478 and 479 of the BCC which read as follows, respectively: “*In contracts for continuous or periodic performance or deferred performance, if the payment or performance by either party becomes excessively burdensome at an extreme advantage to the other party, as a result of extraordinary and unpredictable events, the debtor may apply for termination of the contract*”; “*Termination may be avoided by granting the defendant the opportunity to modify the conditions set forth in the contract in an equitable manner*”.

On the other hand, when parties wish to repeal or modify the *force majeure* doctrine provided in legislation wholly or partially, the usual approach is to tackle one or more of the 3 (three) conditions mentioned before and that are generally understood as concomitant requisites for the application of this doctrine: (a) absence of fault of the party adversely affected by the event; (b) unavoidability of the event and its adverse effects; and (c) the party that seeks to rely on the concept of *force majeure* is not liable for the event and its adverse effects.

Setting forth clauses that hold a party liable for events they had no fault for and/or that were unavoidable (in opposition to the first two conditions mentioned above), while theoretically possible, may be interpreted by courts as unreasonable clauses that oppose the general principle of good faith (*bona fide*) that applies to all contracts as per article 422 of the BCC. Moreover, these kinds of clauses tend to leave the parties excessively vulnerable to broad, indefinite risks. For these reasons, the most usual approach when drafting clauses to derogate the *force majeure* doctrine provided in legislation is to tackle the third and last condition mentioned above (lack of liability of the party for the *force majeure* event and its adverse effects). This is generally considered to be a sound approach because, in this case, a party willingly undertakes liability for clear, definite risks and events (even if they stem from *force majeure*) and the freedom of contract that is exercised in this regard is unlikely to be deemed unreasonable, considering that this approach is expressly stated to be valid in the last part of the main section of article 393 of the BCC: “[t]he debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly undertaken liability for these events” (pursuant to the answer to Question 3 above). This is true for contracts subject to both private and public law regimes.

For instance, it is usual for long-term administrative contracts to contain clauses setting forth that the private party (contracted by the Government or State-owned or controlled entity) is liable for certain circumstances and their related adverse effects (even if they qualify as *force majeure* events as per the doctrine provided in legislation) and therefore such circumstances and their effects do not warrant the right to review the contract as a means to reinstate its original economic and financial balance (pursuant to the answer to Question 4 above). In administrative contracts for the concession of highways, for example, a typical clause in this sense is one that sets forth that the private individual responsible for operating the highway on behalf of the State (concessionaire) is liable for all adverse effects arising from fluctuations in the number of highway users (e.g., reduced toll collection by the concessionaire), even if such fluctuations result from *force majeure* events or other similar supervening circumstances.

6. *Is it common practice to include force*
**majeure clauses in commercial contracts?**

Yes. Even though the concept of *force majeure* which is set forth in article 393 of the BCC will automatically apply to all contracts when the parties have not included a *force majeure* clause in these contracts (pursuant to the answer to Question 1 above), most commercial contracts contain clauses regarding force majeure that either (a) ratify the entirety of the provisions regarding force majeure provided in article 393 of the BCC; or, alternatively, (b) repeal or modify them wholly or partially (that is, opt out of the concept of force majeure set forth in article 393 of the BCC) according to the parties’ will.

In the first case (ratification of the *force majeure* doctrine provided in legislation), *force majeure* clauses are usually included to further develop and improve the interpretation and application of this doctrine to a particular contract (pursuant to the answer to Question 5 above). In the second case (whole or partial derogation of the *force majeure* doctrine provided in legislation), these clauses are included accordingly to expressly carry out this derogation, since the parties must opt out of the concept of force majeure and its legal effects which is provided in article 393 of the BCC (pursuant to the answer to Question 4 above).

**7. Would the courts be willing to imply force majeure terms into contracts?**

Yes. The concept of *force majeure* which is set forth in article 393 of the BCC will automatically apply to all contracts when the parties have not included a force majeure clause in these contracts (pursuant to the answer to Question 1 above). Thus, even in the absence of clauses concerning *force majeure* in a contract, courts may rely on this doctrine based on this legal provision and other related rules.

