

THE “COVID-19” EMERGENCY AND THE PERFORMANCE OF CONTRACTS

Barring sporadic cases, in Italy many companies are wondering what legal remedies can apply to existing contracts to cope with the negative economic consequences due to the spread of the “Covid-19” and the related restrictive measures imposed by the Italian Government (e.g. the Decrees of the President of the Council of Ministers of 23 February, 1 March, 4 March, 8 March and 22 March).

The Italian Civil Code addresses cases where circumstances outside the parties to the relevant contract make:

(a) objectively impossible (or extremely difficult) to carry out contractual obligations;

Or

(b) excessively expensive the performance of one party compared to that of the other party.

I. “Force Majeure” Event

The Italian Civil Code (Sections 1256, 1463 and 1464) grants the debtor the opportunity to be released from its obligation (or to have its execution suspended) if the latter has become impossible (or temporarily impossible) for a cause that is not attributable to the debtor; that is, not dependent on the behaviour of the debtor himself (“force majeure”).

Typical “force majeure” events that have occurred are natural events (e.g. a flood that destroys the goods to be delivered) and/or measures of the public authority (so called *factum principis*), which expressly prohibit the execution of a particular contractual obligation (e.g. the introduction of a ban on the import of a particular material).

II. Excessive Burden

In the different case that an extraordinary and unpredictable event entails -- not the impossibility of the performance -- but an economic imbalance of the contractual obligations, the party to the contract who will be required to perform the excessively expensive obligation may apply Section 1467 of the Italian Civil Code and ask for the termination of the relevant contract, except for the possibility of the other party to offer the modification of the economic conditions of the contract in order to reduce the economic imbalance.

III. Italian Civil Code Remedies and the Emergency from “Covid-19”

We can say that the above mentioned remedies provided by the Italian Civil Code are not suitable to cope with the main problem of the companies as a result of the negative economic consequences due to the spread of the “Covid-19”.

In fact, many companies need to renegotiate the economic terms of the contract (rather than terminating it), in order to adapt the contract to the changed situation and to achieve this as quickly as possible, without having to take legal actions.

Consider, for example, a contract for the periodic supply of goods and/or services which, given the current emerging situation, are no longer *de facto* usable by the receiving company, or at best, in a smaller quantity than that envisaged in the contract.

In such situations, the above remedies of the Italian Civil Code cannot apply as the performance of goods and/or services -- except for specific cases -- would be objectively possible and the prices of goods and/or services have not become excessively expensive.

No new solutions stem from Section 91 of the recent Italian Law Decree No. 18 of 17 March (so called "Help Italy Decree") that states that it is not possible to sanction the default (or delay in fulfillment) of the debtor if such default is due to be compliant with the government's emergency containment measures from "Covid-19". However, this principle seems to reaffirm what has already been established above in terms of the impossibility of the obligation.

Therefore, it is necessary to consider whether in Italy it is possible for a party to renegotiate the contract on the basis of external circumstances that have altered the economic balance of the contract.

The answer would be negative given the difficulty in defining, in the absence of a specific regulation, the circumstances in which the renegotiation of the contract can be asked for and when there is an effective economic imbalance, also considering the possible violation of constitutional rules that protect the freedom of the party to negotiate their own terms and conditions of the agreements.

However, as exceptional cases can be resolved by the application of the general principles, it seems reasonable that the most economically disadvantaged party -- due to the current emergency situation -- may require that certain terms of the contract be renegotiated under the principle of good faith in the implementation of the contract, enshrined in Section 1375 of the Italian Civil Code.

This principle is used by the Italian case-law as a golden rule of conduct to crack down on possible contractual "abuses". Indeed, a refusal by the less-disadvantaged party to renegotiate reasonably the terms of a contract that has become "unbalanced", without objective grounds, could be considered as a possible "abuse" by the competent Judge and sanctioned accordingly.

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