

FLASH INFO - CORONAVIRUS

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In Italy, as well as in other countries, enterprises are coping with the impact of Covid-19 emergency on their business and contracts. Under these circumstances, it is crucial for enterprises to understand the relevant legal remedies available under Italian Law to react quickly to the emergency and reduce the risks of disruption of their business. With this aim, summarized below are:

Part I The main urgent measures adopted by Italian Government to support enterprises and employees under Law-Decree "Cura Italia" D.L. n. 18 of 17 March 2020

Part II The main measures adopted by Italian Government to enhance liquidity of the enterprises and support their export, internationalization and investments under Law-Decree "Liquidità" D.L. n. 23 of 8 April 2020;

Part III the impact of Covid-19 emergency on the contracts subject to Italian Law and related remedies.

*_*_* <u>PART I</u>

LAW - DECREE "CURA ITALIA"

(D.L. n. 18 of 17 march 2020)

The new law decree "Cura Italia" of 17 March 2020, published on 18 March 2020 in the official bulletin (Gazzetta Ufficiale), provides for various measures to support employees and companies affected by the Covid-19 pandemic. Below are the main measures implemented by the Decree.

A. MEASURES TO SUPPORT EMPLOYMENT

ENTREPRISES

- Ordinary Technical Unemployment Fund (CIGO) (art. 19)
- Wage allowance (art. 21)
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EMPLOYEES

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- Extension of paid leave (art. 24)
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- Tax credit for shops and stores (art. 65)
- Suspension of payment of withholding taxes, social security charges and compulsory insurance premiums for the sectors most affected (art. 61)
- Suspension of payment of taxes and social security contributions (art. 62)
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- Suspension of the activity of the tax administration (Art. 67)
- Suspension of deadlines for the collection of tax returns (art. 68)
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- Financial support measures for micro, small and medium-sized enterprises affected by the Covid-19 epidemic (art. 56)
- Central Guarantee Fund for SMEs (Art. 49)
- Guarantee measure of the Confidi (art. 51)
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- Support for the liquidity of companies affected by the epidemiological emergency via guarantee mechanisms (art. 57)
- Financial support measures for enterprises (art. 55)
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- Measures for the internationalization of the country (art. 72)

A. MEASURES TO SUPPORT EMPLOYEMENT

ENTERPRISES

 « CASSA INTEGRAZIONE ORDINARIA » Ordinary Technical Unemployment Fund for temporary lay-off ("CIGO") (ART. 19)

The CIGO ("Cassa Integrazione Ordinaria") is one of the main social shock absorbers provided for by the Italian system. It consists in the payment by the INPS (Italian Social Security Body) of reduced wages to the employees who are redundant and whose employer has had to reduce or interrupt their work activity for temporary reasons beyond the control of the employer and the employees.

The CIGO can be ordinarily requested by the enterprises indicated in art. 10 D.lgs. 148/2015 (industrial enterprises, production and distribution of energy, water and gas, construction etc.).

More specifically under CIGO, INPS shall pay to the employees 80% of their total remuneration, with a cap, which is currently set by the INPS circular 10 February 2020, in a monthly sum of: € 998,18 gross (€ 939,89 net) for employees with a salary below € 2.159,48; or € 1.199,72 gross (€ 1.129,66 net) for employees with a salary exceeding € 2.159,48.

It shall be noted as well that the INPS has a total cap of expenditure for CIGO of \leqslant 1,347.2 million.

Law-Decree Cura Italia confirms the enterprises mentioned in art. 10 D.lgs. 148/2015 can benefit from the CIGO due to the emergency Covid-19 without further justifications with simplified formalities and no consultation of the Unions, for a period of 9 weeks (until August 2020 at the latest).

The employees to be places under CIGO shall be employed at least since February 23, 2020 (by way of derogation from the 90 days seniority ordinarily required).

WAGE ALLOWANCE (ART. 21)

It is a wage subsidy allowance paid, in the event of suspension or reduction of work, to employees of enterprises enrolled in the Solidarity Fund (Fondo di solidarietà di settore and Fondo di integrazione salariale - FIS).

The Solidarity Fund (governed by Articles 26 et seq. of Legislative Decree No 148 of 14 September 2015) provide instruments of income support in the event of suspension or termination of employment of employees belonging to sectors not covered by the legislation on technical unemployment (CIG or CIGS).