**8. How do courts approach the exercise of interpretation in relation to force majeure clauses?**

Courts generally tend to interpret and apply the *force majeure* doctrine according to that which has been agreed upon by the parties in the contract, that is, according to their stated will (freedom of contract), since this principle is a cornerstone of the of the Brazilian legal system, especially in contracts entered by and between private individuals (actual or legal persons) which are subject to the private law regime (pursuant to the answer to Question 4 above). The same stance is adopted by courts in relation to *force majeure* clauses within administrative contracts, provided they do not oppose the compulsory rules in this regard provided in the Brazilian public procurement legal framework and therefore exceed the freedom of contract which is allowed in such cases (pursuant to the answer to Question 4 above). As a result, courts generally understand that such *force majeure* clauses are legally binding and enforceable to the parties involved.

**9. Are there any legislative or statutory controls on the use of force majeure clauses?**

Brazilian law does not provide any specific legislative or statutory control on the use of *force majeure* clauses. Thus, a party’s right (legal prerogative) to invoke *force majeure* clauses or the application of the *force majeure* doctrine is regulated by the general provisions which apply to a party’s right to take legal action – most notably, the general provision in article 205 of the BCC which sets forth a 10-year statute of limitations period applicable to cases not specifically regulated by law, as is the case of claims related to contracts. It should be noted, however, that other specific statute of limitations periods provided in Brazilian law may be applicable to a given case involving *force majeure* depending on the matters under discussion and, for this reason, the applicable statute of limitations period should be assessed on a case-by-case basis.

**10. Must an event have been unforeseeable at the time of the contract to permit a party to rely on it as force majeure?**

The event being unforeseeable is usually the cause and justification for the fulfilment of one of the 3 (three) simultaneous conditions that should be met to apply the *force majeure* doctrine to a particular case – i.e., the unavoidability of the event and its adverse effects. That is because, if a particular supervening event is foreseeable, the party that will or may be adversely affected by this event most likely will be able to wholly or partially avoid the adverse consequences arising from the event (e.g., by adopting counter measures).

However, from a technical standpoint, an event does not have to be unforeseeable to be considered a *force majeure* event (provided the event and its adverse effects are unavoidable by the affected party). Conversely, an unforeseeable event in a broad sense which may be reasonably expected to occur by the parties (e.g., a minor flight delay and other similar circumstances) is usually not considered by Brazilian
courts and legal scholars to be a force majeure event (in fact, it is technically considered to be a foreseeable event from a legal standpoint). For this reason, force majeure events are widely defined by Brazilian courts and legal scholars as events that are unforeseeable, unavoidable, or even foreseeable but with inevitable and/or unforeseeable consequences preventing the performance of contractual obligations.

11. What types of events are generally recognized by courts of your jurisdiction as being force majeure?

Pursuant to the answer to Question 10 above, courts usually acknowledge an event to result from force majeure if it is unforeseeable, unavoidable, or even foreseeable but with inevitable and/or unforeseeable consequences preventing the performance of contractual obligations. Moreover, courts generally understand that force majeure doctrine will apply only if the following 3 (three) conditions are simultaneously met: (a) absence of fault of the party adversely affected by the event; (b) unavoidability of the event and its adverse effects; and (c) the party that seeks to rely on the concept of force majeure is not liable for the event and its adverse effects (pursuant to the answer to Question 2 above).

12. What types of events have been dismissed by courts of your jurisdiction as not being force majeure?

Pursuant to the answer to Question 11 above, courts usually dismiss an event as not being force majeure if the criteria set forth therein are not met. That is, if an event is not unforeseeable, unavoidable, or even foreseeable but with inevitable and/or unforeseeable consequences preventing the performance of contractual obligations: (a) the party adversely affected by the event has contributed to its occurrence; (b) the event and its adverse effects were avoidable; and/or (c) the party that was adversely affected has undertaken liability for the event and its adverse effects.

13. Have courts recognized the COVID-19 pandemic as force majeure in your jurisdiction?

Yes. The COVID-19 pandemic has been widely acknowledged by Brazilian courts as a force majeure event since it meets all relevant criteria for such recognition (pursuant to the answer to Question 11 above). However, it should be noted that, due to its characteristics, the application of the force majeure doctrine provided in Brazilian law has been somewhat mitigated or altogether repealed in some cases.

