

19 March 2020

# COVID-19 Legal Insights



In this issue:

1. Legal effects on the performance of contracts

## What are the legal effects of the COVID-19 epidemic on the performance of contracts?

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The situation brought about by the spread of COVID-19 has the potential to become serious enough for it to be considered, on a case-by-case basis, a force majeure event (i.e. an external, unpredictable, unpreventable and impossible to overcome type of event, which affects existing contracts).

The parties to an agreement may contractually limit or extend the circumstances giving rise to force majeure.

Depending on the factual situation, parties can be freed from liability even under circumstances which, despite not passing the unforeseeability test, nor the irresistibility one, constitute real obstacles in the performance of contractual obligations, with neither party being at fault, such as the case of restrictive measures imposed by competent state authorities (for example, a restriction on transports).

## Force Majeure

1. The force majeure event is the COVID-19 epidemic, or the restrictive measures imposed due to the spread of the epidemic?

The epidemic does not constitute, *per se*, a case of force majeure.

However, restrictive measures imposed as a result of the epidemic, such as quarantine, borders closure, shutting down schools, restaurants and other locales, can constitute a force majeure event.

In a case-by-case analysis, one must consider a series of factors, such as: the governing law of the contract, contractual clauses, place of performance of the contract, the actual

consequences of the epidemic and of the restrictive measures put in place, as well as who exactly put them in place, and so on. We recommend a thorough analysis of contractual clauses in order to assess whether a certain governmental measure, or a measure of a different kind, is excluded or not from the applicability of rules concerning force majeure; this is because certain contracts (especially those subject to English law) define in detail what represents force majeure and which events are not subject to it (such as the so-called “acts of the government”).

## 2. Does the adoption of the Presidential Decree influence the invoking of force majeure?

The Presidential Decree instituting the state of emergency in Romania, dated 16 March 2020 (the “**Presidential Decree**”), imposes a series of immediately applicable restrictive measures, and, on the other hand, provides the framework for the adoption of further such measures in the future. The state of emergency was instituted for a period of 30 days, commencing 16 March 2020.

Among the immediately applicable measures we mention shutting down schools and all other educational establishments for the duration of the state of emergency. This restrictive measure has come into force and currently produces legal effects, thus being capable of constituting a force majeure event, on a case-by-case basis.

A few of the emergency measures with gradual applicability are:

- Isolating and placing under quarantine individuals travelling from areas of risk, as well as those coming into contact with them; placing certain buildings, townships or geographical areas under quarantine;
- Progressively closing down borders;
- Limiting or restricting traffic or people movements to/ from certain areas or during certain time intervals, as well as exiting those areas;
- Gradually banning certain air, water, railway and road transportation routes, as well as the underground;
- Temporary closure of restaurants, hotels, cafes, clubs, casinos, company headquarters and other public venues.

Furthermore, the Military Ordinance No. 1 of 17 March 2020, on certain first emergency measures regarding public gatherings and the transboundary circulation of certain goods<sup>1</sup> already adopted certain measures of immediate application, among which:

- Suspending the serving and consumption of foods, alcoholic and non-alcoholic beverages activities in restaurants, hotels, cafes and other public locales, both inside the location and in places organised in open air;

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<sup>1</sup> Published in the Official Gazette of Romania, Part I, No. 219/18 March 2020.

- However, these entities remain able to sale foods and alcoholic and non-alcoholic drinks insofar as the clients do not remain on the premises for consumption, such as is the case with the drive-in, room service or home delivery services;
- Suspending all cultural, scientific, artistic, religious, sporting, entertainment or gaming activities, as well as spa and cosmetic care activities carried out in closed spaces;
- Suspending all open-air events entailing the presence of more than 100 persons;
- Suspending all commercial flights to and from Spain in all Romanian airports for 14 days. The measure comes into force on 18 March 2020, 18:00 hrs., Bucharest time.

The Military ordinance is a concrete example of enactment which, as each restrictive measure gradually comes into force, is passed and begins to produce legal effects which may, on a case-by-case basis, operate as force majeure event for certain contracts.

Public authorities such as the Ministry of Internal Affairs and the Prime Minister might take further such restrictive measures in the upcoming period.

We will revert with information on such restrictive measures as they become applicable and the need arises

### **3. Where do public authorities stand with regards to force majeure events arising from the COVID-19 epidemic?**

The Romanian Chamber of Trade and Industry (“CCIR”) can certify, upon request and on the payment of a EUR 500 fee<sup>2</sup>, the existence of a force majeure event.

