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Contract Performance and Coronavirus: Does it constitute an event of Force Majeure ?

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The recent escalation of the Coronavirus pandemia and the respective measures for its containment implemented by the Greek and European Authorities (among others the suspension of the operation of specific types of businesses, travel restrictions, the closure of the external borders of the EU) have caused severe business disruptions and impeded countless supply chains, often resulting in companies being unable to fulfill their contractual obligations. In this view, questions arise about the performance of contractual obligations as well as the possibility and the existence of any legal grounds for terminating existing contracts.

Force Majeure Contractual Clause

A force majeure contractual clause may relieve a party from liability arising from its inability to fulfil its contractual obligations due to circumstances beyond its reasonable control. The circumstance must be unforeseeable, unavoidable and must render the performance of the contract by the party affected impossible (temporarily or even permanently). These generally apply to radical, external events, such as natural disasters, outbreaks of war and strikes. A force majeure clause can provide for different consequences upon a stipulation event. Usually, performance is suspended for a short period or for the duration of the event of force majeure. If such event is prolonged or permanent then the clause may allow either party to terminate the contract.

Whether coronavirus and/or the related restrictive measures constitute an event of force majeure will depend on the definition of force majeure typically provided in the specific contract. The definition may be exhaustive or indicative. If the parties have simply provided that force majeure is any event that is beyond a party's control, it is easy to accept that the spread of the coronavirus and the related measures are events outside of a party's control. If, however, the parties have agreed a numerous clauses of events of force majeure and since it is highly unlikely for a contract nowadays to provide for the coronavirus, it is pertinent to determine whether definitions, such as "epidemics", "pandemics" or equivalent language are included (or expressly excluded) as express examples of an event of force majeure. Without express reference, a party may argue that an epidemic or pandemic is an "act of God" or otherwise captured by the definition of force

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majeure. In addition, apart from the pandemic itself, the measures taken by the authorities to

tackle it (e.g. lockdowns forced quarantine and travel bans) may constitute themselves force majeure events.

Furthermore, a force majeure clause will usually include other terms, such as:

- ✔ that the event of force majeure must have been unforeseeable and beyond the reasonable control of the party affected;
- ✔ that the event of force majeure must make the performance of the contract impossible;
- ✔ that notice of the event of force majeure must be given within a certain time frame;
- ✔ that the affected party must use reasonable endeavors or diligence to overcome or mitigate the impact or consequences of the event on its performance etc.

The party relying on the force majeure clause has the burden of proving the event of force majeure, the impact and effect of the event and generally the satisfaction of the agreed conditions.

Therefore, before considering invoking the coronavirus as an event of force majeure, we strongly suggest, to review carefully your contracts to identify firstly whether the COVID-19 crisis may impede your performance, whether or not your force majeure clause may apply under the current circumstances and any related notice or other requirements and formalities. **It is worth noting that if a party invokes force majeure without being entitled to, it may find itself in breach of contract.**

Additional Greek Legal Framework

In the absence of a force majeure contractual clause and/or where the current outbreak may not fall within the scope of the clause, and unless the parties expressly agreed to bear responsibility even for events of force majeure, the relevant protection of Greek law may apply.

Although what constitutes **force majeure** is not explicitly defined, it is considered to refer to any extreme, unforeseeable, inevitable event beyond the party's reasonable control, despite the reasonable endeavours of such party, either objective-external or subjective-linked to the party itself (art. 311, 330, 336, 338, 342, 390 of GCC), which makes the fulfillment of an obligation of the affected party impossible (partially or wholly).

In this context, one could claim that the virus outbreak is a foreseeable event, having occurred in several occasions in the past (other pandemics). Nevertheless, it goes without saying that that no one could foresee the unprecedented crisis of COVID-19 nor the severity and extremity of the local and global unprecedented measures taken across the economy in response to COVID-19.

The extent to which such measures give grounds for a party to invoke a legitimate inability of performance is related to their direct or indirect impact on the specific contractual obligations.

For example, it is undisputed that the suspension of the operation of a certain business imposed by

a Greek Authority prevents same business to offer or enjoy the agreed services, that a supply shortage or a workforce shortage may hinder the performance of a manufacturing contract etc. However, a simple increase of manufacturing costs and subsequent profit reduction cannot be interpreted as inability to perform.

Greek law also introduces a general obligation of the affected party to notify the counterparty of the event of force majeure and the related inability.

Where such inability for a party is temporary, performance is suspended for as long as the event of force majeure and its consequences last. If the counterparty has no interest in the delayed performance of the contract (art. 343, 374 of GCC), it can be released. It follows that where the inability is partial, the obligations not affected by the event of force majeure remain intact.

Where such inability for a party is total and permanent, the general rules of Greek Civil law provide for a mutual waiver of the parties' obligations. In case the counterparty has already fulfilled its obligation e.g. paid the agreed consideration, then it is entitled to claim it back in accordance with the provisions of unjust enrichment. However, said protection will not apply to the counterparty where such counterparty demanded any benefit granted to the affected party due to the inability (either financial e.g insurance payment or a right e.g. right to compensation) (art. 380, 336, 338 of GCC). It follows that where the inability is partial, the obligations not affected by the event of force majeure remain intact, unless the counterparty is not interested in the partial performance of the contract.

Greek law also protects parties from an **unforeseen change of circumstances with a severe impact on a party**, by a mechanism covering also, among others, the protection known in common law jurisdictions as **"frustration"**.

This protection (art. 388 of GCC) applies where the circumstances in which the parties entered into a contract have subsequently changed for exceptional and unforeseeable reasons and, due to the change, the performance of a contract by one party has become excessively burdensome and disproportionate vis-à-vis the obligation of the counterparty. Such affected party may address to the Court and request, depending on the circumstances, either the readjustment of its obligation as appropriate or the termination of contract (wholly or partially, in so far as the contract is not performed yet). The Court is called upon to reinstate the balance of the contractual obligations. In case of termination of the contract, the parties are mutually obliged to return everything they received by the (total or partial) performance of the terminated contract.

The term **"exceptional reasons"** used here is wider including not only events of force majeure, but also any reasons which do not emerge in the ordinary course of events but are caused by natural, social and political events (e.g. acts of God). In addition, the criterion of foresee-ability is subjective, being assessed in the light of the parties' mental abilities, social and commercial experience and expertise. *It is, therefore, likely that an event caused by the COVID-19 crisis, which would not constitute an event of force majeure, will fall within the notion of an exceptional and unforeseeable reasons.*

Even where the **change of circumstances is foreseen,** art. 288 of GCC **provides for a similar** protection (obligations' rebalancing), which however does not extend up to the termination of the contract.

Your Legal Partners are actively advising clients in relation to the Covid-19 outbreak. Please do not hesitate to get in touch with us if your business has been affected.

If you have questions or would like additional information please contact the author:

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