This is because courts have issued decisions acknowledging that some of the adverse effects arising from the COVID-19 pandemic (e.g., restrictions imposed by sanitary conditions and governmental acts upon businesses’ activities and the movement of persons and goods such as compulsory “lockdowns”) may equally affect both or all parties in a contract. In these scenarios, courts have ruled that the party seeking to rely on the force majeure doctrine to review contracts in their favor (for instance, by reducing the amount of payment due to the other party) must prove that it was adversely affected to a greater extent by the COVID-19 pandemic in relation to the other party. When this situation was not proven by the party (claimant), courts have issued decisions either denying the claim to review the contract or, alternatively, ordering that the contract be reviewed in an equitable manner so as to allow its continuation under more favorable conditions for all parties involved (decisions in either sense will depend on particular circumstances and therefore such claims are usually analyzed by courts on a case-by-case basis).

Moreover, courts have also ruled unfavorably to parties that sought the application of the force majeure doctrine in their favor in the late stages of the COVID-19 pandemic under the argument that, since the pandemic had been in course for a considerable amount of time, this event and its adverse effects had become foreseeable and avoidable, especially in cases in which parties sought to review the conditions set forth in contracts signed well after the outbreak of the pandemic. It should be emphasized, however, that courts have not issued decisions ruling out the possibility per se of applying the force majeure doctrine well after the outbreak of the pandemic; in fact, they have denied the application of this doctrine whenever this particular temporal circumstance prevents the relevant criteria for this purpose from being met in a given case.

Nevertheless, in cases in which the adverse effects arising from the COVID-19 pandemic clearly affect only the party that seeks to rely on force majeure (or clearly affect such party to a greater extent than the other), and provided that all relevant criteria have been met, courts have applied the force majeure doctrine accordingly in favor of the affected party (claimant) – e.g., reviewing the conditions set forth in the contract in their favor, exempting the party from liability for losses and damages arising from nonperformance or delayed performance of its contractual obligations etc. For example, courts have applied the force majeure doctrine to cases in which private individuals (concessionaires)
that operate public collective transportation such as city bus routes were subject to fixed operational and contractual costs arising from their concession agreements (such as the costs associated with continued operation of bus routes and periodical payments due to the Municipality as consideration) were negatively impacted by lower revenues due to the reduced quantity of commuters as a result of “lockdown” policies.

Finally, it should be mentioned that the application of the force majeure doctrine to cases involving the COVID-19 pandemic is still somewhat new to Brazilian courts and, for this reason, precedents in this regard, especially from the higher courts in the upper levels of jurisdiction – the Supreme Federal Court (Supremo Tribunal Federal – STF) and the Superior Court of Justice (Superior Tribunal de Justiça – STJ) - are still sparse and therefore this subject has not yet been subject to a more comprehensive and definitive analysis by courts and legal scholars and statisticians.

14. Would a governmental decision or announcement that an event is a force majeure influence courts of your jurisdiction (e.g. force majeure certificates provided by the Chinese Government to Chinese companies during the covid19 pandemic)?

Governmental decisions or announcements in this sense issued by local authorities in Brazil can and have influenced the interpretation and application of the force majeure doctrine to cases involving the COVID-19 pandemic.

One example of a decision was the issuance of Ordinance no. 57/2020 on March 20, 2020 by the National Council of Justice (Conselho Nacional de Justiça – CNJ), the Brazilian judicial body tasked with administrative and financial control of the Judiciary Branch and with the oversight of judges in Brazil, acknowledging the COVID-19 pandemic as an issue of high complexity, great impact and repercussion.

Another noteworthy acknowledgment in this sense was issued by the Brazilian Ministry of Infrastructure on April 9, 2020 in an exhaustive legal opinion that asserted that the COVID-19 pandemic was a force majeure event that could entail the review of administrative concession contracts (e.g., highway and airport concession contracts, among others) as a means to reinstate their original economic and financial balance (pursuant to the answer to Question 4 above).

However, it should be noted that such governmental decisions and announcements are not binding to courts and ruling bodies, whether judicial or administrative (that is, courts are not obliged to apply the force majeure doctrine to cases involving the COVID-19 pandemic due to the contents or nature of these decisions and announcements). Thus, despite these decisions and announcements, Brazilian courts retain their autonomy and duty to assess whether the force majeure doctrine should be applied, or not, on a case-by-case basis.

