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Who bears the contractual risks in the current context of the state of e mergency decreed as a result of the spread of the pandemic (COVID-19)?

The World Health Organization declared on Wednesday, **11 March 2020** that the situation generated by the spread of coronavirus (COVID-19) may be characterized as a **pandemic**. Moreover, starting from Monday **16 March 2020**, a state of emergency was declared in Romania

In this context, both nationally and internationally, the direct result of the effects of the COVID-19 pandemic has been and is expected to continue to adversely affect the business environment and the economic climate.

As such, given that the normal performance of contracts, both nationally and internationally, is difficult or has even been interrupted, although measures have been taken to prevent and combat the spread of this virus, the economic consequences of the contractual bottlenecks that have occurred or that may occur between business partners cannot be neglected.

Thus, there are many cases where different contractual partners are invoking the effects of the pandemic (COVID-19) and are expecting to have their benefits refunded or they are simply not executing the contract.

What are the conditions under which a contractual partner may be exempted from liability?

As a general rule, each contractual partner must execute the contract, or prove an imputable circumstance that prevented its execution.

Therefore, if it is assumed **that the performance of its contractual obligations will be delayed or may become impossible,** a company must pay heightened attention to the contractual provisions, especially those regulating **the terms and conditions of performance and/or the impossibility of performance, the renegotiation of contractual clauses, as well as those concerning the risk of the contract, responsibility and suspending the performance of obligations, force majeure, or, as appropriate, termination of contracts.**

1. CONTRACTUAL RISK

1.1. ***In relation to ownership in contracts involving transfers, the issue of the transfer of contractual risks is regulated by art. 1274 of the Civil Code which provides that in the event that the parties have not agreed otherwise, the risk is assumed by the debtor of the delivery obligation (debitorul obligatiei de predare), even if the ownership has been transferred. If the creditor of the delivery obligation has suffered a delay in the receipt of an asset, the risk is transferred to his/her charge from the date of receiving the delay notice.***
(Liviu Pop, Curs de drept civil – Obligațiile, p. 261, Ed. Universul Juridic, București, 2015.)

In other words, unless otherwise provided, even if the property rights over the asset were transferred, but the asset was not surrendered, the party that has to surrender it continues to be liable for the given asset (for example, A is selling a car to B, but after the parties signed the contract (and the price has not been yet paid) the car was not immediately delivered by A. In those two days when the car remained in the possession of the seller, the car was destroyed during a storm by a tree that fell on it. In this situation, the seller A continues to be liable for the asset, even if the ownership has already been transferred to the buyer, and A has the obligation to surrender a car with the same characteristics or, if it is impossible for A to surrender a car with the same characteristics because it was unique, the buyer will be exonerated from paying the price, A remaining also liable for the damage caused to the buyer who was not being able to benefit from the asset (A will not be held liable for such damage if the impossibility to deliver was the consequence of a force majeure event or an unforeseeable circumstance (Romanian caz fortuit) – for details, please see below).

1.2.

In relation to contracts that do not **transfer ownership**, the distinction between relative (partial) and absolute (total and definitive) impossibility of performance needs to be made.

1.2.1.

In a situation in which the **impossibility of performance is temporary and/or partial,** sit must be observed if the non-performance has a termination character (meaning that the non-performance is material or it is non-material but repetitive) for the purpose of determining the contractual remedies. contractuale

1.2.2.

In the event that the **impossibility of performance is absolute and related to a material contractual obligation,** with regard to
(i) force majeure
(ii) unforeseeable circumstance (Romanian caz fortuit),
art. 1557 of the Civil Code provides the solution of ipso iure termination of the contract. The effect of the occurrence of the unforeseeable circumstance (Romanian caz fortuit) is the same as that of force majeure, i.e. it releases civil liability. However, according to **art. 1351** of the Civil Code, force majeure and unforeseeable circumstances (Romanian caz fortuit) do not exonerate the debtor from liability in any situation, and proof should be given by the debtor of the impossibility of performing the obligation. As an exception to the burden of proof, **Government Emergency Ordinance no. 29/2020** on some economic and financial-budgetary measures (published in the Official Journal of Romania no. 230/21 March 2020) provides in art. X (3) that:

"it is presumed to be a force majeure event in the sense of the present ordinance, the unforeseen situation, absolutely invincible and inevitable that art. 1351 (2) of the Civil Code is referring to, that results from an action of the authorities to apply the measures required by preventing and combating the spread of the pandemic determined by the infection with the coronavirus COVID-19, that affected the activity of small and medium – sized enterprises, an impact that can be attested through the emergency situation certificate. The presumption can be overturned by the interested party by any means of evidence."[our underlining]

In this case of impossibility to perform the obligation, there is no need to prove the existence of the force majeure event –as is presumed under the above-mentioned conditions, and the creditor of the obligation that it is impossible to perform must overturn the presumption by proving that in that situation the conditions of force majeure are not met, even if the emergency situation certificate has been obtained.