In order to ensure easier access to the service and to facilitate maximum use, a simplified framework has been introduced, partially derogating from the provisions of Legislative Decree No 148/2015. In particular:

- the payment of the additional contribution is not due;
- the company's contribution cap is not taken into account;
- the following limits are not taken into account: (i) limit of 52 weeks in the two-year rolling period or 26 weeks in the two-year rolling period for the Supplementary Wage Fund (SIF); (ii) limit of 24 months in the five-year rolling period; (iii) limit of 1/3 of the hours worked:
- periods already authorized are neutralized in the event of subsequent claims;
- It is not necessary for workers to comply with the requirement of 90 days of actual work, it is sufficient that they are employed by the applicant company on 23 February 2020.

The deadline for submitting applications shall be the end of the fourth month following the month in which the period of suspension or reduction of work began, like the CIGO the benefit can be granted for a maximum period of 9 weeks (until August 2020).

The amount of the subsidy allowance is the same provided for the CIGO, with the same caps, within the limit of expenditure by INPS of € 1,347.2 million.

 "CASSA INTEGRAZIONE IN DEROGA" Exceptional Technical Unemployment Fund for temporary lay-off (art. 20,21, 22)

By way of derogation from general rule, with the "Cassa integrazione in deroga" the Law-Decree Cura Italia extends the same benefits of CIGO to all employers (including companies with less than 5 employees) who interrupt or reduce activities as a result of the epidemiological emergency (not already benefiting from the subsidy allowances of FIS). The CIGD is granted by decree issued by the relevant Regions and Autonomous Provinces, which shall be transmitted to INPS within 48 hours of the adoption of the decree. Applications must be submitted to the Regions and provinces concerned and will be processed in chronological order of submission (art. 22).

EMPLOYEES

 ASSIMILATION OF QUARANTINE AND PERMANENT RESIDENCE TO DISEASE (ART. 26)

The period of quarantine with active surveillance or permanent residence with active surveillance is assimilated to sick leave for employees in the private sector (for the public sector such a measure was already provided for by the law decree of 9 March 2020).

LEAVES AND ALLOWANCES FOR PARENTS (ART. 23, ART. 24)

In order to **support working parents**, following the suspension of school services, provision is made for the possibility of taking an additional 15 days' parental leave in the event that the children are aged 12 or under, or in a situation of demonstrated sever disability. An allowance equal to 50 % of salary will then be paid.

Alternatively, a bonus is granted for the purchase of babysitting services up to a maximum of 600 euros, increased to 1,000 euros for National Health Service staff and law enforcement officers. The bonus will be paid through the family record book, in accordance with article 54 bis of Law No. 50 of 24 April 2017.

EXTENSION OF PAID LEAVE (ART. 24)

The number of days of paid monthly leave covered by the contributions paid, according to article 33, paragraph 3, of Law 5 February 1992, n. 104, in case of severe disability, is increased by a further twelve days;

SUSPENSION OF APPEAL PROCEDURES AGAINST DISMISSALS (ART. 46)

All appeal procedures against dismissals (collective and for justified objective reasons) initiated after 23 February 2020 are suspended for 60 days.

B. MEASURES CONCERNING TAXES

TAX CREDIT FOR STORES AND STORES (ART. 65)

For year 2020, those engaged in commercial activities benefit from a tax credit equivalent to 60% of the amount of the rent for the month of March 2020 for buildings belonging to

cadastral category C/1.

 SUSPENSION OF THE PAYMENT OF WITHHOLDING TAXES, SOCIAL SECURITY CHARGES AND COMPULSORY INSURANCE PREMIUMS FOR THE SECTORS MOST AFFECTED (ART. 61)

The payment of withholding taxes, social security contributions and compulsory insurance premiums for the months of March and April, as well as the payment of VAT for the month of March, are suspended, without limitation linked to turnover, for the sectors most affected.

The sectors affected are: tourism and hotelery, spa, transport, catering, culture (cinema, theatres), sport, education, amusement parks, events (trade fairs and conferences), gaming halls and betting centers. To date, this benefit has not been extended to shops, but trade associations are discussing how to extend its application to stores.