These decisions and announcements have therefore influenced the rulings of courts and ruling bodies in such cases only insofar as they constitute further indication that the COVID-19 pandemic qualifies as a force majeure event under Brazilian law (i.e., to corroborate or substantiate the arguments presented by claimants in their cases in favor of the application of the force majeure doctrine). Nevertheless, courts and ruling bodies are especially subject to the influence of these Governmental decisions and announcements in cases involving administrative contracts, since they frequently rely on legal opinions such as the one produced by the Brazilian Ministry of Infrastructure (mentioned above) to justify their decisions and also because these decisions and announcements constitute acknowledgments by the Brazilian Government itself of the qualification of the COVID-19 pandemic as a force majeure event that supports the claims of private individuals (e.g., Government contractors such as concessionaires etc.) against the contracting governmental entities (even if such entities are not directly linked to the authorities that have issued these decisions and announcements and not legally bound to them).

Decisions and announcements in this sense issued by foreign authorities such as the Chinese Government produce no legal effect whatsoever under Brazilian law and therefore may only influence the decisions issued by courts and ruling bodies in theses cases insofar as further, albeit not particularly compelling, corroboration that the COVID-19 pandemic qualifies as a force majeure event.

15. Does force majeure allow a party to suspend its obligations? If yes, for how long?

Yes, but not necessarily since the mere occurrence of a force majeure event per se does not automatically grant such right result. The suspension of a party’s obligations in a contract may be granted by the application of the force majeure doctrine as a result of the modification of the conditions set forth in the contract to allow its continuation in spite of adverse supervening
circumstances, if this is deemed to be practically possible, as per the provisions of articles 478 and 479 of the BCC which read as follows, respectively: “In contracts for continuous or periodic performance or deferred performance, if the payment or performance by either party becomes excessively burdensome at an extreme advantage to the other party, as a result of extraordinary and unpredictable events, the debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly undertaken liability for these events” (pursuant to the answer to Question 2 above).

The terms and conditions of the suspension of the obligations of the party that was adversely affected by the force majeure event will depend on the circumstances of the case. If the obligation cannot be performed temporarily, then the application of the force majeure doctrine by the parties and courts usually allows the suspension to remain for as long as the obligation cannot be performed. However, if the force majeure event permanently or indefinitely prevents the party from performing the obligation, then it must be permanently abolished as a result. Such abolition may entail the termination of the contract (if the obligation is central or indispensable for its continuation) or, alternatively, the review of the contract in an equitable manner (as per article 479 of the BCC) if it is practically possible to preserve it despite the permanent or indefinite impossibility of performance of such obligation.

16. Does force majeure allow a party to totally or partially avoid liability for failure or delay in performing its obligations?

Yes, but not necessarily since the mere occurrence of a force majeure event per se does not warrant this result. Such avoidance of liability would depend on the application of the main section of article 393 of the BCC which states that “[t]he debtor shall not be liable for the losses arising from a fortuitous event or force majeure unless it has expressly undertaken liability for these events” (pursuant to the answer to Question 2 above). Thus, for avoidance of liability to take place, the relevant criteria for the application of the force majeure event should be met, most notably the condition alluded to in the last part of the main section of article 393 of the BCC: the party that seeks to rely on the concept of force majeure is not liable for the event and its adverse effects – i.e., legislation and the contract do not hold the party liable even if there is absence of fault and if the event and its effects are unavoidable (pursuant to the answer to Question 2 above).

This is also reinforced by article 399 of the BCC which asserts that "the debtor in default is liable for impossibility of performance, despite arising out of a fortuitous event or force majeure, if any such event takes place during the delay, unless the debtor evidences that such non-performance was not caused through its fault or that damage would be caused even if the obligation had been performed in due time" (pursuant to the answer to Question 5 above).

17. Does force majeure give a party the potential right to terminate the contract?

Yes, but not necessarily since the mere occurrence of a force majeure event per se does not warrant this result. Pursuant to the answer to Question 16 above, the provisions in articles 478 and 479 of the BCC provide that a contract may only be terminated due to force majeure if it is practically impossible for it to continue in spite of any modifications of its conditions seeking to overcome the adverse effects arising from the force majeure event. The party seeking to terminate the contract due to force majeure will therefore have to prove that.