2. Force majeure

Force majeure - is a cause that exonerates the parties from the contractual liability, being defined by **art. 1351 paragraph (2)** of the Civil Code as being any **external, unforeseen and absolutely invincible and inevitable event.** Thus, force majeure is an natural external phenomenon, with an extraordinary, unforeseen and inevitable character, that objectively and without culpability prevents a person from acting according to its own wishes in terms of preventing the occurrence of an injury. The characteristics of the force majeure event must be: external to the author of the injury, unforeseen, absolutely invincible and inevitable.

In order to be considered a force majeure event, it must prevent anyone (it must be invincible and inevitable for anyone) under the conditions and situation created by the contract concluded between the parties from performing the contract. Thus, the assessment criterion is an extreme one – nobody could have performed the contract under those conditions. Therefore, force majeure events are only those situations which are extreme, critical, and absolutely impossible to prevent or eliminate.

The effect of the occurrence of a force majeure event is the full release of civil liability for the damages caused by the non-performance of the contractual obligation due to a force majeure event.

2.1 Force majeure certificate

With respect to **evidence**, on an international level, the tendency can be observed for companies that are facing the situation of the impossibility of performing their contractual obligations, to request and obtain **force majeure certificates attesting such impossibility.** According to the Financial Times, in the first half of February, 3,325 such certificates were issued in China. ***(https://www.ft.com/content/bca84ad8-5860-11ea-a528-dd0f971febbc)***.

In Romania, according to Law **no. 335/2007** regarding the activity of the chambers of commerce in Romania, the County Chambers of Commerce and Industry, as well as the Chamber of Commerce and Industry of Romania approved the existence of such cases and their impact on contractual obligations. The issuance of a force majeure certificate is made on the basis of a written request, signed by the legal representative, which must present the factual situation and the arguments that would categorize the event as meeting the characteristics of force majeure.

These force majeure certificates can only be issued if there is a force majeure clause in the contract. If there is no force majeure clause, the Chambers of Commerce do not issue force majeure certificates.

Upon request, the Chamber of Commerce and Industry of Romania **approves the existence of force majeure cases,** at the cost of a EUR 500 fee excluding VAT. ***(https://ccir.ro/servicii/avizarea-existentei-cazului-de-forta-majora/)***
The request should include:

(i)) the factual and detailed presentation of the event,
(ii) the presentation of the consequences in relation to the contractual partner and, last but not least,
(iii) the legal arguments according to which the event invoked represents force majeure.

The file should include at least:

(i) a certified copy of the contract affected by the force majeure event, that comprises the force majeure clause;

(ii) documents issued by the appropriate authorities, on a case by case basis (other than The Chamber of Commerce and Industry of Romania) in relation to the existence and the effects of the invoked event, its location, the time of beginning and termination of the event (e.g.: Romanian General Inspectorate for Emergency Situations; Town Halls; National Meteorological Administration, etc. - depending on the force majeure claimed),

(iii) notifications addressed to the contractual partner in relation to the occurrence of the invoked event and its effects on the performance of the contractual operations.

The force majeure certificate is not binding, and it does not represent an absolute and undoubted proof of the existence of force majeure. However, it can be a proof of the event. In practice, the courts are not bound by the conclusions or findings of the force majeure certificate. It is the court that will ultimately determine whether there has been a force majeure event and what its effects are. (It may even be considered that there is no force majeure even if a force majeure certificate has been issued under the law).

Force majeure can be proved with any evidence. A force majeure certificate is a means of proof that can be used for this purpose, but it does not eliminate other means of proof.

Thus, it is obligatory to obtain a certificate of force majeure only if its necessity is expressly stipulated in the contract. For example, if the contract provides for a force majeure clause that requires notification of the co-contractor within a certain period of time from the occurrence of the force majeure event, mentioning that the notification must have attached the proof of the existence of this event, proof that consists of the force majeure certificate, and that the absence of the certificate will cause the force majeure notification not to produce the expected effects because it would be incomplete.

