

**Legal guide for the management of material contracts
during COVID-19 crisis**

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Introduction and purpose

In the context of COVID-19 pandemic and subsequent establishment of the state of emergency on the territory of Romania (together with related measures taken by the Romanian authorities to contain the spread of the virus), commercial entities are facing serious difficulties in implementing ongoing material contracts, mainly due to the effects that such measures have on their activity.

Thus, by anticipating the needs of our clients, we created a step-by-step guide that could prove of helpful tool in their efforts to engage in a contract management process during the current crisis.

Given the above, the most important aspect is to have a clear understanding of the main risks this crisis could trigger over an ongoing contract, as well as of the means for mitigating such risks by using the existing contractual remedies or the supporting measures taken by the authorities to ease the economic burden created over the companies' day-to-day business.

In order to achieve this goal, answers to the following questions should be provided:

- ✓ Which types of activity are most likely to be impacted by COVID-19?
- ✓ What types of contracts are to be affected during the COVID-19 period?
- ✓ What would be the rights and remedies of the parties in case of non-performance of contracts due to COVID-19?
- ✓ What would be the best legal solution to address and mitigate the effects of any potential non-performance?
- ✓ How should companies act in order to protect their rights?

Step 1: Identifying the agreements

The first step is to identify all ongoing material contracts of a certain legal entity (concluded either with a public or a private partner) and to establish how the COVID-19 crisis affects their performance.

By way of example, such material contracts could be: construction contracts, services agreements, contracts with utilities' providers, lease agreements, distribution agreements, employment contracts, transportation agreements, sale agreements.

➤ **Recommendable action:**

- ✓ Sorting the agreements and classifying them according to the type of agreement, contractual partner, importance, value, duration or other similar aspects.

Step 2: Prioritizing the agreements

A key aspect of this exercise is to identify those contracts essential for continuance of the activity during the crisis and those that prove important on a long-term period, helping the company to

mitigate the effects of the crises in time after its cease. This selection has to be performed by considering also the priorities established for each business and the difficulties each particular business faces. Addressing the below issues could prove helpful during the process:

- Which services, products, or other obligations provided or fulfilled by the contractual partners are essential to the company's ability to satisfy obligations to other parties?
 - Which services, products, or other obligations provided or fulfilled by you are essential to the activity of the contractual partners and their ability to fulfill their obligations to third parties?
 - Which are the key contracts allowing continuance of your activity during the crisis?
 - Which are the key contracts that could mitigate the effects of the crisis after its cease?
 - What material contracts present an imminent risk during crises?
 - Which of the above agreements have clauses such as (i) force majeure, (ii) hardship or other similar clauses?
 - What type of economic and fiscal measures would be required on your company to overcome this period of COVID-19?
 - Does the business need cash flow?
- **Recommendable actions:**
- ✓ If you carry out an activity at the registered office give special attention to the rental contract, utilities supply agreements or some other similar contracts;
 - ✓ If you have contracts ensuring you a secured revenue during crises, make a priority of perming your obligations therein;
 - ✓ If some of long-term contracts are not essential for your activity during the crises, but might prove relevant thereafter, postpone their performance by invoking the available contractual remedies such as force majeure events.

Step 3: Conducting a legal review of the material contracts in order to identify the contractual rights and obligations relevant for undergoing the COVID-19 crisis and the manner in which these apply

In most of the cases, the non-performance matters deriving from the effects of the crisis over a certain business may be dealt with through discussions or negotiations. If such negotiations will not lead to an agreement, the legal proceedings could be the available option. The contractual provisions will regulate both the parties' leverage in negotiations and their overall strategy to mitigate the risks, extent to which a legal review will have to be conducted so as to understand the parties' legal rights.

The most relevant provisions for understanding your organization's rights and remedies are:

- Events of default;
- Notice period in the events of termination of the agreement;
- Termination provisions;

- Force majeure provisions;
- Hardship;
- Indemnities and limitations of liability;
- Insurance requirements;
- Rights to set-off or withhold payments;
- Provisions regarding the insolvency procedure;
- Dispute settlement and governing law.