 SUSPENSION OF PAYMENT OF TAXES AND SOCIAL SECURITY CONTRIBUTIONS (ART. 62)

The payment of taxes and social security contributions (VAT payments, deductions, and contributions for the month of March) by taxpayers whose turnover does not exceed 2 million euros is suspended.

 EXTENSION OF DEADLINE FOR PAYMENTS TO THE PUBLIC ADMINISTRATION (ART. 60)

For economic operators, the payment of sums due to the public administration, including taxes, social security charges and compulsory insurance premiums, due since 16 March is postponed until 20 March.

SUSPENSION OF THE ACTIVITY OF THE TAX ADMINISTRATION (ART. 67)

Suspension until 31 May 2020 of clearance, control, verification, recovery and litigation activities by the Tax Agency.

SUSPENSION OF DEADLINES FOR THE COLLECTION OF TAX RETURNS (ART. 68)

The deadlines for the collection of tax collection files, for balancing and withdrawal and for scrapping, sending new files and executory acts are suspended until 31 May 2020.

BONUSES FOR EMPLOYEES (ART. 63)

Workers whose gross annual income does not exceed 40,000 euros and who do not telework but visit their place of work will receive a tax-free bonus of 100 euros in March; the bonus will be paid by the employer in lieu of tax (its amount will be deducted from the payment of taxes).

THE WORK PLACE HEALTH AND SAFETY TAX CREDIT (ART. 64)

For enterprises, incentives are provided for sanitation interventions and for increasing safety at work, through the granting of a tax credit, as well as contributions through the creation of an INAIL fund; in particular: granting of a tax credit up to 50% of the costs of sanitation of working environments and of tools up to a maximum of 20,000 euros.

C. SUPPORT MEASURES FOR THE LIQUIDITY OF COMPANIES

In order to support companies' cash flow due to the lack of liquidity, numerous interventions have been planned, in particular through collaboration with the banking system.

 FINANCIAL SUPPORT MEASURES FOR MICRO, SMALL AND MEDIUM-SIZED COMPANIES AFFECTED BY THE COVID-19 EPIDEMIC (ART. 56)

Moratorium on loans and financing for micro, small and medium-sized companies (mortgages, leasing, credit facilities and short-term loans).

 CENTRAL GUARANTEE FUND FOR SMALL AND MEDIUM-SIZED COMPANIES (ART. 49)

Reinforcement of the Central Guarantee Fund for small and medium-sized companies, including the renegotiation of existing loans. The amendments are as follows: (i) free guarantee by the fund, with the suspension of the obligation to pay the fees for access to the fund; (ii) eligibility for guarantee of debt rescheduling operations, to meet the immediate liquidity needs of companies considered reliable by the banking system; (iii) automatic extension of the

guarantee in the event of a moratorium or suspension of financing linked to the emergence of the coronavirus; (iv) provisioning for operations up to 100,000 euros of the evaluation procedures for access to the fund for economic and financial reasons, in order to make the guarantee available to enterprises in financial difficulty as a result of the crisis linked to the epidemic; (v) suspension of the commission for failure to perform all operations not carried out; (vi) possibility of combining the fund's guarantee with other forms of guarantee acquired for operations of significant amount and duration in the hotel tourism and real estate sectors; (vii) possibility of increasing the junior tranche guaranteed by the Fund for portfolios aimed at the enterprises/sectors/industries most affected by the epidemic; (viii) possibility of setting up special sections of the Fund to support access to credit for certain specific sectors or business sectors, on the initiative of the administrations of the sector in collaboration with other associations and reference organizations; (ix) suspension of the Fund's operational deadlines; (x) extension of the limit for granting a guarantee by 2.5 million to 5 million in financing; (xi) extension to private entities of the possibility of contributing to increasing the fund's resources (currently granted to banks, regions and other public organizations and bodies, with the intervention of the Cassa depositi e Prestiti and of Sace); (xii) facilitation of the granting of guarantees for financing to the self-employed, freelancers and individual entrepreneurs; (xiii) extension of the use of the Fund's resources.

GUARANTEE MEASURES FOR THE CONFIDI (ART. 51)

Reinforcement of Confidi for micro-enterprises through simplification measures.

FIR (ART. 50)

Possibility of granting shareholders and bondholders adversely affected by banks an advance of 40% of the amount of compensation due, from the Investor Compensation Fund (FIR).