18. On whom would the burden of proof lie when attempting to rely on force majeure?

The burden of such proof, as a rule, lies with the party that seeks to rely on force majeure (claimant), as per article 373, I, of Federal Law no. 13,105, issued on March 16, 2015 – the Brazilian Civil Procedure Code (BCPC): "The burden of proof lies with the claimant with regard to the fact that constitutes its right". On the other hand, the opposing party (defendant) bears the burden of proving “the existence of an impeditive, modificative or extinctive fact in relation to the right of the claimant”, according to item II of the same article.

It should be noted that the BCPC allows judges to diverge from these rules and assign the burden of proof to the most suitable party, that is, the party that is reasonably expected to possess proof (if the claimant is not in possession of such proof) or that can more easily gather and/or produce it in court. However, this is an exception to the general rule set forth in article 373, I, of the BCPC and it is unusual for judges to relieve claimants from the burden of proof in such cases involving force majeure since the claimants themselves are indeed most suited to gather and/or produce the relevant proof in court, since they are (presumably) the parties that have been adversely affected by the alleged force majeure event.
19. What would a party seeking to rely on force majeure be required to show?

Pursuant to the answer to Question 2 above, the party would be required to show evidence that all relevant criteria for the application of the force majeure doctrine are met – in short, evidence that the alleged force majeure event is indeed unforeseeable, unavoidable, or even foreseeable but with inevitable and/or unforeseeable consequences preventing the performance of contractual obligations, as well as evidence of: (a) absence of fault of the party adversely affected by the event; (b) unavoidability of the event and its adverse effects; and that (c) the party that seeks to rely on the concept of force majeure is not liable for the event and its adverse effects.

Such evidence would corroborate that the force majeure doctrine should be applied to the case. In this sense, parties usually present, for example: copies of the contract, relevant communication exchanged between the parties (e.g., emails, written notifications, minutes of meetings etc.), documents that substantiate the occurrence of the force majeure event and its adverse effects as well as its nature etc.

In addition, a party may be required to show evidence that substantiates the adequacy of its actual claims (requests) in court in view of the force majeure situation. For instance, if a party intends to review the contract by suspending or abolishing a specific obligation, then it will be required to show evidence that the adverse effects arising from the force majeure event temporarily or permanently / indefinitely prevent it from performing the obligation. For example, if the party (claimant) must fulfill an obligation to pay a given amount of money to the opposing party and has been adversely affected by the force majeure event by being deprived of vital revenues, it is advisable to show evidence of the causal link between the force majeure event and the loss of revenues, as well as evidence of the loss of revenues per se and the resulting lack of financial capacity of the claimant to pay the amounts set forth in contract.

Accordingly, and especially in cases involving force majeure and the COVID-19 pandemic, the claimant may also be required to show evidence that it was solely adversely affected, or affected to a greater extent in relation to the other party, by the force majeure event (pursuant to the answer to Question 13 above).

20. To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?

Considering that a force majeure event is that which is unforeseeable, unavoidable, or even foreseeable but with inevitable and/or unforeseeable consequences preventing the performance of contractual obligations (pursuant to the answer to Question 10 above), a party which seeks to rely on force majeure is not required to mitigate is position or losses before doing so, since this would be contradictory with the concept of force majeure itself as provided in Brazilian law (essentially an event with adverse effects that are impossible to avoid). For this reason, any event with the possibility of mitigation of position and losses by the party cannot qualify as a force majeure event, regardless if such mitigation was in fact carried out, or not.

This does not apply, however, to the mitigation of position and losses after the force majeure event took place. The occurrence of such event and the existence of associated adverse effects do not exempt the affected party from mitigating its position and losses if this is practically possible. For example, if the force majeure event has endangered the health and wellbeing of a party’s employees, such party is not exempted from the legal obligation of undertaking all possible practical measures to abolish or mitigate this danger. Moreover, it should be noted that if the party is not obliged (by law, contract or both) to mitigate the adverse effects arising from the force majeure event, it may opt not carry out such mitigation (even if it is practically possible) and can still seek to rely on force majeure – in this scenario, however, the affected party will be exempted from liability towards the opposing party and other involved third-parties (if any) only with respect to losses and damages caused to them due to the force majeure event itself. Thus, the application of the force majeure doctrine in this scenario will not exempt the affected party from burdening the ensuing losses that it could, but did not mitigate, and will also not exempt it from liability towards other parties if these ensuing losses and damages that do not stem directly from the force majeure event (and therefore could have been averted) also negatively impact these other parties.

