

CONTRACTS AT THE TIME OF THE CORONAVIRUS

1. INTRODUCTION

This is the fourth in 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).

Below some indications are provided regarding the functioning and usefulness of the inclusion of so-called Material Adverse Change clauses (or, more simply, M.A.C.) in M&A transaction.

It will, however, be clear from the brief notes made that this type of clause may be of real use also in other types of contracts largely used in the practice of commerce in a broader sense.

1.1. Abstract

Coronavirus has led most operators to suspend negotiations pending the evolution of the situation.

As time goes by, this has resulted or will ultimately result in the eventual abortion of the project.

The clauses that provide for the right of one or more parties to get rid of their contractual obligation upon the occurrence of certain predetermined events, could be used to make acceptable the risk of concluding contracts (due to the possible prospect of being entitled to exit).

These MAC clauses may be used to supplement, complete and correct the general rule that would otherwise be enforceable under Italian Civil Code, with important advantages, including in terms of

- ***Freedom: extreme freedom in identifying future events that give the right to exit the agreement***
- ***Certainty: unquestionability of the extraordinary and unpredictable nature of the events (both features become irrelevant as a result of the enunciation of the events in the contract)***
- ***Flexibility: possibility to assign the relevant right to more or all the parties to the agreement (also by establishing different circumstances for each of them)***
- ***Cost-effectiveness: they make it possible to avoid time and costs of a judgment before the contract is terminated***

2. MAIN REMEDIES UNDER ITALIAN CIVIL CODE

Italian law provides some tools aimed at remedying serious situations occurred after the execution of an agreement. Clearly enough, remedies provided for extraordinary subsequent situations, in principle, can and indeed should also play an important role in facilitating the development of contractual relations (the presence of the remedy makes it

more acceptable for the operator to assume the risk of the occurrence of unfortunate extraordinarily negative circumstances).

Nonetheless, Italian Civil Code turns out to be rather ineffective as it provides for the right of a party to a still unperformed agreement to get rid of its contractual obligation only if and to the extent that, due to the occurrence of extraordinary and unpredictable events, the performance of the concerned obligation has become excessively burdensome.

Even more importantly, under Italian law it is necessary for the interested party to bring an action to the competent court so that only as a result of a judgement to this effect the agreement will be terminated. This will be the case only if, with its sadly renown slowness, the Italian court considers that, in the present case, the requirements of exceptionality and unpredictability are met.

3 MATERIAL ADVERSE CHANGE CLAUSES

The MAC clauses allow the parties to regulate their contractual relations differently, precisely to the effect that:

- a judgement of a Court is not necessary in order for the contractual relationship to be terminated (the Court may be seized by the party challenging the real occurrence of the conditions set forth by the clause but, in the meantime, the contractual relationship will be terminated as a result of the simple declaration to this effect by the party to whom this right has been conventionally granted);
- the number and nature of the events from which the possibility to terminate the contract arises are predetermined with significant discretion (thus making irrelevant any subsequent judgement on their unpredictable and extraordinary nature);
- the termination right may be conventionally given to one or more parties and significantly vary in scope and actual reach, depending on the actual interest of the entitled party(ies);

4 CONCLUSIONS

Little or nothing would seem to matter to the reader that MAC clauses must be drafted in such a way as to be considered, under Italian Civil Code, as conditions subsequent (with express provision, if this is the desired effect, that such conditions are agreed in the interest of one or other parties to the contractual relationship).

Likewise, nothing or very little will matter to the reader that the concerned clause will require, for its full effectiveness, a language ensuring that it does not fall within the scope of specific, different and (under the given circumstances) undesirable provision of Section 1456 of Italian Civil Code (a commonly used provision though requiring, for the party's being entitled to terminate the agreement, that the other(s) are in breach of their obligations).

However, these are issues of significant practical importance when it comes to possible enforcement.

A good lawyer will also be able to tailor the provision according to the actual needs of the client, as made apparent if one thinks of the wide and varied case history of commercial practice.