FORCE MAJEURE CLAUSE

ITS MEANING IN THE NON-EU COUNTRIES WHICH ARE MOST SIGNIFICANT IN TERMS OF TRADE RELATIONS WITH ITALIAN ENTERPRISES AND OPERATIONAL RECOMMENDATIONS

PREMISE

As we sadly know, the recent spread of the Coronavirus has had and will have a strong impact, for an extended period of time, on economy, on contractual exchanges and on the international relations, affecting, in particular, the operation of both the so-known *supply chain* and the distribution chain.

The casuistry of the effects on the trade relations, with particular reference to the failure, is heterogeneous, however, the common feature is represented by delays and by the impossibility, of Italian enterprises, to comply with their performances (whether they are supply of goods or provisions of services), with a ripple effect that overwhelms various traders, making difficult the classification of the responsibilities.

In emergency situations (firstly in a medical emergency and secondly in an economic emergency) as the current one, the different traders that find themselves in the inability to comply with their contractual obligations, are used to appeal to the so-called force majeure clause.

The risk incurred is that they can assume that in the international transactions such an institute is always applicable and enforceable, as regulated by the Italian law and as commonly believed to be.

There is also another aspect to point out; while in preparing contractual documents, one devotes attention to all the various aspects that characterize the performances, **far too often the force majeure clause is standard and is applied uniformly to all the contracts concluded by the Italian enterprise, without taking into account the legal climate in which the foreign partner finds himself, on the erroneous assumption that "the force majeure cases are the same in every part of the world".** Nothing could be more wrong; for example, in Egypt, the majority of the jurisprudence excludes wars from the force majeure cases. It follows that the company that concludes or review international contracts, must make arrangements to the extenders of the contract to verify carefully how the force majeure is regulated in the Countries of interest, and especially how it is managed from a practical point of view.

In this respect, it is useful – on the one hand – to point out briefly what are the different meanings of the force majeure cases in the non-EU Countries of major interest, on the other to provide a series of "practical" recommendations aimed to protect the traders.

DIFFERENT MEANINGS OF "FORCE MAJEURE"

In general, one can say that the Force Majeure institute or another similar institute, is acknowledged in the majority of Countries, even though some nuances exist or sensitive differences between different notions, due to the historical and cultural context of every Country.

ITALIAN LAW: For what concerns the Italian law, it does not provide a positive definition of force majeure, but however, it acknowledges the art. 1256, 1 subparagraph, Italian civil code, the possibility that an obligation can be extinguished when, for a cause not attributable to a debtor, the performance becomes impossible. Therefore, the jurisprudence has to determine the criticalities and the limits of the institute in question.

COMMON LAW COUNTRIES: Similarly the same situation is to be found in the *common law* Countries, where generally it does not exist a normative definition of the force majeure concept (although some variations of the concept exist, for example, in the English legal doctrine one speaks of "frustration" or the American concept of "impracticability", which allow the contractor to extinguish and suspend their obligation, when the performance becomes impossible for reasons not attributable to himself). It follows that, in the *common law* systems, the parties that decide to bring into play the force majeure as an exemption from the contractual responsibility, by specifying in detail the single force majeure hypothesis, have little choice. They have to define the concept itself in the contracts.

In this sense, the formulation of the force majeure clause in the contractual relation, if important, becomes even more important in cases where one or both parties of the contracts reside in a Country characterized by such a legal system, due to the fact that, without a legislative regulation of the institute, it will be more difficult to define the responsibility and the consequences if they are not determined fictitiously.

ISLAMIC LAW COUNTRIES: The "force majeure" meaning is not uniquely classifiable (following the canons characterizing the *civil law* systems) even in the Islamic law Countries. In fact, the "force majeure" – known in the Arabic language as *quwwat al-qanun* – is not conceived as a simple external event, unpredictable, not

attributable to the debtor and out of his control, but as a reason of justification due to the occurrence of an unpredictable event, but always to be considered as an "act of God".

