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THE IMPACT OF COVID-19 ON INTERNATIONAL AGREEMENTS AND THEIR EXECUTION

The Coronavirus (Covid - 19) and the urgent decisions that China is taking as first and then also Italy, with the Emergency Decree issued by the Council of Ministers in these days (DLN 9/2020, containing "Urgent measures of support for families, workers and businesses connected to the epidemiological emergency from Covid -19 ", the Prime Minister Decree dated 1.3.2020 containing" further implementing provisions of the decree no. 6 of 23 February 2020, containing urgent measures regarding containment and management of the epidemiological emergency from Covid-19 ") are seriously affecting the ability of companies to regularly fulfil their contractual obligations towards their contractors.

THE FORCE MAJEURE CLAUSE IN DIFFERENT JURISDICTIONS

The force majeure clause is normally included in international continuing performance contracts (but also domestic sometimes) (distribution, agency, franchising, supply, contracts, etc. and all the contracts with a long time execution). Basically, under the force majeure clause, because of certain exceptional circumstances, the party that suffers the effects of such circumstances can suspend the execution of an agreement or, if the cause persists, can terminate it, without incurring in a contractual liability or the possibility to be called to compensate damages.

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For example, article 1256 1st paragraph of the Italian Civil Code provides that a contractual obligation is considered as extinguished when, because of a reason which is not attributable to the party that is affected by it, the performance of such obligation becomes impossible.
The concept of force majeure dates back to Roman law and is a typical institution of civil law countries (as stated in Italian, French, German, Spanish and other jurisdictions) and it is expressly provided for also by other legal systems, such as the Chinese, while it is not expressly recognised by the majority of Common law countries (USA and UK in the first place). In fact, the American concept of "*impracticability*" and the British concept of "*frustration*", which are often assimilated to the concept of force majeure, have actually a much more limited scope, with the consequence that, if the agreement is submitted to a Common Law jurisdiction and a party wishes to reserve the rights to invoke a case of force majeure, it is crucial to insert the relevant clause in the agreement.
Unfortunately, the tendency to use "recycling" formats of clauses from previous contracts without considering whether the provisions are suitable to meet the different situations that may arise from time to time in the course of the execution of an agreement and the frequent lack of their adaptation to the specific situation connected with the socio-economic and territorial context in which the contractual relationship takes place, can cause huge problems affecting the companies involved.

Inevitably, this implies the consequence that many situations, amounting to situations of force majeure, are not being included in a proper clause, (very few are the clauses already including an epidemic and/or pandemic as force majeure elements) or worse there can be de facto relationships not established by written agreements in which force majeure is not even mentioned. Despite the diversity of the provisions enacted in the single Countries, in general, in the international agreements epidemics as well as natural catastrophic events are indicated as a cause of force majeure, together with wars, acts of empire and public authority.

In any case, a point must remain clear: force majeure can be invoked - and therefore a part will not be considered as breach of the agreement in which the

clause is included – just if the events that are being invoked as force majeure situations have a significant impact on the possibility of performing the contractual obligations of the party that is invoking it.
In general, it is important to emphasize that any event that makes the performance of an agreement more difficult, is not always to be considered as falling under the force majeure definition; only those events that make it impossible to perform the contractual obligations can fall under such definition. The clauses that make the performance of an obligation more difficult are generally related to the fact that, for unpredictable reasons not attributable to a party, the performance of an obligation has become too burdensome. In Common Law countries, this exception is generally called "*Hardship*" and it is a clause that must also be included in the agreements for it to be invoked.
A general international principle relating to force majeure is the one expressed in article 7.1.7 of the UNIDROIT Principles, where it is established that:

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

The Vienna Convention of 1980 on the international sale of movable goods also defines force majeure as that impediment which is beyond the control of the

party invoking it, which is absolutely not foreseeable at the time of signing the contract and which is impossible to overtake.