The application for a certificate confirming a force majeure event arising from the current epidemic will include, along any other necessary documents<sup>3</sup>:

- The contract affected by the force majeure event, including a force majeure clause;
- A detailed presentation of facts concerning the epidemic and of the restrictive measures that were actually imposed by the competent authorities (including those arising from the Presidential Decree),
- A description of the effects on the relationship with the other contracting party;
- Confirmations from relevant bodies, authorities and institutions (other than CCIR) regarding the existence and the effects of the event, the place where the event took place, the time when the event began and the time the event ceased, as the case may be;

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<sup>2</sup> <https://ccir.ro/servicii/avizarea-existentei-cazului-de-forta-majora> (in Romanian).

<sup>3</sup> According to the CCIR’s rules.

- A presentation of the consequences produced on the relationship with the contractual partner;
- Notifications sent to the contractual partner in connection to the occurrence of the event claimed as force majeure;
- Documents indicating the causality link between the event claimed as force majeure and the claiming party's impossibility to perform its contractual obligations;
- Legal arguments according to which the epidemic together with the restrictive measures imposed by competent authorities constitute a force majeure event.

The application for a certificate confirming the force majeure event is solved within 15 days from the date the required documentation is submitted in full and the fee is paid.

The explanations included with the request for the confirmation of a force majeure event should be present in any situation where force majeure is invoked, including notifications sent to the other contracting party.

In its 12 March 2020 communique, CCIR provided the following explanations<sup>4</sup>:

- In order to confirm the existence of a force majeure case, a contract must be in place and that contract must include a force majeure clause;
- Where the force majeure clause is drafted in a more general manner - even without stipulating epidemics or pandemics, but providing for any action or fact occurring outside the control or will of the affected parties - the spread of the epidemic or pandemic can be considered a force majeure event; and
- Still, a force majeure clause drafted in a vague manner, that only addresses natural events, weather disasters etc., or provides in a merely generic manner for "a force majeure event", may be deemed insufficient to exempt the party of liability.

In other words, the fact that a force majeure clause explicitly addresses the occurrence of an epidemic or a pandemic is not deemed sufficient for the purpose of invoking force majeure.

The party invoking the clause must actually prove that it cannot fulfil its contractual obligations due to certain circumstances arising from the epidemic and outside its control.

At the same time, the claiming party must be able to prove it not in a position to take reasonable measures in order to avoid or reduce the occurrence of the event or its effects.

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<sup>4</sup> <https://ccir.ro/2020/03/12/precizari-privind-avizarea-existentei-cazurilor-de-forta-majora-si-influenta-acestora-asupra-executarii-obligatiilor-comerciantilor-atributie-legala-ccir-si-camerelor-judetene/>

**4. Is there another public authority that could assist contracting parties with proving the existence of a force majeure event, in the context of the Presidential Decree?**

According to the Presidential Decree, during the state of emergency, the Ministry of Economy, Energy and the Business Environment issues state of emergency certificates to economic agents the activity of which is affected by the COVID-19 epidemic, upon request and based on supporting documentation.

The Presidential Decree does not explicitly provide for the procedure that must be followed in order to obtain such certificates, nor does it mention whether they can be used as means of proving the force majeure event, but it would seem reasonable to conclude that they can be used for this purpose.

The Government of Romania has prepared rules for the issuance of such state of emergency certificates (SECs) to economic agents who see their activity affected due to the epidemic. According to the Government Decision analysed in the Government meeting of 18 March 2020, the SECs are issued based on certain documentation (e.g., the certified balance-sheet for the month where a decrease in income in excess of 40% compared to the homologous period of the year preceding the application has been recorded or, where there is no such decrease, but the economic agent experiences difficulties, other justifying documents).

The SECs will be issued to the economic agents operating mainly in transports, tourism, HORECA, the organization of events, advertising industry, private education and ancillary activities, clothes, shoes and leather goods manufacturing, public services. The assessment committees analysing the applications for SECs, as well as a list of the eligible activities (CAEN codes) will be established by order of the Minister of Economy, Energy and the Business Environment. According to the same Government Decision, the SECs will remain valid throughout the year of issue (meaning, theoretically, until the end of 2020).

By means of the SECs, the economic agents will be able to benefit from fiscal facilities (which are likely to be granted in the context of the epidemic). As such, economic agents lacking a SEC may lose access to such facilities. The SECs could also be used in renegotiating certain contracts and in any other relationship with commercial partners, financial, banking, leasing institutions and any other public institution.

We will revert to you with additional information as such becomes available.

**5. Is the confirmation of the force majeure event legally binding?**

In short, no. Neither CCIR, nor the local Chambers can or have the authority to class an event as force majeure, or intervene in a contract; they can only confirm the existence of a force majeure event which frees the party from liability, from the perspective of its effects invoked by the applicant, with regards to not fulfilling their contractual obligations.