21. Are there any applicable notice requirements which an affected party would be required to comply with before invoking force majeure?

Brazilian law does not impose specific notice requirements which the affected party is required to comply with before relying on force majeure. Thus, this kind of notice requirement may be, and usually are, regulated by specific provisions within contracts. In this case, such provisions in the contracts are legally binding to the parties and must be complied with before a party
relies on force majeure. In the event of noncompliance, the opposing party (defendant) may successfully resist the application of the force majeure doctrine on the grounds that the affected party (claimant) lacks interest in the claim, which is a procedural prerequisite for the filing of lawsuits as per the BCPC – i.e., hold that the claimant has not complied with the notice requirements set forth in contract and therefore does not possess the subjective right (legal prerogative) of requesting the application of the force majeure doctrine in court.

Nevertheless, even if there are no provisions in the contract concerning notice requirements, it is highly advisable that the party seeking to rely on force majeure notify the other party as soon as practically possible about the occurrence of the force majeure event and its intent to seek reliance on the force majeure doctrine as an act of good faith (bona fide), since this is required of all parties in a contract as per article 422 of the BCC (pursuant to the answer to Question 5 above) and will allow the other party to undertake possible measures to mitigate any adverse effects it may burden as a result of the event (as well as possibly exempt the party that issues the notification from liability due to possible losses and damages arising from the lack of communication / transparency and good faith that could otherwise take place). Moreover, courts may understand that the lack of notification of the other party in this scenario, even if there are no provisions in the contract concerning notice requirements, entails the affected party’s (claimant) lack of subjective right (legal prerogative) of requesting the application of the force majeure doctrine.

22. What is the consequence of failing to comply with such notice requirements?

Pursuant to the answer to Question 21 above, failure to comply with notice requirements set forth in the contract (or lack of notification even if there are no provisions in the contract concerning notice requirements) can lead courts to understand that the party adversely affected by the force majeure event lacks the subjective right (legal prerogative) of requesting the application of the force majeure doctrine.

23. What would be the impact of force majeure on any prepayments made under contractual arrangements?

The impact of the application of the force majeure doctrine in this case would depend on the result most suitable to the case – either the modification of the conditions set forth in the contract or its termination (pursuant to the answer to Question 5 above).

If the conditions of the contract are modified, prepayments may be accordingly returned in whole or in part to relieve the adversely affected party and allow the continuation of the contract. On the other hand, if the contract cannot survive the force majeure event and its effects and is therefore subject to termination, the effects arising from termination will be retroactive to the date of occurrence of the event (as is also the case of termination for default). In the event of termination, prepayments may also be accordingly returned in whole or in part so as to avoid the undue enrichment of the party that received them, if the prepayments (obligation) have not been equitably or sufficiently compensated with a corresponding good or service (consideration), as would occur in any settlement of payments after the termination of a contract.

24. What contractual remedies are available to affected parties, other than force majeure?

A party may resort to the provisions of articles 478 and 479 of the BCC (solely or in tandem with other provisions concerning force majeure in the BCC), which read as follows, respectively: “In contracts for continuous or periodic performance or deferred performance, if the payment or performance by either party becomes excessively burdensome at an extreme advantage to the other party, as a result of extraordinary and unpredictable events, the debtor may apply for termination of the contract”; “Termination may be avoided by granting the defendant the opportunity to modify the conditions set forth in the contract in an equitable manner” (pursuant to the answer to Question 5 above).