COVID-19 AND ITS IMPACT ON CONTRACTUAL OBLIGATIONS

The scenario in which the Covid-19 pandemic is spreading, which in recent weeks is affecting the health of many people in many parts of the world as well as many companies in the fundamental areas of their business, with the consequence that many obligations contractually assumed through the signing of commercial agreements are currently risking to remain unfulfilled and / or they will have to be cancelled, could very well be cause for invoking force majeure.

If the parties have provided for an epidemic/pandemic event among the causes of force majeure in the agreements, there will be no doubt about the lack of liability of the non-performing party for reasons related to the epidemic/pandemic itself. The sudden global outbreak of a potentially fatal viral pandemic, in fact, seems to have all the characteristics mentioned above: unpredictability, seriousness, and problems generated by it which cannot be overtaken.

Taking into consideration a situation as similar as possible, namely the case of the SARS epidemic of 2003, the Chinese Courts and arbitration bodies considered this type of epidemic relevant as a cause of force majeure, provided that this event respects the criteria of unpredictability that is unavoidably connected with the force majeure's existence.

In a decision dated 5.03.2005, the Chinese arbitration court CIETAC condemned a Chinese seller who had invoked SARS as a cause of force majeure to justify his non-fulfilment dated back to 2003. The reason for this judgement was that SARS exploded before the date of the signature of the contract and, therefore, could not be called as an unpredictable event for the Chinese side. In addition, the Chinese seller had only informed his Dutch client about his intention to call SARS as force majeure in September 2003 - therefore with a delay of a few months,

which the court that the Arbitrators classified as unreasonable - and providing evidence of it (insufficient in any case) even later, only in 2004. As a result, the Dutch client was recognized being due over $ 5 million in damages.

This example clarifies how a prompt information to the counterpart about the intention to invoke a cause of force majeure and, clearly, the correct provision in a contractual clause, is strictly needed.
Not surprisingly, in addition to being established by various national laws (including the Chinese), in international contracts it is a common practice to burden the party which is affected by an event amounting to force majeure to promptly notify the other party the force majeure, together with evidence of the force majeure itself. In most of the cases, up to the moment when the party that is experiencing a force majeure situation does not officially inform the other party about it, this party is not exempt from the performance of its obligations and it is liable for such non-performance, according to the rules and law applicable to the specific agreement, including the compensation for all the damages suffered by the other party (see point 79 of the Vienna Convention, which provides the obligation to compensate the damages for the party who failed to report promptly to the other party a situation falling under force majeure).
Indeed, a delay in promptly sending this information may be sanctioned with the loss of the right to invoke the force majeure, not only if this loss is provided for in the text of the specific agreements but also in conformity to the provisions of the law that has been chosen in the agreements or that becomes applicable, in force of international convention and/or conflict of law provision. Chinese law, for example, expressly provides that the party who has not communicated to the other party or has delayed unjustifiably the information concerning a force majeure event must compensate the damages to the other party.

Concerning the evidences of a force majeure situation, at the moment, the General Office of the Ministry of Commerce of China has decided to provide Chinese companies with certificates of force majeure, legal advices and assistance in order to protect Chinese companies through these certifications

against possible consequences deriving from the non-fulfilment of the agreements due to Covid-19.
The power to issue these certifications has been given to six Chinese Chambers of Commerce, which at this point, remove any possibility of evaluation from any national or foreign judge by certifying a priori that it is an exemption legally not disputable which justifies the non-performance of contractual obligations due to force majeure. These measures appear to be in the process of being issued in other Middle Eastern countries as well (primarily Iran which is being extremely affected by Covid-19).
In general, there is hope that the Italian authorities will also provide similar support to the Italian companies that, currently have big difficulties to manufacture and/ or deliver the goods to their customers and who will almost certainly need to provide with evidences the spread of the Covid-19 pandemic to an extent not foreseeable from the beginning and that makes impossible to perform their contractual obligations.
In addition to the possibility of invoking force majeure, the uncertainty about delivery times or fulfilment, however, may make it appropriate to renegotiate and modify the agreements between the parties.
The alternatives in this regard can be summarized in some hypotheses which we will examine below, namely renegotiation, suspension and, in the worst cases, termination of agreements.