It is up to the party that suffered the loss whether to take into consideration or reject the arguments and evidence (including the confirmation of the force majeure event issued by

CCIR) the faulting party is presenting to justify its non-performance, with the court having the final say in the matter.

With regards to FIDIC terms (issued by the International Federation of Consulting Engineers), used in large construction projects, and usually involving cross-border aspects, it was deemed that a certificate issued by the relevant Chamber of Commerce is not absolutely necessary (not even in Romania) to justify the occurrence of the force majeure event. Force majeure can be proven by other means of evidence.

#### **6. Is it mandatory to notify the other contracting party of the force majeure event?**

The contracting party that cannot fulfil its contractual obligations must notify the other party about the existence of the COVID-19 epidemic and those concrete effects (e.g. quarantine imposed by public authorities, border closure, suspension of certain activities related to education, restaurants etc.) that render the party incapable to perform its contractual obligations.

If the notification does not reach the creditor in a reasonable timeframe from the moment the debtor became aware or should have become aware of the impossibility to perform, the debtor shall be held responsible for the loss suffered by the creditor as a result. In all cases, the applicability of the contractual clauses must be verified, and action must be taken in compliance with these clauses and the legal requirements.

#### **7. Who can invoke force majeure?**

*The removal of liability* mentioned in the Civil Code concerns the party that invokes the impossibility to perform its contractual obligations, and the *loss* is that caused to the other contracting party, as a result of the former not performing its contractual obligations.

Consequently, force majeure can be invoked only by the party that finds itself in a position where it is impossible to perform its contractual obligations due to the force majeure event.

#### **8. Can the contracting partner invoke force majeure?**

The other contracting party can invoke force majeure should the force majeure event render it as well incapable to perform its own contractual obligations.

However, if only one of the contracting parties is affected by the force majeure event and the performance of the contract is only temporarily affected, the other contracting party can either:

- Suspend the performance of its own obligations (applying the objection of non-performance), or
- Terminate the agreement, should the non-performance be sufficiently relevant, but without being able to claim damages.

In case one of the contracting parties partially performs its contractual obligations prior to the occurrence of the force majeure event, then the other party can be held to perform its own contractual obligations proportionately.

## 9. What are the effects of force majeure?

The **general effects** of force majeure, that can be *invoked by the contracting party which is affected by the force majeure event*, are the following:

- Impossibility of performance in kind of the contractual obligation;
- Total or partial suspension of performance or termination of contract;
- Removal of liability for non-performance. If the loss occurred as a result of a cumulation of circumstances, among which a force majeure event, liability will be removed directly proportional with the role played by this event.

The **special effects** of force majeure are as follows:

- Termination *ipso jure* of contract (irrespective of the will of the parties), should the impossibility to perform be total and permanent and concerning an important contractual obligation right from the outset of the force majeure event. In such cases, it is common for the creditor that was served with a notice of default to take on the risk of fortuitous loss of the goods; or
- Suspension of contract, if the impossibility to perform is only temporary, which can be invoked by the other contracting party- creditor, should they wish to do so; or
- Termination of contract following temporary impossibility to perform, which can be invoked by the other contracting party- creditor (should they wish to do so, as an alternative to suspending their own obligations). However, no damages can be claimed.

The contracting parties may, of course, provide for other effects of force majeure.

Furthermore, according to the Presidential Decree, prescription and forfeiture terms do not begin to run and, where they have already started running, they are suspended throughout the duration of the state of emergency instituted as per the Presidential Decree. Legal provisions to the contrary become inapplicable.

## 10. In case the contract is concluded during the epidemic, can force majeure still be invoked?

A force majeure event can only be invoked for ongoing contracts. As such, if the parties conclude the contract at a time when the force majeure event was already known to the parties, or the existence of such an event had become imminent, it can be deemed that the unforeseeability condition is not met, which means that the event in question cannot be invoked as a force majeure with regards to that contract.

The foreseeability of the force majeure event is established in relation to the moment when the contract is concluded.

### 11. Are there contracts where force majeure cannot be invoked?

As a general rule, in any contractual relationship there is an inherent contractual risk, which the parties take on. The issue consists of identifying, first, whether the unforeseeable event is significant, that is, whether it has surpassed the normal contractual risk and, secondly, if one of the parties has taken on this considerable risk, given that in certain speculative contracts risks are deemed inherent. Even in this case, the applicable contractual provisions need to be checked on a case-by-case basis.

Furthermore, in the specific case where the contractual obligation concerns generic goods (such as foods, cereal, mass-produced goods, fuel etc), one can argue that the debtor cannot invoke the fortuitous impossibility to perform. That is because generic goods can be supplanted and, thus, replaced by other similar ones. As a result, if the contractual obligation consists of the delivery of generic goods, merely invoking the fact that the goods come from an area placed under quarantine as a result of COVID-19 may not be sufficient to demonstrate a force majeure event, as generic goods can be sourced from elsewhere.

