

## THE CONCEPT OF FORCE MAJEURE IN DECLARED STATE OF EMERGENCY

Considering the dynamic situation, the previous analysis does not fully cover the legal consequences of the declared state of emergency and should be properly supplemented by up-to-date information for the individuals and for the business. This article takes into account and outlines the new provisions adopted by the not yet promulgated *Measures and Actions during the State of Emergency Act*.

### *I. The facts*

By Decision of the National Assembly of the Republic of Bulgaria dated 13<sup>th</sup> of March 2020 due to the epidemic situation and in order to reduce the spread of COVID – 19 virus on the whole territory of the country a state of emergency was declared. Due to the need for establishment of rules on rights, obligations, measures and legal consequences, as well as for a comprehensive settlement of public relations during a state of emergency, on 18<sup>th</sup> of March 2020, the National Assembly adopted at first reading, and on 20<sup>th</sup> of March 2020, at second reading, the Measures and Actions during the State of Emergency Act, which was returned by the President for new discussion in the National Assembly by Decree No. 70 /22.03.2020. Although the veto is partial and covers only some of the provisions, the members of the parliament shall revise the whole act. The act shall enter into force after its promulgation.

The introduction of such measures has huge legal consequences that might affect not only the everyday life of the citizens and residents living on the territory of Bulgaria, but would also reflect on the business. In order to protect the rights and interests of both individuals and legal entities, certain important aspects of the declared emergency and the COVID-19 pandemic, in particular the force majeure.

### *II. Force majeure - concept, prerequisites and main aspects*

#### *1. The concept*

In Bulgarian law, the term force majeure is known only in theory. The legally used term in Bulgarian could be translated into „irresistible force“<sup>1</sup> and is contained in the Commercial Act (CA). According to Art. 306 of the Commercial Act the force majeure is *an unforeseen or unavoidable event of an extraordinary nature which has occurred after the conclusion of the*

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<sup>1</sup>The literal translation of the Bulgarian term for force majeure in English would be irresistible force (in Bulgarian „непреодолима сила“). However, the term force majeure is widely known and is undoubtedly used as translation of the Bulgarian term.



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*contract*. Therefore, according to the currently available data, the COVID-19 pandemic has undoubtedly entered the requirements of the concept and may be qualified as a force majeure. It could not have been foreseen, and even if it could have been foreseen, the extent, way of spreading the infection and relevant to that consequences of the pandemic could not have been prevented.

Although the term is specified in the Commercial Act, a text with such content is also included in Art. 79 of the United Nations Convention on Contracts for the International Sale of Goods. In addition, it should be noted that according to the text of Art. 81, para. 1 of the Law on Obligations and Contracts, the debtor is not liable if the impossibility of performing the obligations under the contract is due to a reason for which the debtor cannot be held guilty, ie. the possibility of applying force majeure is not limited to trade contracts.

## **2. Prerequisites**

In order for the principle of force majeure to be applied, several basic prerequisites must be fulfilled cumulatively.

First, it is the presence of circumstances, respectively events, which should be **unforeseen or unavoidable and of extraordinary nature**. The practice shows that contractual clauses rather include certain types of events, with an attempt to characterize and define the force majeure circumstances. These include, for example, natural or other disasters (including fires, earthquakes, floods, blizzards, etc.), strikes and blockages; government bans, embargoes and more.

These circumstances, then, should have arisen **after the conclusion of the contract**. The moment of the conclusion of the contract is crucial for the possibility of invoking force majeure. In cases where the contract was concluded after circumstances and events of extraordinary nature have already occurred, the principles of force majeure would not be applicable. Considering the dynamic spread of the COVID-19 infection, obstacles to perform obligations under contract and, consequently, impossibility, must have arisen after the conclusion of the contract. Affecting different regions and countries at different times also lead to a different starting points of force majeure circumstances for each particular trader in connection with the execution of each specific contract.

Moreover, it should be possible to justify a **causal link between the circumstances and the objective inability to fulfill the contractual obligation over time** (eg as a result of the state of emergency measures, restrictions, mandatory quarantine, et cetera). Conversely, if circumstances and/or events of an extraordinary nature would not lead to difficulties or, respectively to an inability to fulfill the contractual obligation, then one of the necessary prerequisites would not be present. Therefore, if despite actual circumstances and events have occurred, the parties can fulfill their contractual obligations (or an alternative way or means of performance if agreed) as they would have been fulfilled, if the same

circumstances / events were not present. Thus, it would not be possible to refer to the force majeure circumstances.

Last but not least, if the contracting party was **in delay before the occurrence of force majeure**, this party shall be considered **mala fide**, i.e. **dishonest**, and could not benefit from the favourable effects of invoking force majeure.

