Pirola
Pennuto
Zei
& Associati
studio di consulenza
tributaria e legale

COVID-19

Force Majeure in international agreements

Frequently Asked Questions

This memo covers the most frequent Covid-19 related issues and takes into account the newly issued Italian Law no. 18/2020 (Cura Italia).

1) **Does Covid-19 mean Force Majeure?**
2) **Does Force Majeure always excuse from contractual liability?**
3) **Can Force Majeure be ruled by the contract?**
4) **Is Force Majeure to be notified to the other party?**
5) **What should you consider when invoking Force Majeur?**
6) **And when nothing is provided by the contract?**
7) **Are there other Italian rules to protect companies unable to fulfill the contract due to the Covid-19 epidemic?**
8) **Is article 91 of Cura Italia applicable to international contracts?**
9) **In case of future disputes?**

1) Does Covid-19 mean Force Majeure?

Force Majeure generally means an impediment beyond the reasonable control of the parties. It is an irresistible force or an unforeseeable event at the time of the conclusion of the agreement, or an impediment which the party cannot be reasonably expected to have avoided or overcome it or its consequences (Article 7.1.7 Unidroit Principles of International Commercial Contracts).

International contracts generally provide a detailed list of Force Majeure events, like for example pandemics and epidemics.

The Covid-19 epidemic (declared pandemic by the World Health Organization) can be considered an exceptional, unpredictable, unavoidable, irresistible event beyond the control of the parties. Also, the emergency rules adopted in Italy (sometimes even providing criminal sanctions) to combat against the spread of the epidemic, can be considered a direct consequence of said event, and therefore Force Majeure.

2) Does Force Majeure always excuse from contractual liability?

The party is basically excused, when it is concretely impeded to fulfill its contractual obligations due to Force Majeure or the consequences thereof.

3) Can Force Majeure be ruled by the contract?

International contracts generally provide clauses expressly and specifically ruling the events of Force Majeure. Nevertheless sometimes Force Majeure rules can also be contained in other contractual clauses not expressly headlined Force Majeure.

4) Is Force Majeure to be notified to the other party?

Force Majeure has to be notified by a written notice from the non performing party providing data, grounds of such impediment, even it is a publicly known event (like for example the Covid-19 disease) and, when available, supporting documents.

Force Majeure clauses normally provide in detail how and by when such notice has to be given, sometimes within very short deadlines (for instance within 24 / 48 hours). Such clauses also often provide that, in case of missing or late notice, the failing party shall be considered in breach of contract and liable for damages due to non-performance or delay (such as application of Liquidated Damages).

5) What should you consider when invoking the Force Majeure clause?

If the Force Majeure clause applies, the non-performing party is normally excused from liability. However, Force Majeure Clauses vary in scope and the language must be carefully considered in order to determine if the party can rely on it to excuse nonperformance or delay.

Moreover, clauses generally provide that the party, which invoked the event has to promptly notify in writing the other party when the Force Majeure event has ceased.

Please note that Force Majeure clauses also often provide, when the impeding event persists beyond a certain period of time, that the contract can be terminated by other party.

6) And when nothing is provided by the contract?

If the agreement does not provide any specific clause or rule of Force Majeure, it has to be verified whether Force Majeure is ruled by applicable national laws or by international conventions, like for example the 1980 United Nations Convention on Contracts for the International Sale of Goods – C.I.S.G..

Such Convention provides that "*A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences*".

Otherwise, reference has to be made to the law applicable to the contract.

7) Are there other Italian rules to protect companies unable to fulfill the contract due to the Covid-19 epidemic?

Article 91 of the Cura Italia provides that "*Compliance with containment measures … is always positively considered for the purposes of excluding, according to articles 1218 and 1223 of the Civil Code, the liability of the debtor, also in relation to the application of any forfeiture or penalties connected with delayed or non-performed obligations*".

Cura Italia does not introduce, however, a generally applicable rule of Force Majeure. In other words, it is provided that the Judge will carefully consider if the delay or non-performance was due to compliance with the emergency measures adopted to combat the spread of the epidemic.

Some examples for the construction industry are available at the following link: http://www.mit.gov.it/sites/default/files/media/notizia/2020-03/Linee%20Guida%20Cantieri%20Edili.pdf

8) Is article 91 of Cura Italia applicable to international contracts?

Yes – it is applicable to international contracts governed by Italian Law.

9) In case of future disputes?

Article 91 shall apply also to contracts governed by foreign law if Italian judges (or arbitrators) will consider it an overriding mandatory provision (in Italian, "*norma di applicazione necessaria*").

Article 9 of Rome I defines the overriding mandatory provision as the "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*".

Article 91 may also be regarded as a public order rule to prevent foreign "non-compliant" decisions to effects in our jurisdiction.

It is difficult to express an opinion on Force Majeure if the contract is subject to foreign law and foreign jurisdiction/arbitration. However, it is not unlikely that other Countries, or even the EU, will adopt similar rules.

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This is a general memo and not a legal opinion. Qualified legal assistance is required to assess Force Majeure issues in international contracts.

Contacts for additional information:

Pirola Pennuto Zei & Associati

- ***Avv. Gabriele Bricchi***: gabriele.bricchi@studiopirola.com
- ***Avv. Massimo Di Terlizzi:*** massimo.diterlizzi@studiopirola.com
- ***Avv. Andrea Gottardo:*** andrea.gottardo@studiopirola.com
- ***Avv. Roberto Padova:*** roberto.padova@studiopirola.com