 SUPPORT FOR THE LIQUIDITY OF COMPANIES AFFECTED BY THE EPIDEMIOLOGICAL EMERGENCY VIA GUARANTEE MECHANISMS (ART. 57)

Introduction of a counter-guarantee mechanism for banks, by the Cassa Depositi e Prestiti, to extend credit expansion to companies affected by the crisis.

FINANCIAL SUPPORT MEASURES FOR COMPANIES (ART. 55)

Facilitation of the disposal of impaired loans (NPL) by converting deferred tax activities (DTA) into tax credits for financial and industrial companies.

In particular, companies are entitled to convert pecuniary credits into tax credits if:

- the credits are assigned before 31 December 2020;
- 90 days have elapsed since the deadline for the payment of the assigned credit expired;
- the aggregate amount of the assignments does not exceed a maximum of two billion euros.

This measure could be very useful to "offset" debts with the tax authorities by assigning receivables that are difficult to collect.

CONDITIONS FOR SUSPENSION OF THE REIMBURSEMENT FUND LAW 394/81 (ART. 58)

Companies that have obtained funding for "internationalization" projects are entitled to request the suspension for up to twelve months of the payment of the principal and interest on instalments falling due in 2020, with a consequent shift in the amortization plan for a corresponding period.

INCREASE OF ADVANCES FROM THE DEVELOPMENT AND COHESION FUND (ART. 97)

Within the framework of the Operational Plans of the Central Administrations and the Development Pacts, with the possibility of requesting 20% of the resources allocated to the different initiatives, if they have an approved or definitively approved executive project in case of joint design and execution of the works.

D. OTHER RELEVANT MEASURES

PROVISIONS REGARDING THE SHAREHOLDERS' MEETINGS (ART. 106)

Art. 106 of the Decree "Cura Italia" provides certain simplifications with respect to the meetings of the shareholders and the next deadlines for the approval of the annual balance sheet, in particular:

- The shareholders' meetings can be validly held even if all the attendants, including the Chairman and the Secretary (and the Public Notary in case of extraordinary meetings), participate by telecommunication means that allow the identification and the participation (right of intervention, voting right....).
 The provision is mandatory and applies even in case the Articles of Association: (i) do not allow to hold the shareholders' meeting by telecommunication means, or (ii) require for the validity of the shareholders' meeting held by conference call or videoconference that the chairman and the secretary are in the same physical place;
- by way of derogation from articles 2364, para. 2, and 2478-bis of the Civil Code or the Articles of Association, the shareholders' meeting for the approval of the financial statements can be validly convened within 180 days from the closing date of the financial year, instead of within the ordinary deadline of 120 days;
- by way of derogation from article 2479, co. 4 of the Civil Code, the quotaholders of limited liability companies (SRL) can validly take decisions by written consultation or written consent in writing even if otherwise provided by the Article of Associations;
- companies, whose shares are listed on a regulated market, can appoint a Designated Representative (pursuant to art. 135-undecies of the Legislative Decree n. 58/1998) to whom the shareholders can grant a proxy with voting instructions on all or some of the items on the agenda, even if otherwise provided by the Articles of Association. The companies with shares listed on regulated markets can also provide in the notice of call that shareholders can only attend the shareholders' meeting through the mentioned Designated Representative, thereby further strengthening the measures to prevent the risk of contamination;
- by way of derogation from art. 135-undecies of Legislative Decree 58/1998, proxies granted to the Designated Representative can be issued also in the form of *simple* proxypursuant to art. 135-novies of Legislative Decree 58/1998.

MEASURES FOR THE INTERNATIONALISATION OF THE COUNTRY (ART. 72)

The Ministry of Foreign Affairs and International Cooperation has set up a fund for integrated promotion to support the internationalization of the country's entrepreneurship.

PART II:

#LAW-DECREE "LIQUIDITA"

(D.L. n. 23 of 8 April 2020)

With the Law-Decree "Liquidità" n. 23 of 8 April 2020, the Italian Government has introduced further measures to face the current Covid-19 emergency situation in Italy, among which in particular urgent measures to support the Italian enterprises and companies in the resumptions of their business. In this regard, it is worth drawing the attention on the main measures aimed at simplifying companies' and enterprises' access to credit, enhancing their liquidity and supporting their export, internationalization and investments.