Obligations consisting in the payment of **amounts of money** could also be exempted from the force majeure defence, since money is also classed as generic, *fungible* goods. Nevertheless, it may be the case that the force majeure event affects the contracting party whose specific performance is of a different kind - for example, a delivery of goods for which a price is due - with the result that the person owing the price can suspend payment (the objection of non-performance).

### 12. Can the COVID-19 epidemic represent a case for removing liability with regards to loans?

With regards to the obligation of the borrower to pay back the loan, the COVID-19 epidemic, specifically the restrictive measures imposed as a result of the epidemic, could be construed as a force majeure event to the extent that it could prevent the execution of payment- for example, with regards to malfunctions of payment systems and in the absence of other means for making the payment. In principle, economic hardship arising from the epidemic does not constitute, in and of itself, a cause of removal of liability such as force majeure, freeing the debtor from the obligation to pay back what is owed.

However, concerning those loan agreements where the debtor does not take on the risk of changing circumstances, and the performance of the contract becomes excessively onerous, he could invoke hardship under the conditions mentioned herein below.

Conversely, creditors may consider invoking “material adverse effect” so that they can refuse to grant new loans to the debtors in question. Under certain circumstances, contracts provide for the right of the creditor to request early reimbursement of the loan should such a negative event occur.

This type of clauses is commonly found in bank loan agreements and they concern various aspects such as the impact on the financial situation, operations or assets of the borrower



and his ability to fulfil his contractual obligations. For example, in a credit agreement that provides for multiple drawdowns and conditions further drawdowns by there not being any material adverse change with regards to the borrower, the occurrence of such a situation which impacts on his ability to repay the loan, could justify the refusal of the bank to grant a new loan.

In the absence of relevant precedents in this matter in Romania, creditors should exercise caution when using such clauses, especially if the borrower continues to fulfil its contractual obligations.

It is expected that the parties to a loan agreement analyse each other's contractual terms, including considering the option to renegotiate, reschedule or restructure the debt.

## Hardship

### 13. Can the COVID-19 epidemic be considered hardship?

As a rule, if the performance of the contract becomes excessively burdensome due to an exceptional change in circumstances which would render grossly unfair the debtor's obligation to perform, the contract may be altered (renegotiated) or even terminated.

This applies even more so in the case of contracts that have as object generic, fungible goods or money payments.

The debtor must try, within a reasonable timeframe and in good faith, to negotiate a reasonable and fair alteration of the contract. Should negotiations fail, the court may order:

- Either that the contract be adapted, in order for the parties to share in a fair manner the losses and gains arising from the change in circumstances; this means that the judge intervenes in the contract directly or indirectly, by imposing on the parties an obligation to renegotiate; or
- That the contract be terminated at the time and in the manner the court sees fit.

### 14. Can hardship be invoked under any circumstances?

The court may opt for either adapting or terminating the contract only to the extent that:

- The change in circumstances occurred following the conclusion of the contract;
- The change in circumstances and the extent of this change were not and could not have reasonably been taken into account by the debtor upon entering the contract;
- The debtor did not assume, and could not be reasonably deemed to have assumed the risk;

- As already mentioned, the debtor has tried, in a reasonable time and in good faith, to negotiate a reasonable and equitable alteration of the contract.

**15. What is the difference between hardship and force majeure?**

Hardship consists of an event which makes contractual performance by a party unusually burdensome or futile.

Force majeure is an event which prevent contractual performance, temporarily or permanently.

Similar to the case of force majeure, the parties may regulate in their contract the conditions and effects of hardship, as well as the procedure by which one party can claim hardship.

**16. What happens when contractual partners fail to reach agreement on the occurrence of a case of force majeure or hardship?**

Any contractual dispute (including one concerning the occurrence of force majeure or hardship) may be reviewed by the courts of law. Notwithstanding, in the context of the epidemic, of the Presidential Decree and of the measures taken by various authorities, the activities of the judiciary in Romania have been slowed down, which creates a risk that disputes brought to court may take a long time to be settled.

**17. What must be avoided by contractual partners?**

A party cannot claim force majeure as a mere pretext to free itself from a contractual obligation. One cannot discount the risk that the court might in such case order it to pay damages often higher than the value of the non-performed obligation.

But in all cases, notifying the contractual partner of the occurrence of a force majeure event remains imperative, as failing to do so may result in liability for the loss thus caused to the contractual partner.

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## Editors

**COVID-19 Legal Insights** is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To keep abreast of developments, please feel free to regularly check our dedicated online resource: <http://www.tuca.ro/covid-19/>



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