Also, additional information on legal rights and their applicability to the present case at hand could prove of relevance:

- i. How is the contractual doctrine or case law dealing with the “Force majeure provisions” or “Hardship provisions” at a local level?
- ii. The passing of special legislation regulating measures having a direct impact on a party’s ability to perform or enforce its rights starting with March 16, 2020 (e.g. presidential decrees for the establishment and prolongation of the state of emergency on the Romanian territory, 9 military government emergency ordinances and subsequent legislation for implementation of the measures provided by the main special enactments);
- iii. The agreements may be terminated, without the possibility of the party to request damages?
- iv. The court may consider that damages are inadequate in case of termination of the agreement in this period?
- v. Are there statutory considerations, such as the application of the of the Romanian Civil Code (the “**Civil Code**”), through which the parties may terminate the agreements?

In order to answer some of the above issues, we will resume below the main contractual remedies the companies could consider in order to preserve the ongoing contracts and to mitigate, in the same time, the risks deriving from their impossibility to provide a proper and timely performance of the contractual obligations during this period.

A. Invoking the provisions regarding the force majeure and its effects

According to the provisions of the Civil Code, the force majeure is a cause which, unless otherwise provided by the legal enactments in force or by the contracting parties, shall exempt a party from liability when damage has been incurred due to its occurrence. A force majeure cause is an „external, unpredictable, absolutely invincible and inevitable” event, generated by circumstances beyond the parties’ control, and which prevents a party from performing its contractual obligations.

In contracts, the parties may freely refer that specific situations they agree upon could qualify as force majeure events, exempting the debtor from the liability for nonperformance.

By reference to the above, it is important to note that the effects of force majeure apply by virtue of the law, irrespective of whether a force majeure clause is provided in a certain agreement or not.

As per the legal doctrine, in order to produce evidence that the above said criteria are met, the party invoking the force majeure event must prove that (i) the damage/breach of the contract is a consequence of the occurrence of the force majeure, (ii) such event was not foreseeable when concluding the contract and (iii) such event could not be avoided in order to mitigate the damage.

The Romanian courts ruled decisions whereby the force majeure causes have been restrictively determined as being events such as extreme weather, riots, wars, terrorist attacks or invasions, governmental or regulatory actions, etc. In the same time, the courts ruled that the following are not force majeure causes: atmospheric conditions consisting of low temperatures or prolonged drought (as they can be predicted), strikes (when they were foreseeable), lack of available financial resources etc. However, as Romania is not a precedent bases jurisdiction, the circumstances of a force majeure event shall be assessed by a court on a case by case basis. Also, a separate assessment shall be made by the court also in a case in which the parties determined themselves in the contract other situations that could qualify as force majeure event.

The party invoking the force majeure must provide evidence of its occurrence. In this endeavor, one may request the Chamber of Commerce and Industry of Romania (“CCIR”) and/or its local offices to issue a certificate attesting the existence of the respective force majeure event.

The request for issuance of such a certificate will have to include a factual and detailed presentation of the event, its consequences in relation to the contractual partner and legal arguments that the event invoked represents a force majeure event and be accompanied by:

- A copy of the contract affected by the force majeure event, comprising the force majeure clause;
- Certifications from the authorized bodies, authorities and institutions, on a case-by-case basis (other than the CCIR), regarding the existence and the effects of the event invoked, its location, the moment of beginning and ending the event – **in this case you may submit, for example, the certificate of emergency situations**;
- Notifications addressed to the contractual partner regarding the occurrence of the event invoked and its effects on the contract performance
- The proof of payment of the fee of EUR 500.

B. Invoking the provision regarding the hardship and its effects

Hardship is referred to as an exception from the principle *pacta sunt servanda*, i.e. contracts are binding for the signatory parties. The underlying reason for this exception is that the circumstances envisaged by the parties when concluding a contract may change thereafter.

As such, in case the performance of a contract becomes excessively onerous for one party (due to the increase in costs of performing its obligation, or due to the decrease in value of the consideration), the Civil Code provides for the possibility of one party to invoke the hardship.