If all the prerequisites are met, the other party to the contract should **be timely informed** that the fulfillment of the contractual obligations is not possible due to extraordinary circumstances. The notification is an important step that must be followed to avoid paying compensation for damages to the contractual partner. The notification must be in writing, indicating the type of circumstances justifying the force majeure and the possible consequences for the performance of the contract. Failure to notify shall lead to obligation to pay compensation for the damage that has occurred

As for the existence of a special clause for the application of the principles of force majeure, the options are generally two. Firstly, a special clause may be incorporated into the contract, etc. a force majeure clause which shall clearly and specifically regulate the relations between the parties. Thereby, the clause shall indicate which circumstances and events are regarded as extraordinary, as well as the extent and type of consequences if the force majeure is invoked. Contrariwise, the possibility of invoking force majeure is guaranteed by law in accordance with the provisions of our legislation. However, the contract may contain provisions for regulation of the relations between the parties under a different legal order (other than Bulgarian law).

In such cases, each individual contract should be considered, analyzed and interpreted to determine the applicable law and the possibilities of either party to invoke force majeure.

### ***3. Force majeure certificates***

Inasmuch as the guilt and the culpability in the civil law is presumed, the burden of proof rests with the debtor. Thus, until proven to the contrary in default of the contractual obligation, it is assumed that it is the fault of the debtor that the obligation is not fulfilled. Due to the fact that the rules on proving force majeure are not regulated, in practice, mostly written evidence, such as documents, is used.

A document issued by competent institutions or organizations may be presented to demonstrate the existence of force majeure. Issuance of force majeure certificates is carried out in accordance with international practices, which indicate that such documents are issued by associations representing the interests of traders, such as chambers of commerce. For example, the Bulgarian Chamber of Commerce and Industry (BCCI), as an independent organization and member of the International Chambers of Commerce, of the ICC-Paris and



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other international organizations and institutions, is competent to issue this type of document that shall serve as a discharge document for default or delayed performance of contractual obligation under a trade deal caused by force majeure.

In order to issue a force majeure certificate, the trader should file a written request, indicating the inability to fulfill his obligation to his Bulgarian or foreign partner according to the contract concluded between the two parties. If necessary, the certificate may be issued in Bulgarian, as well as in English, French, German, Russian or other language, as requested by the applicant. Force majeure certificates issued by BCCI are internationally recognized and accepted as documentary evidence by international arbitration institutions.

A certificate of international validity may also be issued from another organization, the Bulgarian Chamber of Commerce. In any case, the application for a certificate shall be accompanied by an official document certifying undoubtedly the force majeure circumstances as well as other supporting documents, if necessary.

### ***III. Legal consequences***

#### ***1. Suspension of execution***

The suspension of the execution is regulated in Art. 306, para. 4 of the Commercial Act. According to this Article, ***„The performance of the obligations and the related counter obligations shall be suspended for the duration of the force majeure“***. After the duly and timely notification sent to the other party of the contract, indicating that there is a complete inability to fulfill the contractual obligations due to the spread of the COVID-19 infection and the related factual and legal consequences, the performance of the contract will be suspended. There are several consequences of the suspension: First, ***temporarily compensations nor penalties will be due***, which would normally be due for delay, respectively for default. During the suspension and during exceptional circumstances, the party will be released from the obligations under the contract. For example, in the case of an obligation to deliver goods, the seller is temporarily released from the obligation to deliver the goods. In addition, the other party whose obligations are counter-obligations could also not fulfill them. However, this lack of performance will not have an adverse effect on either side. Thus, the buyer of the goods of the example above has no obligation to pay the price for the duration of the suspension.

However, once the exceptional circumstances have passed, ***the obligations of both parties to the contract are automatically restored***. Therefore, if the default continues, each of them will owe compensation to the other for the damage caused.

#### ***2. Termination of the contract***

The inability to fulfill the contractual obligations may continue over time. If the exceptional circumstances are so long, either party may lose interest in the continuation of the contract or in its execution. The unpredictability of COVID-19 and the lack of clarity regarding the

duration of the pandemic, can lead to such consequences that once it is finally declared as passed, the performance under the contract might be so delayed that it will be nugatory for the parties. This is certainly the case with the so-called *fixed deals* in which the time of execution is explicitly agreed and the obligation cannot be fulfilled at any other time. In any other cases, when the duration of the force majeure causes significant changes in the term of execution, the interest of the creditor in any late execution must be examined and whether it will be equated to a complete default.

**Therefore, the party that has lost interest in the performance of the contract has the right to terminate it.** Supposing the contract is terminated, **each party will bear its own costs, in accordance with the costs already incurred.** During the period of force majeure, neither party owes any compensation to the other if the conditions described above are met.

In each case, the good faith of the parties, the moment of the conclusion of the contract and the moment when the force majeure circumstances have occurred should be thoroughly examined.