The main **financing measures** in favor of companies and enterprises, and under certain condition to self-employed workers, can be summarized as follows:

- The Italian State, through the company SACE Simest of the Cassa Depositi e Prestiti Group undertakes to guarantee (for a global amount of 200 billion of Euro) the funding granted by the banks in favour of enterprises with registered office in Italy and of individual enterprises and self-employed workers with VAT number.
 - The guarantees shall be issued by SACE within the 31 December 2020 and in relation to funding with a duration not exceeding 6 years.
 - The guarantees shall cover between 70% and 90% of the amount financed (depending on the size of the company) and are subject to several conditions, including the prohibition for the companies to distribute dividends for the next twelve months and the utilization of the amount financed to support the production activities exclusively located in Italy. More specifically:
 - companies with less than 5,000 employees in Italy and a turnover of less than 1.5 billion of Euros can obtain a coverage equal to 90% of the amount of the financing requested and they can benefit from a simplified procedure for applying for the facilities;
 - companies with more than 5,000 employees and a turnover between 1.5 and 5 billion of Euros can obtain a coverage equal to 80%;
 - companies with a turnover above 5 billion of Euros can obtain a coverage equal to 70% of the amount of the financing requested;
 - the amount of the guarantee cannot exceed 25% of the turnover recorded in 2019 or twice the personnel costs incurred by the company;

- 30 billion of Euros are reserved to small and medium enterprises, including individual enterprises or self-employed workers with a VAT number. The access to the guarantees issued by SACE shall be free of charge but subject to certain conditions.
- The Law Decree provides measures aimed at promoting companies' exportations and internationalizations through the role of SACE. Among the other things, a new coinsurance system, on the basis of which 90% of the commitments deriving from the SACE's insurance activities are undertaken by the Italian State and the remaining 10% by the company itself. According to the Government press release n. 39 of 6 April 2020, this system shall free up further resources for an amount of 200 billion to be allocated to the enhancement of exports.
- The Law Decree introduces new measures to further strengthen the Guarantee Fund in favour of SME (Small Medium Enterprises), by (i) increasing its financial endowment, (ii) extending its application in favour of companies up to 499 employees and also of entrepreneurs and self-employed workers, (iii) simplifying the procedure to access to the Fund. Under the Italian Government point of view, thanks to these new provisions, the Fund already increased by the "Cura Italia" decree (Decree Law no. 18 of 17 March 2020) with 1.5 billion of Euros shall become a more effective instrument to support small and medium enterprises, to protect entrepreneurs, artisans, self-employed works and professionals, as well as to safeguard export and all those commercial /industrial sectors that constitute the backbone of Italian economic system.

In addition on the above, the Law Decree provides further measures to support the business activities, such as measures to ensure companies' going concern, measures aimed at strengthening the so called special powers of the Italian Government in the strategic industrial sectors, tax and fiscal measures in favor of companies and self-employed workers.

PART III:

IMPACT OF COVID-19 EMERGENCY ON CONTRACTS UNDER ITALIAN LAW

As in most Countries in the world, Italian companies and enterprises are facing the impact of Covid-19 emergency on their business and contracts.

The Covid-19 emergency and consequential measures adopted by the Italian Government for the containment of the epidemy are having (or will have in the following weeks and months) significant impacts on several contracts, either rendering the performance of the obligations temporary or definitively impossible, or disrupting the economic equilibrium of the obligations of the parties. In international commercial practices and in several legal systems, these exceptional circumstances, accordingly to their characteristics and effects on the concrete cases, are generally indicated as "force majeure", "supervening impossibility of performance" or "hardship".

Under Italian legal system, in absence of specific clauses included in the contract regulating the effects and consequences of supervening extraordinary events that rendered the performance of the contractual obligations impossible or exceptionally burdensome for one of the party (notably, the "force majeure" clauses and "hardship" clauses), the relevant provisions and remedies to deal with these situations are provided for by the Italian law and, in particular, the Italian Civil Code.

The aim of this document is to provide a brief overview, not purporting to be comprehensive, of the legal remedies available to companies in case in which the performance becomes impossible ("force majeure") or excessively onerous for one of the parties ("hardship") under Italian law, with respect to contracts governed by such law.

