ORSINGHER ORTU
avvocati associati

CORONAVIRUS, AN EMERGENCY TO BE MANAGED

1. INTRODUCTION

This is the first of a series of brief notes that Orsingher Ortu - Avvocati Associati makes available to support companies in relation to the situation arising from and in relation to the spread of Covid-19 infection (Coronavirus).

In particular, in the present first issue, a few essential features of certain Italian law institutes that may have a significant practical relevance on the handling of commercial relations are outlined below.

2. CORONAVIRUS AND SUSPENSION / EXTINCTION OF CONTRACTUAL OBLIGATIONS

In general, the spread of the Coronavirus epidemic and the related decisions of the authorities are liable to amounting - if accompanied by certain circumstances to be verified on a case-by-case basis – to specific **hypotheses contemplated by Italian law for the suspension or even termination of contractual obligations**.

A specific provision of Italian Civil Code provides that:

(i) an obligation is cancelled when, for a reason not attributable to the obligor, its performance becomes definitively impossible,

(ii) where the impossibility is only temporary, the obligor, as long as the impossibility persists, shall be exempted from any liability for the delay in the performance, it being understood, however, that the obligation shall in any case be deemed cancelled if the impossibility, despite its transitory nature, persists beyond reasonable limits of time (on this notion, please see below).

A few practical hints.

The Italian case law has stated that, in order for the obligor to be exempt from any liability pursuant to the provisions referred to above, the impossibility of the performance of the concerned obligation shall not only materialize after its undertaking, but – as further requisite - shall also have the characteristics of objectivity and absoluteness.

This is to say that the performance shall be impossible not only for the concerned particular obligor (requirement of objectivity, under which the characteristics of a particular obligor are not relevant as the impossibility must be such for any average subject of the same nature as the concerned obligor) and shall also derive from an obstacle that cannot be overcome not even by a surplus effort (requirement of absoluteness). Therefore, those events which only make the performance more difficult or refer exclusively to the obliged party (except for what will be said on the notion of excessive onerousness) do not amount to causes which pardon the lack of performance of obligations pursuant to the rules of law above.

An example of the first case (subjectivity and therefore irrelevance of the impossibility for lack of the requirement of objectivity) would be that of a debtor who has contracted the Covid-19 virus or who, as a result of the Covid-19 epidemic, in the absence of a more general restrictive measure (e.g. general closure of activities for enacted measures of the authorities), does not have personnel capable of fulfilling the obligation.

An example of the second case (relativity and therefore irrelevance of the impossibility for lack of the requirement of absoluteness) would be where the performance of the obligation, in view of the nature of the same and the timing required, would still be

possible although by the employ of alternative means (e.g. the delivery of goods through an alternative way that goes through an area not closed to traffic as a result of the epidemic and/or the related regulatory measures).

Given that the impossibility must be subsequent, the person who undertakes an obligation today is not at all in the same situation as the person who assumed the same obligation before the onset and spreading of the epidemic and/or the enactment of the relevant measures of the authorities. This person may not conjure in its own defence the well-known circumstances or, in any case, circumstances which were foreseeable in relation to the situation already existing at the time of its undertaking of the concerned obligation.

Beware: undertaking today an obligation that is impossible due to circumstances already existing, known or reasonably predictable, does not entitle the obligor to invoke this impossibility tomorrow.

With regard to the case of a persistence of the transient impossibility of the performance, although not definitive, for such long as to determine the cancellation of the obligation (please refer to the above notion of " reasonable limits of time") Italian law expressly makes reference to the fact that, due to the nature of the obligation or its object, the creditor no longer has an interest in its performance (consider the case of a certain service which was contracted to allow participation in a tender now expired, or that of a supply which was required for components of a product that the creditor had to produce and supply under a contract now terminated by the other party due to the delay).

Italian law also provides that where the impossibility, even if definitive, is only partial, the other party may choose between: (i) remaining bound by the relationship, requesting a corresponding reduction in the counter-performance to which is obliged, in case it has an appreciable interest in a partial performance, or (ii) withdraw from the agreement.

In the same logic underlying the rules briefly described above, the Italian Civil Code provides that a party may request the termination of the agreement if the performance of its obligation, although not impossible, has become excessively burdensome.

Few practical hints also on this.

Italian case law has stated that this remedy is accessible if and when a disequilibrium between the economic values of the parties' obligations materializes after the execution of the concerned agreement and such imbalance is attributable to extraordinary and unforeseeable events that do not fall within the scope of the normal contractual *alea* in consideration of the nature of the concerned contract.

Also in this case the creditor is allowed to avoid the termination of the agreement by offering adjust the agreement and equalize the disequilibrium.

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The institutes briefly and non-exhaustively out-lined above are provided for by Italian law, provide however that they are common - except for some important differences – also to other so-called *civil law* systems (such as the Spanish and French ones).

Some legal systems, typically so-called *common law* systems, deviate significantly from the principles set out above.

In fact, the theory of English *frustration* and the American doctrine of *impracticability* have a more limited scope than Italian so called *force majeure*. Therefore, in relationships subject exclusively to such laws, *force majeure* must necessarily be provided for at a contractual level to be invoked by the parties.

Force majeure and *hardship* are defined also in the 1980 Vienna Convention and in the Unidroit principles which provide that the breaching party is exempted from liability and

can therefore invoke the application of the relevant remedies if the following requisites are met: (i) the event is outside the control of the obligor; (ii) the event is not foreseeable at the time of the execution of the agreement; (iii) the insurmountability of the impeding event or its outcomes.

The aforementioned Vienna Convention provides that the concerned party must promptly notify the other with the impossibility to fulfil its obligations, together with the evidence of the *force majeure* event, under penalty of non-exemption from the fulfilment of the agreement and the consequent and related liability.

Even if Italian law does not provide for such requisite and relevant foreclosures in its absence, it is highly recommended to make such a notification in order to avoid or reduce the risk of disputes, also in the light of the information obligations of the parties however existing under a more general principle of good faith in the performance of the contractual relationships pursuant to Italian Civil Code.

3. FORCE MAJEURE CONTRACTUAL CLAUSES

Commercial contracts often contain specific force majeure clauses aimed at supplementing, detailing and/or deviating from the above-mentioned legal provisions.

In the light of such legal provisions and related the case law, there are wide margins for discussion of the actual integration of the hypotheses recurring from time to time in commercial relationships (a recurring and emblematic question in the past was whether or not the personnel strike constituted a cause of impossibility of the obligation; in deciding such cases the Italian courts set out the aforementioned principles of objectivity and absoluteness; however, while remaining a significant area of uncertainty, it is frequent in the contractual practice to include or expressly exclude the strike in the conventional notion of force majeure or even distinguish according to its scope, corporate or general).

If the parties have indicated the specific event of an epidemic/pandemic among the events amounting to force majeure, no doubts arise in terms of lack of responsibility of the breaching or delaying party, but - beware - there must be a causal link between the failure to perform the obligation and the epidemic which obviously must not be an opportunity to relieve from one's obligations.

However, in the absence of an express inclusion of the epidemic/pandemic in an existing force majeure clause, a detailed analysis of the clause and a full use of all the criteria set forth by Italian law for its correct interpretation is unavoisable.