

EFFECTS ON CONTRACTS

COVID-19



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& PARTNERS**



FORCE MAJEURE - HARDSHIP (SUDDEN ADVERSE CHANGE OF CIRCUMSTANCES 388 GCC) DISCHARGE OF CONTRACTS IN ACCORDANCE WITH GOOD FAITH AND BUSINESS USAGE (288 GCC)

COVID-19

EFFECTS
ON CONTRACTS

The COVID-19 pandemic may have severe implications on the performance of private agreements and transactions, since contracting parties may be impeded from complying with the obligations assumed in a contract before the pandemic or with specific terms agreed before the pandemic.

In the absence of suitable clauses in a contract governed by Greek law, the party wishing to adjust their obligations or terminate the contract may invoke Force Majeure (see under A below), Hardship (art. 388 of the Greek Civil Code, GCC, see under B and D below) or the application of Good Faith and Business Usages (art. 288 GCC, see under C and D below). Regarding the application of such clauses in foreign law governed contracts, see under E below.

A) IS THE COVID-19 PANDEMIC A FORCE MAJEURE?

The GCC does not include a definition of force majeure. Force majeure is defined in case law as one or more inevitable and unforeseen events that are outside the sphere of influence of the contracting parties and render the fulfilment of contractual obligations impossible. The usual examples of force majeure are natural disasters, war, coups.

The existence of a force majeure event can, among others, relieve a contracting party temporarily or permanently from its obligation to perform, readjust the parties' obligations or allow the termination of a contract without damages.

Contracts that include a definition of force majeure

In number of contracts force majeure events are defined. The usual definition includes an epidemic. In such case, it is clear that the pandemic should also be considered as included in the force majeure definition, since the lesser event of an epidemic is considered as a force majeure event.

There is a possibility the parties did not anticipate the current circumstances and the remedies provided for in the agreement are not adequate or appropriate. In such a case the contract has to be interpreted in accordance with the intention of the parties (including with the hypothetical intention of the parties if the parties had not in fact considered such an event) and with good faith. The parties have also the alternative to invoke hardship and adjust the obligations emanating from the contract (See analysis below under B - Hardship).





Contracts whereby the contracting parties undertake to perform their obligations regardless of the existence of a force majeure event

There are cases where the parties undertake to perform their obligations regardless of the existence of a force majeure event. The most prominent example of such a contract by virtue of its nature is a life insurance contract or a fire or earthquake insurance contract. Furthermore, the Greek Supreme Court has upheld as valid clauses pursuant to which one contracting party undertook the obligation to perform its obligation regardless of the existence of a force majeure event e.g. to pay rent even if the lessee could not use the leased property due to a force majeure event.

Contracts that do not include a definition of force majeure or the force majeure event definition does not include an epidemic

The invocation of a force majeure event in order to temporarily or permanently relieve a contracting party from performing its obligation will require an interpretation of such clause, taking into account the intentions of the parties.

The interpretation may be different for different types of contracts. In an acquisition contract this will depend on whether the pandemic affects the industry, or the jurisdiction involved.

In a contract that contains financial covenants or other conditions related to the financial performance of a company, a breach of such provisions may not be taken into account if they are deemed to have been caused by force majeure. On the other hand, this will not be the case, if the intent of the parties was for such covenants to be taken into account even in case of force majeure or if it is established that the relevant party could have, but failed to, take mitigating measures that could avoid such breach to materialize.

Since the courts are not operating, we recommend that parties review carefully their contracts and the specific clauses, if they exist, take any precautionary measure they are in a position to take, anticipate any actions of their counterpart, and, if possible, engage in discussion with their counterparts in order to find a mutual acceptable solution to remedy the situation like a postponement or a standstill.



B) HARDSHIP (388 GCC)

There is a possibility of adjustment in the obligations emanating from a contract due to a sudden change in circumstances, provided that the adjustment is required from the viewpoint of good faith and business usage. This may be the case in the absence of a MAC (material adverse change) clause in the contract, or when the MAC clause is inadequate for the required adjustment.

Good faith in the context of Article 288 GCC is the honesty and directness that transactions impose on an honorable and sapient person, determined objectively. In order to determine the conduct that satisfies the demands of article 288 GCC one must take into account business usage, although in case of conflict good faith prevails. "Business usage" are prevailing transactional habits, having been established by repetition in a certain place and/or a certain kind of transactions and/or category of transacting actors.