¹ More details on this document may be find below in Section C

Hardship may be invoked only if the parties did not expressly waive the right to invoke it through the contractual provisions.

In order to invoke hardship in court, the following conditions are to be simultaneously observed: (i) the change of the contractual circumstances occurred after the conclusion of the contract, (ii) the change of the contractual circumstances, as well as the related effects were not, and could not have been, foreseen when signing the contract, (iii) the party invoking hardship has not undertaken the risk of the aforementioned change, nor it may be reasonably considered to have accepted such risk and (iv) the party invoking hardship, within a reasonable time and in good faith, attempted a reasonable and fair amendment of the contract with the other party.

Thus, prior to proceed with a legal action in court, a party must notify the other party with regards to the occurrence of the unforeseeable event and its intention to carry out negotiations for the reasonable and fair amendment of the contract. If no agreement is reached, the party invoking the hardship event may proceed with legal action.

When initiating such an endeavor, one should bear in mind that not any change of the circumstances envisaged when concluding a contract entitles the parties thereof to invoke hardship. For example, Romanian courts have ruled that the following cases may not trigger hardship: a change of the currency exchange rate with more than 80% within a few years, the application of a civil fine together with the prohibition to exploit the mineral aggregates (prohibition which affects the payment obligations of one party due to the lack of available financial resources), the increase in costs for performing an obligation (electricity supply) due to extreme temperatures, since the party could have anticipated such events.

C. Obtaining the certificate of emergency situations

The certificate of emergency situations is issued by The Ministry of Economy, Energy and Business Environment and may be requested by any economic operator whose activity is affected by the COVID-19 pandemic, thereby complying with the conditions provided by Order no. 791 of March 24, 2020.

The certificate of emergency situations is of two types:

- **TYPE 1 (BLUE)** - issued for the applicants declaring the total or partial disruption of the activity, as a result of the decisions issued by the competent public authorities, according to the law, during the state of emergency;
- **TYPE 2 (YELLOW)** - issued for the applicants who declare a decrease of the incomes in March 2020 with a percentage of at least 25% compared to the average of the incomes from January to February 2020.

In order to obtain the certificate of emergency situations, the representatives of the applicants must submit a request through the platform <http://prevenire.gov.ro/>.

Obtaining the certificate of emergency situations could bring the companies a series of economic benefits, such as postponement from the payment of the utilities' services or postponement from the payment of the rent to the registered office. Also, the certificates of emergency situations can be used in order to facilitate the issuance of the certificate of force majeure by CCIR.

D. The possibility to obtain government support in accordance with the Labor Code

In case you have difficulties in paying the salaries of your employees during the COVID-19 crisis, you can declare, for example, the technical unemployment in accordance with art. XI of Government Emergency Ordinance no. 30/2020 ("GEO 30/2020") and art. 52 paragraph 1 letter c of the Labor Code.

In the case of fulfilling the legal conditions regarding the government support in accordance with art. XI from Emergency Ordinance 30/2020, the employers will benefit of an the indemnity of 75% from the basic salary corresponding to the job occupied (but not more than 75% of the gross average earnings provided by Law no. 6/2020, respectively RON 4,071.75).

Step 4: Make the plan and use the best means to achieve it

Once the material contracts with a significant risk for the company business have been identified, together with their relevant clauses, you should start making the related strategy. Even though each business and contractual relationship has its own particularities, such strategy should take into consideration some commonly applicable aspects:

- Prioritize the most critical risks and contractual relationships;
- Where the agreement contains specific provisions regarding force majeure / hardship / termination be careful when you want to activate them, based on the contractual partner, value of the agreement, type of agreement and what type of advantage or disadvantage can be obtained;
- For the long-term contractual relationships, always consider the effects by reference to the big picture;
- Start an open and timely negotiation with your partner, in order to allow both to make better decisions and mitigate potential future damages;
- Bear in mind that this is a crisis in which the intervention of authorities and new developments may constantly change the situation and you need to have the possibility to adapt.

Going forward

If you have limited capacity to take on contract management in these times, our qualified lawyers from **SUCIU POPA** can help you at any time.