In all other cases where the obligation to obtain a force majeure certificate is not stipulated in the contract (for example, if there is a force majeure clause that does not provide for the need to obtain a certificate or there is not a force majeure clause) obtaining a certification of force majeure is not mandatory.

As we said, the force majeure certificate is only a means of proof; the parties can also use any other means of proof to prove force majeure. Thus, given the high cost of obtaining a force majeure certificate, the parties must assess whether they have sufficient evidence to prove force majeure without the force majeure certificate.

The force majeure certificate is different from the emergency situation certificate ("ESC"). For details on the ESC, please see the section Emergency Situation Certificate below. Thus, while the force majeure certificate could help to prove the existence of a force majeure event (which may lead to exemption from liability), the EC only has the effects expressly mentioned by the legislation issued during the state of emergency.

2.2 Emergency Situation Certificate

The Emergency Situation Certificate (ESC) was introduced by Decree no. 195/2020 on the establishment of the state of emergency (**"Decree 195/2020"**) and is then mentioned in Government Emergency Ordinance no. 29/2020 on some economic and fiscal budgetary measures (**"GEO 29/20202"**) and Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation determined by the spread of the coronavirus SARS-CoV-2 (**"GEO 30/2020"**). The EC is obtained free of charge from the Ministry of Economy, Energy and Business Environment.

According to GEO 29/2020, the EC is to be used "during the state of emergency, for small and medium-sized companies, as defined by Law no. 346/2004 on stimulating the setting up and development of small and medium-sized companies, with subsequent amendments and completions, which interrupted their activity totally or partially based on the decisions issued by the competent public authorities, according to the law, during the state of emergency declared" to benefit from "the deferred payment for utilities services - electricity, natural gas, water, telephone and Internet services, as well as deferred payment of the rent for the building of their social headquarters and secondary offices". The same facilities have also been offered, under the same conditions, to public notaries, lawyers, executors, family doctors' offices, dental offices, national sports federations and sports clubs, etc. The criteria on the basis of which the beneficiaries of this measure are established, are determined by Government decision.

The penalties stipulated for delays in the performance of the obligations arising from the contracts concluded with the public authorities by the SME holding such ESC are not due in the period of the state of emergency. The EC will also help all small and medium-sized companies to benefit from the presumption of force majeure mentioned in art. X (3) of OUG 29/2020 (quoted above).

According to GEO 30/2020, the EC can also be used during the period of the state of emergency, established by Decree no. 195/2020, by employers who "interrupt the activity totally or partially based on the decisions issued by the competent public authorities according to the law, during the period of emergency state decreed" in order to benefit from the compensation "for the period of temporary suspension of the individual employment contract, at the initiative of the employer, according to art. 52 paragraph (1) lit. c) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, as a result of the effects produced by the coronavirus SARS-CoV-2". Thus, "the benefits that the employees receive [in this situation] are set at 75% of the basic salary corresponding to the job occupied and are borne by the unemployment insurance budget, but not more than 75% of the gross average wage provided by the Law of the state social insurance budget for the year 2020 no. 6/2020 "

Also, employers that reduce their activity as a result of the effects of the epidemic and do not have the financial capacity to pay all the salaries of their employees, can benefit from the payment of compensation based on a declaration attesting to a 25% reduction of the revenues - they do not need an ESC.

3.Unforeseeable circumstance (Romanian caz fortuit)

Unlike force majeure, an **unforeseeable circumstance (Romanian caz fortuit) is**:

1) Circumstantial to objective circumstances that concern the internal nature of the work or the scope of activity, control and influence of the debtor.

2) Relatively unforeseeable circumstances (Romanian caz fortuit - which means that it refers to the responsible person whose conduct is evaluated according to the ordinary diligence and prudence imposed by the company).

3) Relatively invincible and inevitable (by referring to the possibilities that the responsible person would normally have at his disposal the opportunity to eliminate the risk of this event occurring).

Unlike force majeure, which hinders anyone, unforeseeable circumstances (Romanian caz fortuit) are circumstantial and analyzed with respect to the person who was to execute the obligation.
(This time not everyone is prevented from executing under the given conditions, but the respective person - with the information he had, with the training he had - was forcibly prevented from performing). Other people may be able to perform under these conditions.