E. The supervening impossibility of performance of contractual obligations

Legal framework and legal effects of supervening impossibility of performance

The Italian Civil Code does not provide a definition of force majeure or of impossibility of performance of obligations, but it regulates its effects and consequences. In this regard, the relevant dispositions are articles 1218 and 1256 of Italian Civil Code (in relation to obligations in general) and articles 1463 and 1464 of Italian Civil Code (more specifically concerning

contracts with reciprocal consideration and obligations). In particular, with reference to the obligations in general, the Italian Civil Code provides the following:

- Art. 1218 of Italian Civil Code: "the obliged party that does not exactly perform the obligation due is liable for damages, unless it proves that the non-performance was due to impossibility of performance for a cause not attributable to the same party".
- Art. 1256 of Italian Civil Code: "an obligation is extinguished when its performance becomes impossible for a cause not attributable to the obliged party. If the impossibility is only temporary, the debtor is not responsible for the delay in performance as long as the impossibility lasts. In any case the obligation is extinguished if the impossibility lasts until, in relation to the cause of the obligation or to the nature of its object, the debtor cannot be deemed obliged to perform or the creditor has no longer an interest in its performance".

On the basis of these provisions, should an obligation be impossible to be performed because of a cause not attributable or under the control of the obliged party (force majeure), a distinction should be drawn:

- (i) <u>in case of temporary impossibility</u>, the debtor is temporarily released from the liability for damages for the non-performance of its obligations, as long as it lasts the impossibility to performance the obligation; when the temporary impossibility ceases, the debtor is compelled to complete the performance of his obligations;
- (ii) <u>in case of definitive impossibility to carry out the obligation or in the event that the suspension lasts until the debtor cannot be considered bound to the same or the creditor has no more interest in the fulfilment, considering the aim of the obligation or its nature, the obligation is extinguished ipso iure. The debtor cannot be deemed in breach and, as a consequence, he is not liable for not having performed the obligation.</u>

In brief, simply put, two are the main effects or consequences of impossibility of performance of an obligation:

- discharge from liabilities for damages for the non-performance (or delay in performance) of the obligation by the obliged party;
- termination *ipso iure* of the obligation in case of definitive impossibility, in the sense explained above.

The same principles regarding the obliged party's exoneration from liabilities for cause not attributable to the same and the extinguishment of the obligation in case of definitive impossibility apply also to contracts with reciprocal obligations and considerations.

Moreover, art. 1463 and art. 1464 Italian Civil Code regulate and clarify the consequences of the impossibility of performance for reasons beyond the parties' control on the contracts, depending on whether the impossibility is total or partial. In particular:

- Article 1463 of Italian Civil Code ("Total Impossibility") provides that: "In contracts with reciprocal obligations, the party exonerated due to the supervening impossibility of performance of its obligation cannot claim the performance of the other party's obligation and has to return what it has already received from the counterparty, according to the rules relevant to claim for return of undue payment".
- Article 1464 of Italian Civil Code ("Partial Impossibility") provides that: "When the
 performance of a party has become impossible only in part, the counterparty may
 request a proportional reduction of its (counter)obligation or might withdraw from the
 contract in the event it has no relevant interest in the partial performance of the
 contract".

In light of all above, for contracts with bilateral obligations, it results that:

- (i) In case of temporary impossibility, the obligated party is not responsible for the delay and for the non-performance of its obligations; the contract has to be considered suspended as long as the temporary impossibility lasts;
- (ii) In case of partial impossibility, the debtor is bound to perform the part of its obligations that are still possible to be carried out. In this event, the counterparty is entitled to request a proportional reduction of its counter-obligation or request the withdrawal from the contract, should it not have a relevant interest in the partial performance of the contract.
- (iii) In case of total and definitive impossibility, the obligated party is not responsible for the non-performance of its obligation and its obligation is extinguished *ipso iure*. The obligated party is not entitled to claim the counter-performance from the other party and the contract is terminated with full release of the parties. This means that the parties are restored in their original positions and the contractual obligations are terminated retrospectively. By way of illustration, in case of a sale contract in which the obligation of the seller that has already cashed in advance the price of the goods becomes impossible for a force majeure event, the sale contract is terminated: the seller is not liable for not having sold the good, but it has to return the payment already collected to the buyer.

