

Effects of the Coronavirus on contractual obligations

The diffusion of the Coronavirus not only affects to a significant extent our daily life, but may also lead to comply, in part or entirely, to contractual obligations already entered into. This newsletter aims to briefly outline what to look at and the legal remedies provided for by the applicable law.

Cooperation with the contractual partner

Contractual parties are bound to give execution to a contract in good faith, which also includes the duty of each party to inform the other party, as soon as possible, about any difficulties in the fulfilment of a contract. Following such duty of information, an attempt should definitely be made to reach an amicable solution regarding the continuation of the contractual relationship. Possible amicable solutions could be for example considered the agreement upon a new delivery date, the temporary suspension of the contract, a reduction of the scope of the delivery or a price adjustment. In order to avoid any future misunderstandings and problems of evidence, any agreement should be made by writing.

Examination of the contract

It is furthermore essential to examine the contract and the general terms and conditions for so-called clauses of "force majeure". Force majeure is normally considered any event that is beyond the control of the contracting parties and cannot be overcome by the parties by reasonable means. No clause specifically regulating cases of force majeure is foreseen in the Italian Civil Code, but it can be easily incorporated into a contract between parties. Such clauses generally exempt the parties from liability of non-performance in the event of a case of force majeure. Moreover, the force majeure clauses may also provide for a right of withdrawal or impose on the parties the obligation to negotiate an amendment to the contract.

Different types of non-performance

If the contract does not contain specific clauses concerning the occurrence of extraordinary circumstances, the general provisions of the Italian Civil Code shall apply, which distinguish between (a) permanent and temporary impossibility on the one hand and (b) total and partial impossibility on the other.

With regard to the first category, applies the principle according to which the debtor, pursuant to Art. 1256 Civil Code, is released from his contractual obligation and is not bound to indemnify, if he is definitively unable to perform them due to the current exceptional situation. Please note, however, that in this case the agreed consideration is also no longer owed and shall be returned.

If for example the owner of a congress hall cannot make such hall available because of the current orders of the authorities, his contractual obligation towards the client expires and he has not to fear any indemnity claim. At the same time, the owner shall lose his right to pretend the agreed payment, unless the contract provides otherwise.

On the other hand, if the contractual fulfilment is only temporarily impossible, the debtor shall not be liable for late fulfilment. However, if the creditor loses interest in performance due to the prolonged delay, the contractual obligation is also deemed to be extinguished.

To use again a practical example, it can be stated that an entrepreneur shall not be liable for the consequences of a delay if he cannot respect the agreed term because of a delay in the supply of specific materials. If such impossibility persists for such a long period to be no longer of use to the client, the contractual obligation shall expire also in this case and the contract is terminated.

Partial impossibility

In case of an only partial performance of a contractual obligation due to prevailing circumstances, reference is made to the provision of Art. 1258 of the Italian Civil Code, according to which the debtor is only relieved by performing the remaining possible part of such obligation. However, the other party to the contract is entitled to a corresponding reduction of the consideration due in return and may also withdraw from the contract if it has no significant interest in a partial performance.

To illustrate this case with an example, let us assume that a trader can only deliver half of the ordered goods due to a prevailing situation. This leads to the consequence that he will be released from the obligation to deliver the part of the goods that cannot be delivered, but is still obliged to deliver the remaining part. At the same time, the client is obliged to accept part of the delivery and may refuse it only if it has a valid reason. Of course the price shall be adjusted to the effective scope of the delivery.

Excessive burden

A different situation is when the contractually agreed performance does not become impossible, but has as a consequence an imbalance in the fulfilment of the obligations and

leads to an excessive burden to the disadvantage of one of the two parties. In this case, the disadvantaged party can request the rescission of the contract, with the consequences of the definite impossibility described above. However, this principle applies only to contracts extended over a certain period of time, such as purchase contracts or contracts for the regular performance of services (contracts with continuous, periodic or deferred performance).

If for example a supplier of detergents is excessively burdened by the current emergency in the execution of his contractual performance (sudden increase in the cost of cleaning agents, compliance with special safety precautions), he can request the rescission of the contract. The respective contractual partner can avoid such rescission by proposing an adequate adjustment of the contractual conditions, including the price.

The legislator does not provide any guidance to determine an excessive burden, which is why an assessment of the concrete situation is always necessary. Moreover, it should not be neglected that the above mentioned provisions are not applicable, if the subsequent burden is within the average contractual risk or if it is a so-called aleatory contract, in which the parties have taken a risk of an increase in price or costs since the beginning.

Lease agreements

As far as real estate lease agreements are concerned, please note that according to the current legislation the rent is still due. The "Cura Italia" Decree however provided for a tax credit of 60% of the rent for the month of March 2020 for leases relating to properties registered in the cadastral category C/1 connected with the exercise of economic activity. Considered the current circumstances, an attempt should therefore be made to find a common solution with the landlord to bridge the current emergency situation. In this regard, a rent reduction or temporary suspension of rent payments in combination with an instalment payment could be proposed. In extreme cases, a termination of the contract for valid reasons according to Art. 27, Par. 392/1978 could also be considered. Please note, however, that a notice period of 6 months must be observed, during which the rent payments are still owed, reason for which such option is financially and from a practical point of view not very attractive, as we all hope that in 6 months' time activities will be back to operate.

Work Contracts

The principle according to which contractual obligations shall be complied also applies to contracts regarding performance of work and services which fall within the scope of application of the provisions of the Civil Code on contracts for work and services. However no liability shall arise from a delay without responsibility of the contractor.

Nevertheless, the provision under Art. 1664 of the Civil Code may become relevant, according to which the contractual parties may request to determine a new price if unforeseen circumstances result in such an increase or decrease in the demand for

materials or labour that it causes an increase or decrease of the agreed total price by more than one tenth.

International contracts

In international sales contracts, however, it must first be checked whether the contractual relationship is subject to the Vienna Convention on the International Sale of Goods (CISG), which basically always applies unless not expressly excluded by the parties.

If the named convention applies, the party having difficulties in performing the contract may invoke the force majeure clause provided for therein and will therefore not be liable for failure to perform its obligations. Therefore an Italian supplier, according to Art. 79 CISG, is not liable to its German client for the consequences of non-delivery caused by an unforeseeable event. Similar rules are also laid down in the UNIDROIT Principles of the International Chamber of Commerce; on the contrary, special attention is required for contracts subject to common law (e.g. the United Kingdom, Singapore), since in such a system a force majeure remedy generally should be contractually provided for.

Indemnity and forfeiture

In conclusion, particular attention should be drawn to Art. 91 of the "Cura Italia" Decree, according to which *"compliance with the containment measures referred to in this decree is always assessed for the purposes of excluding, pursuant to and with the effects of 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 fulfilments"*. Although the legislator does not intervene with regard to the termination effects of the contract, it can be understood that it does intend to mitigate the position of the debtor by ordering that the court, in any proceedings, shall take into account, whilst assessing the debtor's liability and the quantification of the damage, the fulfilment of the debtor's obligations and therefore relieve the debtor of further burdens.



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