

## Covid-19 emergency and force majeure: *considerations concerning the Italian legal framework.*

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### **Introduction.**

*The outbreak of Covid-19 and the measures adopted by the Italian Government and the most interested Regions, affect freedoms both of citizens and businesses and limit their operativeness. The Covid-19 emergency breaks into the legal world as an "event of force majeure".*

*Article 91 of the "Cura Italia" Decree, which supplemented Article 3 of Decree-Law no. 6 of February 23, 2020, converted with amendments by Law no. 13, March 5, 2020, provides significant elements concerning the "force majeure" and the nonfulfillment of obligations. Therefore, it is deemed necessary to assess whether these emergency contingencies can exempt the party thus unable to comply.*

### **THE DISCIPLINE PROVIDED BY ITALIAN LAW.**

The Italian legal system does not contain a precise definition of 'force majeure', since no provision explicitly describes the case, the effects and, therefore, the related consequences.

According to an interpretative approach, the notion of force majeure would be postulated, summarily, by Article 1467 of the Italian Civil Code, which recognizes the debtor's right to request the termination of the contract when the service he owes has become excessively burdensome due to extraordinary and unforeseeable events outside his sphere of action.

The Court of Cassation has ruled on several occasions that only the event that prevents the regular performance of the contract and also renders ineffective any action of the obligor aimed at eliminating it, can be considered as a situation attributable to the concerned exemption. The Supreme Court also specifies that the impeding event must not be causatively connected to direct or indirect actions or omissions of the debtor<sup>1</sup>.

As for the extraordinary and unforeseeable nature of the event, the Supreme Court of Cassation carefully circumscribed the preceptive meaning of both characteristics in its decision no. 12235, Cass. Civ., section III, May 25, 2007.

In particular, extraordinariness occurs in objective terms, with regard to an abnormal event, measurable on the basis of elements such as its intensity and dimension. Unforeseeability, on the other hand, concerns the subjective profile and involves the cognitive capacity and diligence of the contracting party in representing itself *ex-ante* whether the event in question can recur or not<sup>2</sup>. The assessment of unforeseeability must be made regarding the behavior of an average person in the same conditions<sup>3</sup>.

What has been so far affirmed reflects the discipline provided by legal sources, that, due to its nonmandatory nature, it comes into play when the contract does not make any provision for events that may potentially integrate the notion of force majeure.

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### **FORCE MAJEURE IN INTERNATIONAL LAW.**

Along the international legal horizon, the case of force majeure is broadly outlined<sup>4</sup>.

<sup>1</sup> v. *inter alia*, Cass. Civ., sez. VI., 11 aprile 2017, n. 678.

<sup>2</sup> Cass. Civ., sez. III, 25 maggio 2007, n. 12235.

<sup>3</sup> Cass. Civ., sez. VI, 2 novembre 2018, n. 28063

<sup>4</sup> Art. 7.1.7, UNIDROIT, Principles of International Commercial Contracts, 2010; Art. 8.108, The Principles of European Contract Law, 1998.

The Convention on the International Sale of Goods<sup>5</sup>, recognizes three characteristics that must be met in order to find a concrete application of the force majeure exemption:

- i. extraneousness of the event from the sphere of control of the obligor;
- ii. unforeseeability of the event at the time the contract is stipulated;
- iii. insurmountability of the preventing event or its outcomes.

Thus occurring all the above three elements, the non-performing debtor is usually deemed to have no liability to the creditor<sup>6</sup>.

The ICC drafted its own force majeure clause recalling the three elements previously mentioned in the 1980 Vienna Convention. However, the ICC force majeure clause in respect of the Vienna Convention contains a list of events whose occurrence entails the application of the force majeure clause<sup>7</sup>.

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#### **THE COVID-19 EMERGENCY AND FORCE MAJEURE.**

Now, connecting the above with the current circumstances arising from the Covid-19 emergency, it is necessary to observe the provisions of the recently issued measures.

Article 91 of the "Cura Italia" Decree (which integrated Article 3 of Decree-Law no. 6 of February 23, 2020, converted with amendments by Law no. March 5 2020) prescribes as follows at paragraph 6 bis: "...Compliance with the containment measures set forth in this Decree shall always be assessed for the purposes of excluding, pursuant to Articles 1218 and 1223 of the Italian Civil Code, the debtor's liability also with regard to the application of any forfeiture or penalties connected with delayed or omitted payments".

Therefore, the obligation to stay at home imposed on citizens or the lockdown of non-essential production activities in compliance with the safety measures, integrates, according to the law, a cause of force majeure that removes, although without completely avoiding, the consequences of the nonfulfillment such as compensation for damages, the application of contractual penalties and the obligation to provide indemnification that would generally be borne by the party in default of the contractual obligation.

The current emergency, therefore, justifies the nonfulfillment, and, based on the mentioned legal provisions, it could be invoked the irrecoverability of the obligation whose term of fulfillment expires pending the emergency. Nonetheless, the Covid-19 crisis is deemed as an event of national relevance, extraordinary and unforeseeable, and with consequences that the obligor's diligence cannot exceed or contain, not even by applying the best efforts.

These principles must, however, be applied *cum grano salis* with regard to an assessment, on a case-by-case basis, appreciating both the fact that certain production activities are permitted and the actual impact of the emergency on the contractual structure, also concerning its duration and the type of obligations undertaken, as well as in consideration of the nature and subjective situation of the Parties.

Careful consideration must be given to production activities associated with those directly suspended or more markedly impacted by the emergency and which, until the continuous spread of the phenomenon, contractually placed legitimate expectations on the obligations of other parties that could not be fulfilled under a liability exemption regime.

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<sup>5</sup> Art. 79, paragraph 1, United Nations Convention on Contracts for the International Sale of Goods, 1980.

<sup>6</sup> v. *ex multis*, ICC Award No. 4462, YCA 1991, at 54 *et seq.* (also published in ILM 1990, at 567 *et seq.*)

<sup>7</sup> v. Art. 3, ICC Force Majeure Clause. 2003. Examples of these events are: wars, rebellions, acts of terrorism, sabotage, the so-called "acts of God" (all those situations that do not depend on human will, such as epidemics, cyclones, earthquakes, drought, etc.).