

COVID-19: First Outlook on Legal Ramifications

(A) CoVid-19 Emergency

- > CoVid-19 is a new respiratory illness affecting most countries and recently declared as a pandemic event by WHO.
- > All the Governments are trying to contain the spreading of the COVID-19 throughout the issuance of **increasing restrictive orders** (such as, among others, commercial activities' shut down, smart working implementation and movement and transportation restrictions).
- > As we will see, such emergency could be qualified as a **Force Majeure Event**.
- > **Then, what happens to commercial contracts?**

(B) Italian Laws: Force Majeure (and also so-called *Factum Principis*)

- > **Which are the applicable rules under Italian law?**
- > Pursuant to Italian Law, in case of breach of contract, the party which does not exactly fulfill its contractual covenants (entirely or even partially) is required to prove that the nonfulfillment (or the delay) was caused by the impossibility of performance resulting from a **cause beyond its control** (Section 1218 of Italian Civil Code).
- > The Concept of "cause beyond control" includes **(i) Force Majeure, (ii)** unforeseeable circumstances and also **(iii)** the so-called ***Factum Principis*** (*i.e.* legislative or administrative orders which affect the fulfillment of contractual covenants such as many orders which entered in force over these weeks/days).
- > Now, on the one hand, certainly CoVid-19 may certainly trigger a Force Majeure event, but (on the other hand) this clearly does not apply to any company nor to any covenant.
- > Hence, it is necessary to verify, on a case-by-case basis, if the non-fulfillment should be excused (as depending on a Force Majeure event) and not being qualified as a breach of contract.
- > Moreover, on a case-by-case basis, it should be also assessed if other instruments under Italian Law may be applied, such as:

- ✓ Cancellation due to (total or partial) impossibility (Section 1256 of Italian Civil Code); or
- ✓ Termination for extreme onerousness (Section 1467 of Italian Civil Code); or
- ✓ The “assumption” (“presupposizione”) doctrine.

(C) Force Majeure under International Law

> Which are the applicable rules under International Law?

(1) UNIDROIT Principles state that **non-performance by a party is excused if:**

- “[t]hat party proves that the non-performance was due to an **impediment beyond its control**; and
- that party could not reasonably be expected to have taken into account such impediment at the time of the conclusion of the contract or to have avoided or overcome it or its consequences” (see Article 7.1.7 of UNIDROIT Principles).

(2) The ICC Force Majeure Clause 2003, essentially following UNIDROIT Principles, states that:

- “[w]here a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that party proves that:
 - [a] its failure to perform was caused by an impediment beyond its reasonable control; and
 - [b] it could not reasonably be expected to have taken into account the occurrence of the impediment at the time of the conclusion of the contract; and
 - [c] it could not reasonably have avoided or overcome the effects of the impediment. (See Paragraph 1);
- **Epidemic event is expressly included into the notion of “impediment”** (see Paragraph 3 (e)).

(3) Also the Convention on Contracts for the International Sale of Goods (CISG) follows the same rules and principles of UNIDROIT Principles and of the ICC Force Majeure Clause 2003 (see Article 79 of CISG).

- > As a conclusion, such as Italian law, also applying the International Conventions, the current CoVid-19 scenario may be qualified as a Force Majeure event.

(D) Brief Overview of Case Law on Force Majeure and Epidemic Events

- > **Guiding Opinion of Shanghai Higher People’s Court on February 8, 2020** [one of the most recent case law just addressing CoVid Emergency]

- *“If the parties are unable to perform due to the impact of the epidemic or their performance has a significant impact on the rights and interests of the other parties, they shall follow the principles of fairness, good faith, etc. and aggregately consider factors such as the agreement between the parties, the development stage of the epidemic, the causal relationship between the epidemic and the inability to perform or difficulty in performing the contract and the level of impact of the epidemic”*

- > **Italian Supreme Court, June 8, 2018, no. 14915**

- *“The release of debtor due to the impossibility of performance may occur (according to the provisions of Articles 1218 and 1256 of the Italian Civil Code) only if and to the extent that the objective items of the impossibility to fulfil the obligation and the subjective element of the absence of fault on the part of the debtor (with regard to the determination of the event that made performance not possible) are concurrent”.*

- > **Belgium, Tribunal of Tongeren, January 25, 2005, Scaform International BV & Orion Metal BVBA v. Exma CPI SA**

- *“According to Art. 79 CISG, a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an **impediment beyond its control** and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract”.*

(E) CoVid-19, Force Majeure And Some Contractual Doubts

- > The **different impact** (in terms of, for example, case number) of CoVid-2019 emergency across different world countries and even across different regions within the same State could allow to follow a **different approach** in considering such emergency as a Force Majeure Event? In other words, it is sustainable that – even if in the same State – some parties could be considered as “covered” by Force Majeure principles and other parties no? At what extent?

- > Also within the same territory, it is sustainable that companies operating in certain industries could be considered as “covered” by Force Majeure principles and companies operating in other different industries no? Which are the criteria to be followed here?
- > **Who is the “impaired party”?** Only the party directly affected by the Force Majeure Event or also the party that may be indirectly affected (*i.e.* parties whose performance depends on the execution of a different contract already affected by CoVid-19)? Which is the casual link to be applied in such cases?
- > **Many other doubts growing on a daily basis**

(F) **What’s Next**

- > All contracts governing commercial, banking and M&A transactions would probably be required to include a new **CoVid Clause**. In particular, such clause should address:
 - The exact notion of Force Majeure (*i.e.* the “extent” of the health emergency which allows to invoke onwards the CoVid Clause);
 - The route to be clearly followed soon after the Force Majeure Event occurrence (such as information/notices to be immediately circulated to the other parties, by way of forfeiture);
 - The duty of mitigation and the exact content of such duty (with the clear indication of the activities to be carried out to be compliant with such duty);
 - The possibility to “switch” the performance on other companies (typically group companies, but maybe also other third selected parties, already approved within the contract);
 - The exact duration of the suspension period which does not allow the other party to invoke the contract termination;
 - The clear consequences of the termination (Restoration, also partially, of the other party?; No restoration? Thresholds?);
 - The regime to be applied in case, after a Force Majeure Event, the party impaired by such event may start again complying with its contractual covenants;
 - Criteria to re-negotiate the contractual covenants once the Force Majeure Event ceases;

- > Much more attention to be paid to all **H&S Regulations** aimed, in particular, at handling **(i)** the management of workplace spaces, **(ii)** policies of conduct to be followed at the workplace and **(iii)** overcrowding of employees in the workplace;
- > Increasing key role of a number of industries such as **pharmaceutical, logistics, telecoms and technology**, which would probably become the primary industry for potential M&A transactions;
- > Much more **extreme digitalisation** which will involve the increase of **(i)** electronic documents; **(ii)** worldwide validity of digital signature, **(iii)** *ad-hoc* rules for virtual-only meetings; and **(iv)** cyber security risks on documentation and information.

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