It is worth clarifying that, to the contrary, for long terms contracts, such as distribution agreements or agency agreements, the termination has no retrospective effects, since the restoration of the parties in their former positions is not possible. With respect to long term contracts, art. 1458 of the Italian Civil Code establishes that the effect of termination does not extend to obligations already performed.

The notion of force majeure under the Italian Legal System

As anticipated above, under the Italian legal system, there isn't a legal definition of force majeure provided by the law. According to the majority of doctrine and case law, in order to trigger the application of articles 1218, 1256, 1463, 1464 of Italian Civil Code, the impossibility of performance of the obligation has to meet the following requirements:

- the impossibility of performance has to be supervening: it has to be unforeseen and unforeseeable at the time the obligation was undertaken and so it has to arise *after* the execution of the contract;
- the impossibility of performance has to be objective and absolute: the performance has
 to be objectively impossible and not merely burdensome; the obliged party has no
 means to avoid or to overcome the impossibility of performance;
- the impossibility of performance shall not be attributable to the obligated party: the impossibility has to be caused by an event, circumstance, act or fact beyond the parties' control and it cannot be avoided by the debtor by taking all reasonable measures and precautions necessary.

It is worth underling that under the notion of force majeure, as described above, fall not only factual events (i.e. a strike, a natural disaster, riot, war or other facts, events not attributable to the parties) but also the so-called "factum principis", an order or measure adopted by an administrative authority or a law or decree adopted by a Government which renders the performance of the obligation impossible to be performed from a legal point of view (i.e. a decree prohibiting the selling of the goods of a sale contract executed by the parties).

Finally, the obliged party bears the burden to prove that a specific event has made performance impossible and the occurrence of all requirements that trigger the application of the mentioned provisions is assessed by the Judge, if necessary, on a case-by-case basis.

Can the COVID 19 emergency be considered a force majeure event under the Italian Law?

It shall be preliminarily noted that that each contract has to be considered individually, on a case by case basis, in order to assess if and how the performance was actually prevented by the emergency and related measures, and the contracting party could not manage otherwise to avoid such impossibility.

Nonetheless, from a general point of view, it can be said that the Covid 19 emergency and the consequent measures and decrees adopted by the Italian Governments, might in fact prevent a party to perform its obligations, meeting all the requirements to be considered as force

majeure event. For the purposes hereto, among the measures and decrees adopted by the Italian Government, it is worth recalling:

- the President of the Council of Ministers Decree (DPCM) dated 9 March 2020, which has extended to the entire national territory the stricter measures in force in the north of Italy aimed at containing the spread of COVID 19 by severely limiting the movement of people throughout the nation and the opening of commercial activities and public institutions;
- the Law Decree n. 18 of 17 March 2020 (the so called "Decreto Cura Italia"), which provides various extraordinary measures to support employees and companies affected by the Covid-19 pandemic. These exceptional provisions established in order to support the companies and employees confirm that the current COVID 19 emergency is an extraordinary and unforeseen fact, that is significantly affecting companies, enterprises, industrial and commercial activities.
 - Moreover, art. 91 para. I of the Law Decree "Cura Italia" provides that the compliance with certain restrictive measures imposed to face the COVID-19 emergency "shall always be taken into account for the purpose of the exclusion, under Article[s] 1218 [and 1223] of the Italian Civil Code, of the liability of the obligor, also with regard to any acceleration or any liquidated damages applicable to delayed or omitted performance". Put differently, art. 91 acknowledges that the COVID-19 emergency and the consequent measures adopted might be considered a force majeure event, exempting the debtor from liabilities. Being the provisions titled "Provisions regarding delays or contractual breaches resulting from the implementation of the containment and anticipation of the price in public contracts" is not clear if para. I of the same applies only to public contracts (as para. II on anticipation of price) or to commercial contracts in general. In any case, by way of analogy, the COVID-19 emergency should have the same effects on the commercial contracts.
- the President of the Council of Ministers Decree (DPCM) dated 22 March 2020, which introduces further measures regarding the containment and management of COVID 19 emergency in Italy and tightens the lock-down. The Decree provides, as a general rule, the suspension and shutdown of all the industrial activities, from the 25 March to the 3 April 2020, except for the enterprises involved in necessary services, strategic sectors or in the sectors listed in Annex I of the same Decree.