In accordance with the "casuistic" method typical of the discipline of the Islamic contracts, however, the external event, that is to say the "act of God", is identified as a "heavenly fact" and as "human fact which is impossible to resist to". So, they are potentially identifiable as force majeure cases, for example, the rain that destroys the harvest and the command of the Authority.

It is important to point out that the *Shari'ah* extends the scope of "force majeure" not only to the hypothesis in which it is impossible for the debtor to comply with his performance, but to the situation in which for the debtor has become – because of the changed circumstances attributable to the obligations and to the fundamental rights of the contracts – impossible to exactly or partially comply with it.

In accordance with the Islamic law, in fact, a contract should cease to be binding for the parties if a change in the circumstances referable to the obligations and to the fundamental rights of the contract has occurred, such as to make it excessively onerous for the obligated party, since a contract has always to be right, equal and reasonable.

It is worth pointing out that for excessive cumbersome is meant – also in light of the interpretations given by the jurisprudence, in particular by the Egyptian and Lebanese Courts (that are to be considered as guides in the world for commercial law) – an increase of the burden against a party that could not predict nor could not imagine or estimate it.

So, the foundation of the force majeure institute resides in the principle of the equal balance of rights and of the obligations by the contracting parties and its application represents a clear example of the reminder to those principles of fairness, justice and sacredness that have to characterize a contract in the Islamic law.

It is necessary to point out, however, how the current legislations in numerous Islamic Countries (that is to say in the Countries of the Islamic world that have allowed forms of codification and secularizations) have provided for, during the years, a gradual westernization of the "force majeure" concept, in an effort to outline the borders (as far as the juridical substrate is always the *Shari'ah*) and aiming at giving a further restrictive meaning to it.

FOCUS ON IRAN: For example, in Iran the *force majeure* institute has to be considered as fully existent in the law system. The underlying event has to be characterized by three definite profiles: inevitability, unpredictability and the strangeness towards the control of the parties. It is an interpretation consistent with the one that prevails in the majority of the international legal systems, but it is different from the one of the other legal systems based on the *Shari'ah.* The epidemy of COVID-19 is considered to be an unpredictable, inevitable and uncontrollable event. It is important to point out that, even the Iranian normative does not refer to pandemics or epidemics as force majeure events, the recall of the Labour Legislation to events "similar to floods, earthquakes and wars", suggests that the contagions on a large scale are acknowledged as pathological events in a contractual relation.

RUSSIAN FEDERATION: Even the Russian federation law outlines a general definition for "force majeure" concept. It is the occurrence of exceptional circumstances that are unpredictable and inevitable such as to exempt the party from complying with the obligations contractually taken, unless otherwise required by law or by the agreement between the parties.

In the definitional perspective one can place also the Russian Supreme Court, to whom one has to acknowledge the primary role for having contributed, through a copious jurisprudence, to draw up a list of exceptional circumstances under which the exempting "force majeure" can be recalled. It requires a concomitant subsistence of requirements of exceptional nature and of unpredictability referred to the specific case.

It is necessary to specify that in the Russian law the indications of the individuation of event considered as "force majeure" by the Chamber of Commerce and Industry of Russia enjoy a high juridical value. In accordance with the contractual relations on the Russian ground that Authority has the power to clarify what are the exceptional circumstances to be considered as "force majeure" events.

From a brief examination of the legislation and of the Russian measures in relation to the institute of "force majeure" it emerges that one can include event the epidemiological events.

PEOPLE'S REPUBLIC OF CHINA: Similarly, the article 153 of "*Main Principles of civil law of People's Republic of China*" and the article 117 of "*Contractual law of People's Republic of China*" bring into play the force majeure in case of unpredictable, inevitable events or in case there might be some impediments objectively unsurpassed to the fulfilment.

The Chinese regulations abovementioned exclude the responsibility of the party in breach if determined by a force majeure cause, as provided, for example, in the article 107 of the "*Main Principles of civil law of People's Republic of China*". A further provision of law, in particular refer to the article 94 of the "*Contractual law of People's Republic of China*" enshrines that the parties are able to terminate the agreement if a force majeure makes the object impossible.

