



The Coronavirus and force majeure

Context

While only few days ago the Covid-19 outbreak was just a Public Health Emergency of International Concern, on March 11, 2020 the World Health Organization (WHO) declared it a pandemic, a situation in which the national governments have the obligation to impose drastic measures to prevent the spread of the virus and to mobilize the whole health system.

Can this virus change the global economic picture? How can you act to limit any negative consequences and manage the risks of defaulting on your contractual partners? Who can be blamed for not fulfilling contracts or for their improper performance especially during the period when the epidemic / pandemic state was not officially declared? What happens when the contract becomes impossible to execute or the fulfillment of the obligations becomes illegal due to the restrictions imposed by the authorities?

All of these are questions to which specialists seek answers and solutions.

Legal analysis and some recommendations

Most contracts contain clauses that refer to situations of force majeure in which the negative consequences of non-performance of the contracts in whole or in part are neutralized by suspending the contractual obligations assumed or even by the termination of the contract, when the force majeure operates for a longer period of time. *Force majeure is any external, unpredictable, absolutely invincible and inevitable event.* At the case law level, epidemics have also been considered, in some situations, to be exonerating causes of liability, being classified as events of force majeure.

In order to establish an exemption from contractual liability due to the spread of coronavirus, first of all it must be proven that it has an external origin or etiology, that it was unpredictable, absolutely invincible and inevitable. And yet, the absolutely invincible and inevitable unpredictable events do not automatically constitute cases of force majeure, but they must be analyzed on a case-by-case basis to determine whether there is a causal link between the event that is considered force majeure and the fact that the legal contract/relationship generating obligations is not fulfilled. The Chamber of Commerce and Industry of Romania notifies, on request, for the Romanian companies, based on documentation, the existence of force cases. However, not

always the opinion and the certificate of attestation of the force majeure issued by the CCIR are sufficient to prove the existence of a case of force majeure.

In similar cases, the courts have considered that there is unpredictability especially at the time of occurrence of these events, but as the risks of the epidemics became known, they lost of the unpredictable nature and no longer represented events of force majeure. This is why, from a legal point of view, the official communications of government institutions/WHO have a special role in shaping the awareness on the subjects of these legal relationships.

In the case of contracts to be concluded during this period or which are already under negotiation, in this global context where the negative consequences for the national and world economy are not yet evaluated, greater attention is needed in reconsidering the force majeure clauses in which to expressly and explicitly stipulate how it operates; but why not, separately from events of force majeure, the parties might provide potential risk mitigation mechanisms, including possibilities to modify/adapt the schedule for fulfilling contractual obligations, the right of suspension or termination of the contract before the deadline, ways of regulating the price of the contract related to the market change, the demand/supply ratio, etc.

For contracts concluded before the parties are aware of this epidemic risk, the courts could emphasize the invincible and inevitable character of the eventual force majeure, where the causal link between the event and the non-performance of obligations must be very strongly supported and demonstrated. This is why we recommend companies to call for qualified assistance and to assess the applicability of force majeure within basic contracts already concluded, including from the perspective of the law applicable to said contracts, to estimate the consequences of contracts suspension/non-execution, to initiate the renegotiation of the existing contractual terms and conditions, and together to recalibrate their contractual obligations or to determine the possible remedies.

To summarize

- Analyze whether your contract becomes impossible to perform or the fulfillment of your obligations becomes illegal due to restrictions imposed by the authorities;
- Establish a communication management plan with the contractual partners. Keep records/logs of the situations created;
- Risks related to supply: think of alternative sources of supply or dual supply;
- Consider an audit of the measures taken by your contractual partners;
- If applicable, consider the availability of risk insurance policies.

The information provided herein presents general information and should not be relied on as legal advice when analyzing and resolving a specific legal issue. If you have specific questions regarding a particular fact situation, please address your queries to:

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