

Force Majeure and hardship in times of pandemics

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The social and economic effects of the COVID-19 pandemics are extending globally and have heavily affected the performance of both national and international contracts. Numerous companies have completely or partly suspended their activities, so that the possibility of fulfilling the contractual obligations is now rather uncertain. Please find hereinafter a summary of the rights of the parties in case of Force Majeure events, respectively in case of hardship according to the Romanian law.

What does Force Majeure mean?

The Romanian Civil Code defines Force Majeure in art. 1.351 as an “external, unpredictable, completely insurmountable and unavoidable event”. The debtor is not liable, in this case, for damages caused by the non-fulfillment of his or her contractual obligations if the non-fulfillment is determined by Force Majeure.

This provision applies when there is no other special legal provision or contractual agreement of the parties. Therefore, Force Majeure takes effect also when the parties did not conclude any agreement in this respect.

Who bears the burden of proof?

The party that seeks to claim Force Majeure upon non-fulfillment of its obligations must prove the following:

- the occurrence of the Force Majeure event;
- its impossibility to fulfill the contractual obligations precisely because of such event.

Since Force Majeure represents a legal fact (Ro. *fapt juridic*), any means of evidence is admissible to prove it. Normally, the Romanian Chamber for Industry and Commerce issues, upon request and against payment, certificates regarding the existence of Force Majeure events in individual cases. In the case of the COVID-19 pandemics however, it was additionally established by Decree No. 195/ 2020 of the President of Romania for the declaration of the state of emergency that the Romanian Ministry of Economy is competent to issue the so-called “*certificates regarding the state of emergency*” (Ro. *certificate de situatie de urgenta*). Such certificate is primarily used by persons who want to benefit of the newly established measures for the support of the economy (e.g. postponement of rent or tax payments without interest, payment of the so- called “technical unemployment indemnity” by the State, etc.). Given the above, it should also be possible to prove Force Majeure with it.

One must take into account, however, that the current state of emergency cannot serve *per se* as a justification of the Force Majeure event and, thus, it does not lead to the certificate being automatically issued. Moreover, in each individual case, certain documents must be submitted, in order to prove that the performance of the contractual obligation is impossible because of the

event claimed. This means that these certificates confirm only the said impossibility in specific individual cases.

Furthermore, they can be reviewed by courts; the judicial practice is inconsistent in what regards the probative force of such certificates.

What alternatives to Force Majeure are there?

If (i) the performance of the contractual obligation is not impossible, (ii) no Force Majeure event exists or (iii) the non-fulfillment of the contractual obligations cannot be justified by such event, the legal institution of hardship according to the Civil Code can be taken into consideration.

Sometimes extraordinary circumstances can make the fulfillment of a contract particularly burdensome for a party, however not completely impossible. In case the circumstances change significantly, the party affected by such circumstances has the right, under certain legal conditions, to request the appropriate, mutually agreed, adjustment of the contract.

Should the negotiations of the parties regarding the contract adjustment fail, the affected party has the right to take legal action. The court shall consequently review the circumstances of the case and shall usually decide upon the adjustment of the contract, so that both parties will bear the advantages and disadvantages of the changed circumstances. Only if this is not possible, the court can decide the termination of the contract.

Conclusion

The COVID-19-pandemics has caused a great disruption of the economic activity globally. The suspension of activity of big producers alone (for example in the automotive industry) affects the suppliers directly and with immediate effect.

However, the pandemic alone is not considered to be a general Force Majeure event for all companies; its effects must be assessed according to the particularities of each case.

Where a party cannot claim Force Majeure, it should verify whether hardship can be invoked in order to trigger an adjustment of the contract.

In both cases an assessment of the specific individual case is required.

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