

FORCE MAJEURE (CIVIL CODE ART.393)



Fortuitous event or force majeure: event whose effects cannot be avoided or prevented

A force majeure event releases the debtor from complying with the obligation without any liability for the default (for duration of the event/for those obligations that cannot be fulfilled due to the event)



Applies to long-term contracts or to contracts with any deferred obligation

Debtor cannot be in default at the time of the event

REBUS SIC STANTIBUS/ EXCESSIVE BURDEN /HARDSHIP (CIVIL CODE ART. 317 AND ART.478-480)



Requirements: (a) long-term contracts or contracts with any deferred obligation; (b) excessive burden (c) unforeseeable or unexpected events



Termination or review of contracts must occur via lawsuit if parties do not reach agreement



The supervening event (unforeseeable/unexpected) does not necessarily prevent compliance with the contract, but it makes it very hard by significantly modifying the economic balance of the obligations, thereby authorizing its termination or judicial review



Risks inherent to the contract cannot give rise to hardship



Inconvenience of contract review by the Courts - judicial interference in the contract

In all cases, the contractual duty of good faith must always be observed by the parties

JUDICIAL DECISIONS



Courts have already decided that pandemics/epidemics are force majeure/fortuitous events or unforeseeable and unexpected events under the doctrine of *clausula rebus sic stantibus / hardship*

There is significant controversy on what is an unforeseeable and unexpected event so to trigger the termination or review of a contract. There are rulings that the event cannot be a risk inherent to the contract. Along those lines, Statement #366 of the IV Civil Law Conference establishes that the event cannot be linked to normal contractual risks

The Superior Court of Justice has already ruled that judicial interference in contracts under the doctrine of hardship or due to a supervening excessive burden requires the demonstration of changes in the initial balance of the agreement caused by the unforeseeable or unexpected event

New laws can influence judicial interpretation, such as Bill No. 1.179/20, presented by the Senator Antonio Anastasia. Some provisions of this bill have already been presented by the President of the Supreme Court to the National Council of Justice as recommendations to be followed by Judges

The adoption of measures related to the doctrine of hardship or to force majeure depends on a case-by-case analysis, being preferable that renegotiation occurs out of Court due to the unpredictability of Courts and the inconvenience of judicial intervention in contracts