So far, the fulfilled requirements of Article 388 GCC are:

- 1) Existence (prior to unexpected change) of an obligation in a contract,
- 2) There has been a change in the conditions that the parties relied upon in executing the contract;
- 3) The change is substantial, judged on good faith and in line with business usage. **Depending on the duration and the intensity of the change (closure of business or reduction in economic activity) the condition may have already been satisfied or could be satisfied depending on the duration of the pandemic and of the governmental measures;**
- 4) The change is due to extraordinary and unforeseen reasons, including the pandemic as an event of force majeure; and
- 5) The change is subsequent to the execution of the contract.
- 6) The satisfaction of the obligation has become overly burdensome for the liable party and:
- 7) There is a causal link between the change in circumstances and the onerous nature of the obligation

The court, in order to determine whether a party is overly burdened by the contractual obligation it had undertaken before the pandemic (unexpected change), **examines the impact on the financial situation of the liable party which must in any case be significantly harmed. Apart from the duration and the intensity of the pandemic, such a finding requires an individual analysis of the liable party's financial situation before and after the pandemic, in order to record its damage and severity, together with the financial position of the counterparty.**



We could illustrate the above with an example.

A tenant has rented several premises in different parts of the country. In order to determine whether an adjustment to the rent is warranted, a judge would need to know for each business what loss the tenant suffered from the coronavirus pandemic, the financial situation of each landlord as well as the terms of payment of rent. The conclusion could be different, for example, if the rent is paid quarterly (so that rent has not yet been paid for 2020) or monthly (so that March 2020 rent may have already been paid); if the rent is 1,000 euros or 30,000 euros; if the rent received by the landlord is a significant or its sole source of income or if it is a business profit, or if the rent is assigned by the tenant to a financial institution for e.g. loan repayment.

It is also different if there is only fixed rent or if rent has been agreed to be based on turnover.

C) GOOD FAITH AND BUSINESS USAGES (288 GCC)

Failure to meet all the conditions of Article 388 GCC forces the adjustment of an obligation to rest solely on the legal basis of Article 288 GCC, which establishes the general principle that any obligation must be fulfilled by the obliged party in good faith, also taking business usage into account. This provision is of a general nature and is specifically applied by a judge on a case-by-case basis.

When Article 288 GCC is combined with a request for an adjustment of an obligation, Greek courts ask for the following conditions in order to accept the claim in question:

- 1) a valid agreement;
- 2) a permanent change in circumstances, from the time of the agreement or from the time of any prior contractual or statutory adjustment to the time of the first hearing of the claim before the court of first instance, regardless whether the reasons for the change had or should have been foreseen; and
- 3) **substantial reduction at the time of the filing of the claim (i.e. after the liable party's conditions changed) between the "proper" satisfaction of the obligation from the viewpoint of good faith and business usage on the one hand, and the contractual obligation on the other hand, in such a way that the persistence of this discrepancy causes loss to the claimant that exceeds the risk assumed in contractually setting the original obligation**

Of the above three conditions, it is certain that as of now the first two have been fulfilled, while **the third and final condition** will depend on the duration, the intensity of the pandemic as well as the financial situation of the contracting parties.





D) REGARDING THE FORMATIVE NATURE OF THE RIGHTS DERIVING FROM THE PROVISIONS OF 388 AND 288 GCC

It should be noted that the right of readjustment under the provisions of Articles 288 and 388 GCC is formative in nature, that is to say it allows for readjustment from the time of filing of a court action, without retroactive effect.

In theory, however, it has been argued that a court can give retroactive effect to the readjustment, but only in exceptional cases, primarily when the new retroactive adjustment should have been expected by the parties in good faith.

Suspension of operation of the courts and consequent inability of contracting parties to take legal action, as is the case during the Covid-19 pandemic, may be an argument for triggering retroactivity.

At this moment, in addition to being too early to assess the situation and calculate the total loss suffered by the any contracting party the courts are not accepting filings of lawsuits, and there may be a long period of time until the courts open again and until a court ruling is issued.

For this reason, the parties would be well advised to engage in good-faith discussions to address the problem and amend their agreements accordingly in order to avoid the uncertainty and cost of protracted litigation.

E) FOREIGN LAW GOVERNED CONTRACTS

In case of contracts governed by foreign law, the issues of force majeure and hardship will be governed by the applicable law. However, if that law does not provide for any relief whatsoever, Greek courts could consider invoking the concept of public order (ordre public) to either apply Greek law on the matter, or in case a foreign court judgment or foreign arbitral award has been issued, to deny it recognition and enforcement. So far Greek courts have not addressed the issue whether failure to provide relief to a contracting party in cases of hardship runs contrary to Greek public order, but has upheld that a related provision, article 281 GCC Code (abuse of rights) does not per se constitute a part of Greek public order. In general, Greek courts have very seldom invoked public order in matters of contract law – this principle is much more often used in cases of family law. However, as the concept of public order is a flexible one, it is possible for the courts to find that in a specific case the circumstances are so extreme that the failure to apply such general clauses is so fundamentally unfair as to warrant the invocation of the concept of public order.