### ***3. Fulfilment of contractual obligations***

If any of the prerequisites described above is not present, then invoking force majeure will not generate the desired favourable effect. It's undeniable that the spread of COVID - 19 is an extraordinary circumstance. However, if before the occurrence of the exceptional circumstance, **the party was mala fide/dishonest, it cannot be relieved of its contractual liability.** Similar is the case in which a contract was concluded after the spread of COVID-19. If the parties had entered into contractual relations in the event of already declared state of emergency and a widespread infection, then both parties were aware that this circumstance could not be determined as force majeure. In this case, the parties cannot invoke force majeure and discharge themselves from their contractual obligations.

Despite defining the spread of COVID-19 as a force majeure, **debtors with monetary obligations** normally could not justify their failure to fulfil the obligations with the stated emergency situation. It is clear from the provision of Art. 81, para. 2 of the Law on Obligations and Contracts **the fact that the debtor does not have the financial funds to fulfill the obligation does not release him from liability.** However, the legislator may introduce special measures that derogate this provision (see paragraph 4 below).

### ***4. Specific legal measures***

According to the bill- officially published on the website of the National Assembly, no specific measures have been prepositioned. Therefore, no such measures for regulation of this type of relations during the state of emergency have been provided. Nevertheless, in text of the adopted law we find a provision that, until the state of emergency is lifted, **"the consequences of late payment of obligations to private law individuals or entities, including**

*interest and penalties for late payment, and non-monetary consequences, such as early repayment, contract termination and expropriation of property shall not apply,“.*

The main issues that need to be clarified are the following:

Which entities are private law entities? Such are namely **individuals** and **legal entities**, as well as **public law entities**, when they participate in **equal civil law relations**.

What obligation does the provision apply to? Since force majeure does not generally apply to monetary obligations, this provision seeks to cover exactly this type of debt. Thus, the interpretation of the provision unequivocally indicates that the obligations in questions are **monetary obligations** indeed.

What legal consequences are covered by the provision? Considering the adopted provision, the consequences covered are precisely **the consequences of delayed performance under a contractual obligation**. Undoubtedly, the provision does not cover the discharge of contractual obligation or the reduction of the obligation. The legal consequences regulated by this provision are two types. Firstly, the **monetary obligations** arising from delayed performance, such as **interest, penalties and / or compensation** for major damages or **other monetary obligations**, depending on what is agreed between the parties and the legal rules governing the contractual relations between the parties.

In addition to monetary obligations, depending on the type of contract, there may be other consequences, the rules for which will also not apply. The provision indicated non-exhaustive and exemplary collected them under the general of "non-monetary consequences". Examples given are "early repayment, contract termination and seizure of property". Early repayment is mainly observed in the event of default on **loan agreements, bank loans, leasing agreements and similar**, in which the non-payment of a certain number of installments by the debtor entitles the creditor to receive the full amount of the debt earlier.

In addition, in the event of default from the debtor, the creditor has the right to terminate the contract. In some cases, the creditor should give an appropriate performance period with a warning that upon expiration of which the contract will be considered terminated. In others the creditor is not obliged to give a prior warning as he may directly terminate the contract. In any case, with the termination effect of the contractual obligations will be terminated as well. However, these rules will not apply during a state of emergency.



Other non-monetary consequences because of default in contractual obligations may also arise. As a matter of law, the rules related to the consequences of delayed enforcement will also not apply to them.

For what period of time will the provision in question apply? The deadline is not clear at this time as the measures will be valid **until the state of emergency is lifted**. It shall continue until 13<sup>th</sup> of April 2020, according to the original decision announcing it, but it is very likely that the term will be extended. However, after the definitive cancellation of a state of emergency, the obligation to pay is restored and both parties should duly fulfill their contractual obligations.

#### **5. Business contradiction**

The consequences of the pandemic caused by the spread of the COVID - 19 infection for which the business must be prepared may vary depending on the duration of the state of emergency.

Therefore, the possibility of termination of the contract should not be underestimated if there is economic contradiction. The same will be present if "*when circumstances, which the parties have not been able and bound to foresee, have occurred and the preservation of the contract is contrary to fairness and good faith*". It is clear from Art. 307 of the Commercial Act, that the business contradiction represents an opportunity for one of the parties to terminate the contract, including the termination of the whole contract or parts of it. In addition to termination, the party may also request modification of the contract in whole or part of it. The main difference between force majeure and business contradiction is that in the hypothesis of a business contradiction not necessarily the party cannot fulfill its contractual obligations. On the contrary, the party can fulfill its contractual obligations, but due to unforeseen circumstances, the implementation would significantly harm it.

Currently, the pandemic caused by the spread of the COVID-19 infection could not itself justify economic intolerance for business contradiction. However, in a dynamic environment, a pandemic could be a basis that could create economic problems in the future or even lead to a wider economic crisis. Thus, the COVID - 19 infection and its worldwide spread can be pointed out as a cause of economic intolerance under which the traders might invoke the principles of business contradiction.

It should also be considered that the right to request an amendment or termination of the contract is exercised in court. The judicial institution has the jurisdiction to give judgment on the circumstances indicated by the parties and has the power to issue a decision amending or terminating the contract in whole or in part.



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