Thus, even if the force majeure doctrine cannot be relied upon for any reason in a case, the party may still resort to articles 478 and 479 of the BCC, if the performance of the contract becomes “excessively burdensome at an extreme advantage to the other party, as a result of extraordinary and unpredictable events”. It is worth mentioning that such “extraordinary and unpredictable events” may not necessarily qualify as force majeure events (pursuant to the answer to Question 2 above) and, for this reason, these provisions may apply even if no force majeure event took place. In this scenario, the interested party should file a lawsuit in court to either seek the modification of the conditions set forth in the contract to allow it to continue in spite of these “extraordinary and unpredictable events” or, if that is not practically possible, to seek its termination (pursuant to the answer to Question 5 above).
Resorting to such remedies therefore may bring about similar results to those that would be obtained if the party had also resorted to the application of the force majeure doctrine. The main difference or disadvantage in this scenario, however, is that the application of the provisions in articles 478 and 479 of the BCC do not exempt the affected party (claimant) from liability for losses and damages arising from the extraordinary event, as would otherwise occur in a force majeure scenario.

25. What effect does force majeure have on consumer contracts? When can a producer or retailer effectively rely on this concept?

The application of the force majeure doctrine on consumer contracts yields the same results as those that are brought about in other contracts (e.g., commercial contracts not subject to consumerist law and administrative contracts), namely: exempting the affected party from liability for losses and damages arising from the force majeure event and serving as justification for the modification of the conditions set forth in the contract or its termination as per articles 478 and 479 of the BCC (pursuant to the answer to Question 5 above).

This holds true even in view of the rigorous provisions set forth in articles 12 and 14 of Federal Law no. 8,078, issued on September 11, 1990 – the Brazilian Consumer Defense Code (BCDC) that state that manufacturers, importers, producers, retailers, and suppliers are strictly liable (that is, regardless of proof of fault or malice) for defects in the manufacturing of products or in the delivery of services for consumers. That is, if such defects occur as a direct result of a force majeure event, these parties cannot be held liable for the ensuing losses and damages burdened by consumers.

It should be emphasized, however, that Brazilian courts tend to adopt a strict stance in relation to the qualification of extraordinary events that adversely impact these parties (manufacturers, importers, producers, retailers, and suppliers) as force majeure events. This is because an unforeseeable event in a broad sense which may be reasonably expected to occur by these parties is usually not considered by Brazilian courts and legal scholars to be a force majeure event; in fact, it is technically considered to be a foreseeable event from a legal standpoint (pursuant to the answer to Question 10 above). Brazilian courts therefore understand that many events of this kind that frequently occur in connection with these parties (manufacturers, importers, producers, retailers, and suppliers) qualify as “business risks”. For example, courts have issued numerous precedents in the sense that credit card frauds, despite being perpetrated by third parties and somewhat extraordinary in nature, are “business risks” undertaken by the financial institutions that issue and manage credit cards. Thus, even though such frauds could be interpreted as “fortuitous events” as per article 393 of the BCC (and therefore entail identical legal effects as those produced by the application of the force majeure doctrine), courts tend to reject this interpretation and to nevertheless hold these financial institutions liable towards consumers (credit card users) due to losses and damages arising from frauds, since they are “business risks”.

26. What type of insurance policy could cover force majeure events in your jurisdiction?

The insurance policy suited to cover force majeure events in Brazil is the All Risks Liability Insurance, but policies with such coverage are very rare in Brazil since insurance companies usually refuse to provide it and, when they do, the insurance is very costly.

It is also worth mentioning that the Brazilian Private Insurance Authority (Superintendência de Seguros Privados – SUSEP) has issued Directive 440 to set forth that the COVID-19 pandemic is a risk excluded from insurance coverage.

27. Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation (both for the short-term and long-term), to assist parties with force majeure, given the recent COVID-19 pandemic?

There are no immediate plans for enacting further laws to assist parties with the interpretation and application of force majeure events related to the COVID-19 pandemic. This is because the Brazilian Government and Brazilian lawmakers, at the current stage, have already enacted several new laws and amended pre-existing legislation for this purpose.

For instance, Federal Law no. 14,010 was issued on June 10, 2020 to set forth the “Emergency and Transitional Legal Regime for Private Law Relations” during the course of the COVID-19 pandemic with the purpose of providing transitional procedural rules applicable to family, corporate, antitrust and real estate law matters in this context. Another example is Federal Law no. 14,034, issued on August 5, 2020, to provide emergency
measures for the civil aviation industry in view of the COVID-19 pandemic, such as exempting consumers from contractual penalties arising from their supervening disinterest in using purchased airline tickets.

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