With reference to the epidemic or, more precisely, pandemic of Coronavirus, if the parties have indicated the epidemic event among the force majeure causes, should there be no doubt about the lack of responsibility by the party in breach for reasons linked to the epidemic itself. Even where this event had not been expressly mentioned as force majeure cause, it is probable that Chinese Courts consider it as such. Such an affirmation derives from the previous ones occurred in the past in the same way. In fact, in 2003, the SARS epidemic, has allowed Courts and other Chinese arbitration tribunals to consider this kind of epidemic as force majeure cause.

However, in some cases, in which the envisaged retrenchments adopted by the Government did not completely prevent the execution of the performance, some Courts did not consider excluding the responsibility of the party, if not partially. Currently the General Office of the Chinese Ministry of Commerce has decided to provide to Chinese companies certificates of force majeure, issued in order to protect the companies in case of non-compliance with the delivery time due to the epidemic.

From the above observations, the international legislative framework is uneven, so it leads traders to define directly and specifically, hopefully in print, the force majeure cases and establish expressively the consequences linked to them.

INTERNATIONAL GUIDELINES

At an international level the main principle expressed in the art. 7.1.7. of **UNIDROIT Principles** allows, abstractly, an alignment of the different subjects, through the decree for which **the party in breach is exempted from the responsibility if the non-compliance derives from circumstances unrelated to its sphere of control, and that the party itself was not bound to predict at the moment of the conclusion of the contract or to avoid or to overcome the consequences.** A similar principle is contained in the Vienna Convention of 1980 (art. 79) about the selling of international goods.

Another aspect to be taken into account in the field of international contracts, is the important difference between the force majeure cause and the *hardship clause*.

In 2003 the International Chamber of Commerce (ICC) in an effort to provide a useful guideline for international traders, provided some standard texts, respectively, some clauses disciplining the force majeure cases and the *hardship* ones.

The force majeure clause, known as *Force Majeure Clause*, provides that the party that cannot perform the contract for the occurrence of a force majeure cause, is not to be considered as responsible.

On the contrary the *hardship clause* governs the hypothesis of excessive cumbersome of the performance. Its aim is to allow the parties to renegotiate the terms of the agreements in order to allow their adjustment to the new state of affairs. If an agreement is not reached, and only in that case, it will be possible to request the withdrawal of the contract.

It is necessary to point out that, while in the case of force majeure, the text suggested by the ICC regulates the consequences of an unpredictable and unexpected event that makes impossible one of the performances, the circumstance contemplated by the hardship clause does not stop the party that suffer it to perform the contract, it simply make its performance excessively cumbersome as compared with the consideration.

In case of occurrence of the event, between contractors that have predicted in the context of the contractual relationship, the abovementioned clause, the part that invokes it has to notify to the counterpart the existence of the event while attaching the proof that the event occurred match with what provided by the contract. As a consequence of such a communication, one proceeds with the suspension of the performance in order to allow the possible resolution of the event occurred. If, the prevented fact, were to remain, after a reasonable time limit, the contract will be able to be terminated.

In conclusion, in the light of the thoughts carried out, tackling in broad terms the theme of force majeure connected to the Coronavirus, it is noted that it is necessary to perform a distinction between the international contracts of medium-long term and the ones of short terms, given that, while for the first it is legitimate and reasonable that the party unable to fulfil asks and obtains (recurring possibly to the judicial authority) a period of suspension of the contract – period that will reasonably be more or less long, proportionally to the residual length of the contract below – for the

second it will be quite difficult to suggest a suspension, given the time frame within the obligation has to be fulfilled.

In these latter cases, provided that this is not provided by the contractual document and/or that the parties of the contract do not make an agreement on the point, it starts to be difficult to think about the remedy of the suspension of the contract, representing the resolution/dissolution of the contract the typical solution, without prejudice to the party that has become defaulting will be able , while invoking the force majeure or a similar institute, to be exonerated from the responsibility and so it is not required to give a compensation or every other form of refund, also equivalent, to the creditor.

