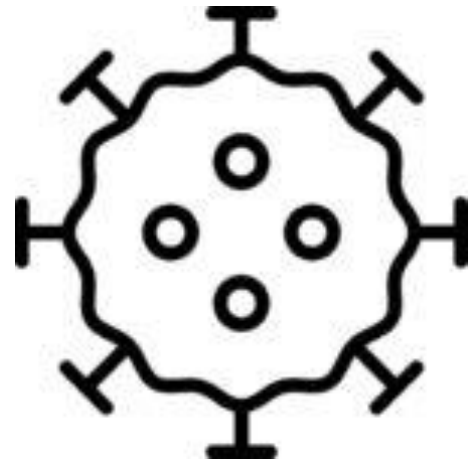


COVID-19

LEGAL UPDATE



The Pandemic of COVID-19
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The Pandemic of COVID – 19 as a “force majeure” event and how it is affecting contractual relations

By Apostolos Nikolopoulos

The spread of COVID-19 (Coronavirus) is having significant legal implications as it has severely impacted the performance of legal relationships of virtually every nature between businesses as well as individuals in the private sector. One of the many questions that have been raised under these exceptional circumstances that all of us are being faced with is whether the outbreak of the COVID- 19 Pandemic (as officially declared by the World Health Organization), can be legally regarded as a “force majeure” (or “Act of God” a term used sometimes in common law jurisdictions) and what this means for the performance of contractual obligations agreed between parties.

1. “Force Majeure” in Greek Civil Law

The Greek Civil Code (“GCC”) does not explicitly provide for the notion of “force majeure”. The GCC stipulates that no party is obliged to carry out its obligations should it be prevented to do so through no fault of such party. Any event not attributed to the party’s fault (fault defined on the basis of intent or negligence) is regarded as a fortuitous event which in effect includes “force majeure”. It is extensive Greek case law that has addressed and established the notion of “force majeure” being any unforeseeable and exceptional event that could not be avoided by any reasonable

measures. Such events have been held by Greek courts to include, inter alia, acts of nature such as earthquakes, extreme thunderstorms etc. Taking into consideration the above, it can be safely assumed that the current COVID-19 Pandemic does legally qualify as a “force majeure” event. It can also be argued that the nature of the Pandemic as a force majeure event, allows consequential events such as a Governmental/State measures directly resulting from the occurrence of the outbreak to fall under the same notion and therefore to receive equal legal treatment.

2. The legal impact on contractual relationships

The existence of the Pandemic as a force majeure event can be argued to affect the performance of contractual obligations irrespective of whether the subject matter contract has provided for a “force majeure” clause as by definition the notion’s purpose is to deal with the legal consequences for parties as regards an event for which the parties could not foresee and therefore did not stipulate in their contractual arrangement. However, there should be a causal link between the force majeure event and the inability of the party to carry out its contractual obligation in which case no liability should be attributed to the non performing party by its counterparty. It

should also be taken into consideration that only for obligations where such causal link can be substantiated could a force majeure as a reason for non-performance apply and not for the sum of all contractual obligations agreed in a contract.

On the other hand, the GCC allows parties to set out the terms of their contractual relationship freely and therefore in this respect it is often that parties agree to a clause setting out the terms of risk allocation between them and sometimes the mechanism of how they shall in practice act in case a force majeure event occurs (the “force majeure” clause).

The “force majeure” clause is in practice intended to encompass all events that could be held by a Greek court based on Greek case law as abovementioned and therefore it does not need to provide for an exhaustive list of such events even though the parties could agree to specify and limit their contractual provision to certain events only. In this respect even if the Pandemic is not expressly stated as a force majeure occurrence in a force majeure clause of more generic reference, it can be safely assumed argued that the clause could apply under the current outbreak circumstances too. In case of doubt however, it can be argued that the parties did not wish to agree liability for force majeure events not expressly included in the force majeure clause.

The relevant clause may also include a particular mechanism stipulating how the parties wish to deal with the occurrence of such an event including the notifications to be made, whether they wish to suspend all or part of their obligations or entirely terminate the contract as well as the time frames within which to proceed with the agreed actions depending on the nature

and the duration of the subject matter event.

One more point that may affect contractual relationships and is connected to the Pandemic and the severe economic consequences that are already becoming apparent, is the legal possibility provided under GCC for parties to request to the court the adjustment of their obligations or even termination of their contracts due to an unexpected change of circumstances causing an excessive detriment to the party making such request. Although there are specific considerations that the Court should examine for such request it can be anticipated that parties may wish to reach out to such legal reserve.

3. How should Businesses and individuals respond?

The notion of good faith is expressly provided in the GCC and the parties to a contract should take into consideration such notion when contemplating how to proceed regarding the performance or nonperformance of contractual obligations under the exceptional circumstances in the name of the Pandemic as a force majeure event. Especially in the absence of an express force majeure clause, parties should be encouraged to reach out to their counterparties and seek in good faith to reach a mutual solution that would mitigate the losses for both parties and make efforts to revisit the terms of their contractual arrangements adopting to the exceptional circumstances.

Contractual parties that wish to proceed to more drastic unilateral acts regarding their existing contracts should seek legal advice addressing the particular circumstances, factual framework as well as the terms of the subject matter contractual

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arrangement and evaluate the risk of a potential litigation.

Businesses and individuals should also seek legal advice when it comes to contracts they wish to conclude during or after this Pandemic in order to safeguard their interests and set the legal grounds on how to deal with such occurrence now or in the future.

We are undoubtedly being faced with rather unprecedented circumstances resulting to a number of social and economic implications and therefore no certain conclusions can be reached or estimates made as to how the Courts will interpret legislation and how they will apply it to the particular facts of each case and thus we should possibly expect the emergence of new highly significant case law.

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