In any case, the effect of an incident of unforeseeable circumstances (Romanian caz fortuit) is the same as that of force majeure, i.e. the release of the civil liability.
Force majeure and an unforeseeable circumstance (Romanian caz fortuit) cannot be invoked for contracts concluded during the force majeure event or when it became predictable, as the condition of unpredictability is no longer fulfilled.
Force majeure and unforeseeable circumstances (Romanian caz fortuit) cannot be relied upon in relation to an obligation to hand over fungible goods (e.g.: cereals, food, including money). Fungible goods do not perish and may be replaced by others of the same kind, as they should be in areas not affected by the force majeure event. Only if the relevant goods have been permanently lost and cannot be found anywhere, could a force majeure event be determined to have occurred. So, in such situations the debtor of the obligation must find solutions to supply the good from other areas, from other markets. The fact that the obligation to deliver the goods has become much more onerous does not justify invoking a case of force majeure or an unforeseeable circumstances (Romanian caz fortuit), but it may justify invoking an unforeseen situation (see below for details on unforeseen situations). Contractually, the parties can assume the risk in the case of force majeure and unforeseeable circumstances (Romanian caz fortuit), hence renouncing the benefit of invoking such an event in order to be exempted from liability.
Given the absolutely invincible, inevitable and absolutely unpredictable character of force majeure, it is still debatable whether force majeure can be subject to the early renunciation of its benefit by the debtor of the obligation that has become impossible to be performed.

The parties may contractually agree force majeure (or fortuitous) clauses which may include:

1.

Detailing the cases of force majeure majeure by listing the events that the parties consider to be force majeure. The listing of these events can be **limited** (in which case the clause is favorable to the creditor of the obligation which it is impossible to perform because if an event is not listed then the debtor has assumed the risk and will not be able to invoke force majeure) or **exemplary** (in which case the list of events can be completed with any event that meets the requirements provided by law or contract); if epidemic / pandemic is not included in the list of cases of force majeure specified in the contract and the enumeration is limiting, the debtor has assumed the risk to deliver also in the case of an epidemic / pandemic and will not be exonerated from liability if he cannot perform his obligation.

2.

Details on the process of invoking force majeure - for example, whether the process of notifying the occurrence of the event must include: notification of the occurrence of the event within a specified period, specific information which must be be contained within the notification, specific documents which must be attached (e.g.: the original force majeure certificate issued by the chambers of commerce and industry), etc.

3.

risk taking: assuming the risk of force majeure by one or both parties practically means eliminating the possibility of invoking force majeure (by one or both sides).

4.

the obligation to limit the risk: this is the obligation of the debtor who wishes to invoke force majeure in the sense that he will have to take all necessary measures to minimize the effects of force majeure on the contract (we are talking about a stronger / more aggravated obligation than the simple good faith with which both parties must act even in cases of force majeure and take reasonable measures to protect the rights of the contract).

In cases where force majeure or unforeseeable circumstances (Romanian caz fortuit) cannot be invoked as legal levers to avoid the performance of a contract in extreme situations when the obligations of the parties become much more onerous, greater attention must be paid to both the exception of non-performance and

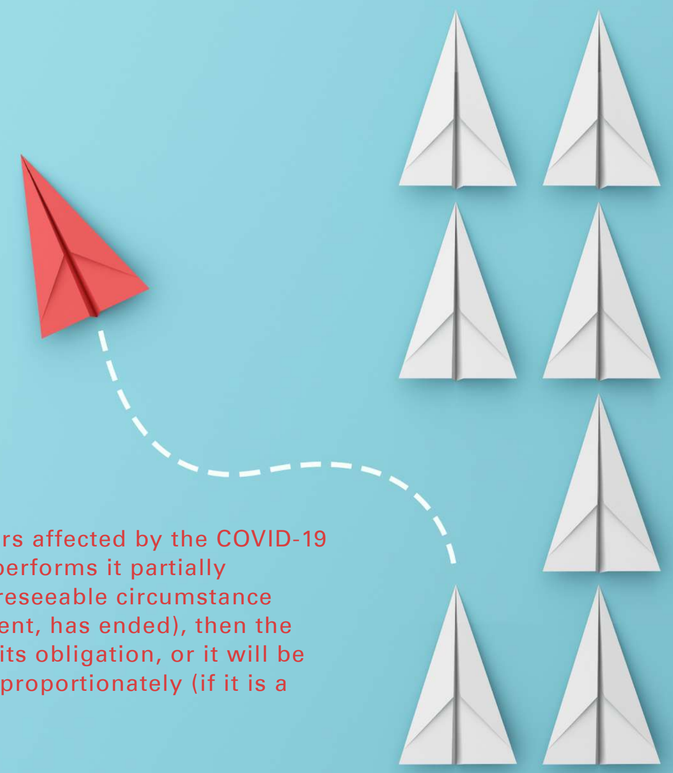
4.Exception of non-performance

If one of the contracting partners does not fulfill its obligations due to an event (which does not represent force majeure or unforeseeable circumstance -Romanian caz fortuit), the other contractual partner is entitled not to perform the contract, in turn.