In conclusion, generally speaking, the Covid-19 and the measures adopted by the Italian Government have all the requirements to be considered force majeure events. If they have actually affected (or will affect in the following weeks) the contracts, determining the supervening impossibility of performance of the obligation of a party, the effects and remedies

provided for by art. 1218, 1256, 1463, 1464 might be invoked by the parties, such as – inter alia - the discharge from liabilities of the debtor and the suspension or termination of the contract, whether the impossibility is temporary or definitive. In any case, the application of the general remedies set forth by the Italian Civil Code's provisions shall be assessed on the basis of a case-by case analysis of the specific contract, the nature of the obligations affected, the alternative means and the interests of the parties.

- F. Hardship or supervening excessive onerousness of performance (Eccessiva onerosità sopravvenuta della prestazione)
- Legal framework on hardship under the Italian Law

A hardship event is a supervening and unforeseen event, not attributable to the parties and beyond their control that, contrary to force majeure, does not render the obligation impossible to be performed, but just excessively burdensome for the obliged party, disrupting the economic balance of the reciprocal obligations, as originally envisaged when the contract was originally executed.

Art. 1467 of the Italian Civil Code, that applies only to duration contracts (with continuous performance), clarifies the notion of hardship and regulates its effects and consequences on the contracts:

- Article 1467 of Italian Civil Code ("Contracts with reciprocal obligations"): "In contracts with continuous or periodical performance, or deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand the termination of the contract, with the effects established in Article 1458. The termination cannot be requested if the supervening onerousness falls within the normal risk of the contract. A party against whom termination is requested can avoid it by offering to modify equitably the conditions of the contract."
- The notion of hardship under art. 1467 Italian Civil Code and the remedies granted to the parties.

The remedies set forth by art. 1467 of Italian Civil Code in case of hardship, that is defined as extraordinary and unforeseeable event(s)" that makes "the performance of one of the parties excessively onerous" apply only to duration contracts. Specifically, to contracts with continuous or periodical performance (i.e. lease agreements or periodic supply of goods

contracts) or deferred performance (i.e. sale agreement with deferred date for the sale and the payment of the price).

Under art. 1467 Italian Civil Code, the supervening event has to render the performance of the obligation *"excessively onerous"*.

The Italian law does not establish any criteria to determine when the onerousness of the performance has to be considered "excessive". The excessive onerousness of the performance is evaluated case-by-case by the Judge.

The case-law usually adopts a restrictive and strict interpretation of this requirement, drawing a distinction between the excessively onerousness of performance and the mere difficulty of a party to perform its obligation, that has no juridical relevance under the Italian legal system. The *excessive onerousness* to be considered as hardship: (i) has to affect significantly the equilibrium of the parties' obligation and (ii) has not to fall within the normal risk of the contract.

In case of hardship, as defined above, the affected party is entitled to the termination of the contract. Pursuant to the mentioned art. 1458 Italian Civil Code, since hardship applies to duration contracts, the termination has no retrospective effects; put differently, the effect of termination does not extend to the obligations already performed.

However, the counterparty, should be still interested in the performance of the contract, in order to avoid the termination, is entitled to offer the restoration of the balance of reciprocal obligations, by amending the contract "equitably", according to a good faith principle.

Eventually, it is worth to mention that, despite the general remedy set by Italian Law for hardship is the termination of the contract (or the agreement by the parties on a rebalancing of the reciprocal obligations), certain specific agreements might give ground to a readjustment of the price, often based on an increase of raw material prices, transportation etc..

• The COVID-19 emergency as an "hardship" event in compliance with art. 1467 Italian Civl law.

In relation to the contracts executed before the outbreak of the emergency, in general terms the COVID-19 emergency and related measures might be considered as extraordinary and unforeseeable events suitable to render the performance of a party not impossible, but excessively onerous pursuant to art. 1467 Italian Civil Code.

However, the affected party, in order to lawfully claim the termination of the contract, has the burden of proving that the mentioned emergency has resulted in a significant and excessive unbalance of the reciprocal obligations of the contract and such event is not to be disregarded

based on the nature of the contract and the disruption could not be avoided. It is understood that, in any case, the contract cannot be terminated if the counterparty offers to amend the contract, re-establishing the balance between the reciprocal obligations.

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