A further thought must be done on a theme that is has not been tackled properly: tackling **the theme of force majeure, one has to differentiate the contract signed before the spread of the news about the virus, but whose performances had/has to be fulfilled yet, at least partially, and the contracts signed after that, using the ordinary diligence, commonly understood, the parties should have been aware of the existence of the virus and of its fast spread**. Again: Does the existence of the virus in the Countries of one or of both parties, count to invoke the force majeure or equivalent, and therefore to shy away from the fulfilment obligation?

For what concerns the first question, the case of force majeure or of a similar institute can, theoretically, be invoked by the party that is considered to be unable to perform its performance. But in the event that a contract has been concluded after the news of the spread of the Coronavirus outside the People's Republic of China, with great speed, certainly, on the writer opinion, none of the parties will be able to invoke the force majeure or other similar institutes, since the event was already known or should have been known using the ordinary diligence, with the result that, unable to fulfil, it will have to be considered responsible and pay for the damages.

The following issue is interesting: it might happen, as it is happening right now, that a contractual party <located in a Country in which the Coronavirus has not appeared yet > has to carry out some contractual performances to a counterpart located in its turn in a Country unafflicted by the epidemic, but that the first party cannot fulfil it since it is unable to receive the components or the semi-components or the services from a supplier and/or a sub-supplier and/or from subjects, necessary to the completion of the products or of the ordinary service, since they find themselves in the territories affected by the epidemic and so they are unable to fulfill an order.

Let's draw some conclusions that can be valid for the majority of the systems worldwide:

- As a matter of principle, a contract can be only modified with the consent of the parties or for causes provided by the contractual law, and so the Judges, whether they be "magistrate" or Arbitrators, do not have much space to intervene and modify the contract itself or to exempt the party in breach from the obligations taken;

- The occurrence of the event that has made impossible the performance, has to be unexpected, unpredictable, irresistible and not provoked by the party that had to carry out the performance;

- The economic balance of the parties of the contract has to be affected materially;

- In order that the irresistible event (in our case the spread of Coronavirus) leads to the suspension of the contract (if provided contractually or if agreed between the parties) or to its resolution, it is not possible in this case to proceed with the review of the contract itself, provided that the circumstances occurred do not alter the original equilibrium of the contractual obligations. In other words, to invoke the force majeure or other equivalent institutes, the gravity of the event has to make impossible the performance of the contractual obligations. Hence, the termination of the relationships or the suspension of the contract.

- If the irresistible event affects a wide socio-economic context but not in a way that makes the performance impossible, one has to think, at least in the Countries where hardship is provided, about modifying the mutual performances or about renegotiating the contract itself.

OPERATIONAL RECOMMENDATIONS

From an operating point of view, it is advisable what follows:

(i) In case of new negotiations or conclusion of new contracts or in case of split or multiple deliveries, one draws up a contractual text that regulates fully – among other things – the force majeure cases and its consequent solutions and hopefully one tries to subscribe them; in their absence, one has to convey them to the other party so that, on the one hand there is proof of successful transmission, on the other there is a specification related to the

fact that, the beginning of the performance of the contract, is equivalent to a silent attention of the contractual document;

(ii) Given the extreme sensitivity of the subject, one has to avoid *standard* clauses but has to regulate fully force majeure cases, and their consequences (contract suspension, for how many months, how to manage the recovery, payments, etc…), also and above all having in mind the Countries in which the force majeure has to be invoked;

(iii) If an emergency situation has not occurred yet and one can fully comply with the obligations taken, one has to notify in fairness and in respect of the principle of good faith, the counterpart of finding itself in a Country (Italy) affected by the epidemic and that one cannot exclude a fast deterioration of the situation or the onset of a situation that makes impossible the correct fulfilment (e.g. the couriers who do not collect and do not deliver, the suspension of transportations, etc…);