RENEGOTIATION

In the current uncertain situation, renegotiation with the counterparty will undoubtedly be the preferable way. This may consist in drafting a written agreement from the scratch, an addendum, an agreed extension and / or in extending the duration of the contract or, in more complicated cases, in rebalancing the obligations of the parties adapting them to the nature of the situation.
In the absence of a written agreement, it will be necessary to refer to the law chosen by the parties in the agreement or, in the absence of such choice, to the law applicable to the agreement by virtue of conflict of law provisions.

Knowing the rules from a legal point of view prevents to do wrong moves that expose companies to litigation, to potential claims for damages and, above all, it is important in order to renegotiate in the best way an agreement affected by this dramatic situation generated by Covid-19. It is clear that, as never before, the problem of the law chosen to regulate the contract plays in this situation a fundamental role in the hypothesis of absence or gaps in the clause relating to force majeure. As never before it has been necessary for companies to pay the utmost attention to the drafting of the contractual text with particular reference also to the clause concerning the applicable law.

SUSPENSION

In international commercial agreements, the possibility of suspending the agreement for a period that can vary from a few weeks to a few months and the consequent regulation of the consequences of such suspension is often provided for in the agreement itself.

Of course, the suspension cannot be extended indefinitely and, in many agreements, it is established that, after a certain term, the contract must be terminated or renegotiated or, possibly, that at the end of the suspension period one of the parties is entitled to re-submit the deadlines of its obligations not necessarily in proportion to the suspension period but also having regard to the commitments made in the meantime towards other contractors.

Like other systems, if the temporary impossibility carries on, Italian law allows the party who has no interest anymore in the performance of the other party to terminate the contract even if he no longer has an appreciable interest in a partial performance only (art. 1256, 2nd paragraph and art.1464 Italian civil code).

TERMINATION OF THE AGREEMENT

Finally, in more complicated cases, the breach of the agreement caused by the Covid-19 pandemic can result in the termination of the agreement itself.

Given that, in international contracts, it is generally not foreseen that the cause of force majeure will automatically terminate the contractual relationship, this hypothesis must in any case be taken into consideration, especially for the compensation schedules that follow. There are also sectors in which the

regulation is very specific - for example the construction sector with the various books (contract models) of the FIDIC - which establish that following the receipt of the communication of the existence of a case of force majeure the contract is not suspended but terminated immediately. It is essential to be aware of this, because it is not always (almost never) in the interest of the party that suffers the situation of force majeure to terminate the contract, so it is better to check carefully the agreements that are not yet signed and modify this pre-prepared clause in such a way that it can be acceptable for the contractor and/or the company that hires the contractor. In this sense, companies operating in this field are invited to review also the contracts already signed and to try to contact the other party promptly in order to reach specific regulations and agreements with the aim to avoid to be dramatically affected by the consequences of such an (unexpected) termination.
Normally, to the termination of the agreement - for a valid force majeure cause - a determination and liquidation of costs and expenses will follow under the criteria provided (if any) by the agreement and by the applicable law, taking into account that damages for non-performance because a force majeure event are normally not compensated, provided that the party affected by the force majeure was not already in default for other reasons and did not delay unjustifiably in communicating the impediment of force majeure to the other party and proves that such force majeure exists.
With regard to restitution profiles, Italian law provides that the party totally unable to perform due to force majeure cannot request a compensation from the other and must return what has been received. If the impossibility has affected only a part of the obligations, the counterparty will be entitled to a corresponding reduction in the price (articles 1463 and 1464 of the civil code). These restorative criteria are often found in international contracts. For example, the Force Majeure clause of the ICC (2003), provides that the party that has benefited from the partially executed contract, must however compensate the other in an amount equivalent to the benefit received.

In conclusion, in order for the epidemic / pandemic not to be accompanied by a commercial pandemic, it will be necessary for all the companies which can

expect situations potentially affected by the Covid-19 epidemic, regardless of the countries currently involved, to check with great attention their specific situations and their existing agreements, as well as those under negotiation, in order to prevent damages that could become extremely heavy to face.

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