According to art.1556 Civil Code, **"(1) When the obligations arising from a synallagmatic contract are enforceable and one of the parties does not perform or does not offer the performance of the obligation, the other party may, to an appropriate extent, refuse to perform its own obligation, unless it is clear from the law, the will of the parties or the customary practice, that the other party is obliged to perform first. (2) The performance cannot be refused if, according to the circumstances and taking into account the small significance of the non-performed obligation, this refusal would be contrary to good faith".**

Thus, in compliance with the principle of proportionality and good faith, the other contractual partner has the right to refuse the performance of his obligation, by raising the **exception of non-performance.**

Consequently, if one of the contractual partners affected by the COVID-19 pandemic does not perform its obligation or performs it partially (including until the force majeure or the unforeseeable circumstance (Romanian caz fortuit), if such cases are incident, has ended), then the other party will not be held either to perform its obligation, or it will be compelled to perform its obligation assumed proportionately (if it is a continuing contract).



5. Hardship

The principle of hardship applies to contracts with successive performance or affected by a suspensive term. Thus, if the performance of the contract has become excessively burdensome due to an exceptional change of circumstances which would make it manifestly unjust to oblige the debtor to perform the obligation, the contract adjustment or termination may be obtained in court.

The mere increase of the value of the benefit in relation to the counterpart does not automatically lead to the possibility of invoking hardship. Thus, if the performance has become reasonably more onerous, the respective party is held / obliged to perform, as it relates to the risk of the contract (the parties reasonably assume that their obligations may become more onerous during the contract). The performance of the benefits must have become **excessively** (not only reasonably) onerous due to a circumstance subsequent to the signing of the contract that affected the balance between consideration (i.e. it is obviously unfair to oblige the debtor to perform the obligation).

The conditions under which the hardship can be invoked are:

1. The change of circumstances took place after the conclusion of the contract.
2. The change of circumstances and the extent of the hardship were not and could not be reasonably foreseen by the debtor, at the time of the conclusion of the contract.
3. The debtor did not take the risk of a change in circumstances and could not reasonably be considered to have assumed this risk (for example, in the case of gambling, or futures contracts where the parties take such risks); the debtor has attempted, within a reasonable time and in good faith, to negotiate the reasonable and equitable adaptation of the contract.

The contractual remedies, in the case of meeting the conditions of hardship, are the adaptation of the contract or its termination, to which the parties can agree by negotiation or, in the absence of an agreement, they can be ordered to do so by a court (which will also determine the moment and the conditions of the termination if the balance of the contract cannot be restored by adapting the terms of the contract).

In practice, the parties also negotiate **hardship clauses** (also called hardship clauses) whereby the parties virtually eliminate (for both or only for one of the parties) the benefit of hardship. In other words, by these types of clause the parties declare that they will perform their obligations even if these become more onerous for reasons that exceed their will and could not be foreseen at the date of conclusion of the contract and that hardship will not be invoked in such situations, and hence they relinquish the right to invoke the unforeseen.

RECOMMENDATIONS

Considering the current situation caused by the extension of the pandemic (COVID-19), we recommend a careful analysis of each contract (with great attention being paid to force majeure, unpredictability/hardship clauses, the performance of the obligations (terms and conditions), the modification of contracts and follow-up, with the primary aim of saving the contract and, if this is not possible, to find solutions for discharge of liability.

In this period we believe that negotiating the resolution of the situations arising from the COVID-19 pandemic and the measures taken by states to limit its effects will bring more benefits to the parties than litigation. The renegotiation of contractual clauses, and attempts to rebalance the benefits of the parties, could prove faster, more efficient, less expensive and more likely to save the contract. Initiating a dispute during this period - given the suspension of court hearings and magistrates' protests - would be more expensive and would generate a very long drawn out process, which would affect both parties, and might prove ineffective, given that it would be dependent on obtaining a favorable court ruling.

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