(iv) On has to collect and keep as much as possible the documentation about the epidemic, the effects, etc… (articles, services, reports and so on), for future reference;

(v) If one is afraid that the client does not accept the performance because he is afraid of a contagion (think of rumours about how agri-food products can be a vehicle for the virus), one has to collect documents and proofs, even public ones, that certify that the production is regular, that the goods are strictly checked, etc… so that one is able to distrust effectively the other party into accepting the performance object of the contract;

(vi) If a foreign enterprise, debtor of a performance, has invoked the application of force majeure to obtain the exemption from responsibility, and has alleged as proof element a certificate issued by the Chamber of Commerce, one shall not accept the document itself but has to investigate if the epidemic has affect significantly the foreign enterprise. More specifically, certificates themselves do not automatically imply the application of force majeure and/or the exemption from responsibility;

(vii) If an enterprise keeps on sending or retaining its employees and/or agents abroad, one has to adopt immediately an accurate and detailed protocol in terms of Travel Security;

(viii) The enterprises have to update the Duvri which is the document of risk evaluation.

Then, from a practical point of view, it is suggested to proceed as follows, distinguishing the case in which the Italian Company is the enterprise that has to carry out a performance (be it a supply of goods or of services) or if it is the debtor enterprise.

I case

*** first hypothesis**

The Italian enterprise is likely to become defaulting, unable to fulfill orders or to carry out its performances. The suggestion is to notify, if possible, forewarn the counterpart in advance, that a shutdown may occur. All this for due respect of the principle of good faith. With an alert communication, it has to specify the reasons for which a force majeure has occurred (i.e. suspension of transports, blockade of borders, production block, subcontractors that do not supply, lack of goods, etc…), so that any negligence is left out.

Even in the case of "simple" delay it is recommended to communicate it immediately to the counterpart, notifying them that because of "*the impossibility of maintaining Your usual productive levels, for reasons not dependent on Your will, the delivery time of the goods object of the contract will not be able to be met and it will be necessary to postpone the delivery*".

It is advisable to collect documents to support that (e.g. newspaper's articles, government or local orders, correspondence with subcontractors or with conveyors, etc…). It is also necessary to make agreements with the commercial partners about some shared solutions that are fair and reasonable.

Focus on machines and systems: If the productive activity concerns machines and systems, the above-mentioned indications will have to be extended to the possible installation and to the checks and tests.

More precisely, if the contract provides the installation or the presence of the staff of the enterprise near the buyer, it is advisable to communicate (if the contract is under execution) or include (if the negotiations or the conclusion of a new contract have already started) a period of after this manner "*it is necessary to note that even in some Countries (after checking, add the name of the purchaser Country: "among them*

also…"), have restricted the entrance of Italian citizens in their national territory, which makes extremely difficult the performance of the provided installations".

***second hypothesis**

The Italian enterprise receives from its foreign suppliers/subcontractors the communications in which, while invoking the force majeure clause they declare to be unable to fulfill their contractual obligations. It is necessary to request a supporting documentation that indicates that the difficulties affect directly the performances. More precisely, it is not enough that the suppliers invoke a general difficult situation because of the virus spread, they have to provide precise and accurate documents. The certificates issued by the Chambers of Commerce of some Countries generally are not definite, and "they have to be considered with caution", they count at most as hints but not as a full proof from a juridical point of view. So, the suggestion is that the Italian enterprise verifies with great accuracy the quality and the truthfulness of the statements by the foreign enterprise, and it is made sure that a negligence has not occurred (e.g. insufficiency of goods, evaluation errors about the gravity of the contagion, etc…) that will exclude the force majeure, becoming the latter responsible of non-compliance and it will have to pay the damages suffered by the Italian enterprise.

II case

The Italian enterprise, because of the emergency situation, is likely to be unable to fulfill its commitments towards the foreign companies. The same recommendations abovementioned in the first case, in the first hypothesis are valid.