

# *Covid-19 and force majeure: A comparative analysis.*



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COVID-19, the virus originated in Wuhan China, which is influencing the lifestyle of billions of people on earth, ruining the economy and killing many, is also creating room for discussion among professional community worldwide. Many legal and financial experts are talking now about the immunity of legal relations governing the economic relations as well.

Taking into consideration COVID-19's measures taken by the Albanian Government many questions arise, mainly on the consequences of non-fulfillment ("breach") of contractual obligations. Do companies, which have frozen their activities and/or which have seen a decrease in revenues, have a way out to get harmless from such "breach"?

Invoking a force majeure event as an excuse for the "breach" may be an option which is worth exploring.

Albanian legislation does not contain express or clear provisions regarding force majeure to be used as a remedy implementation or invocation in a contractual relationship.

On the other side the European Court of Justice has defined the notion of force majeure through various judgments. Peoples' Republic of China, one of the first countries fighting the virus, even though has provisions on the concept of force majeure has chosen a quite unique solution to define whether a business is undergoing the circumstances of force majeure due to COVID-19 pandemic. Therefore, through analyzation and better understanding of the notion of force majeure the consequences from the measures against COVID-19 can be eased.

## **What is considered as a force majeure under the Albanian legal system?**

Force majeure, or 'vis major' or 'casus fortuitus' is a legal concept originated from Roman law.

Although Albanian legislation mentions several times the concept of force majeure, it fails to define or elaborate further on such a notion. In practice there are many contracts which have a force majeure provision, but they have rarely been tested...at least until to date.

The jurisprudence of Albanian Courts has drawn upon force majeure through its interpretation bases not only on civil law, but also on criminal law, however the notion remains unclear as yet.

Judgment no. 164, dated 18.04.2002 rendered by the Criminal Section of Supreme Court refers to force majeure as: "an extraordinary event which cannot be evited by due care, or with the means possessed by a given person." This decision defines the notion of force majeure as an extraordinary and inevitable event. The court in this case only defines three conditions for the existence of the event of force majeure, without explaining each condition and the reasoning behind each of these conditions.

Decision no. 786, dated 27.09.2017 rendered by the Administrative Section of the Supreme Court refers to force majeure as: "a situation having a general impact, beyond the control of the right-holder and which prevents him from exercising his subjective right or the right to a claim". In this decision the court takes as condition for the existence of force majeure the fact whether the event deprives a person to enjoy the rights, beyond his control. The judgment does not elaborate on whether the nature of 'beyond control' fact that prevents a person from enjoyment of the rights is absolute or not. By setting the condition of the 'control' it is not clear if the situation depends on the control of the person or just on the will to deprive of the enjoyment of the rights. In respect of the other condition the judgment makes a consideration about 'general impact' the situation may bring but does not explain how fundamental the 'general impact' is to enable us to consider the situation as event of force majeure.

It should be emphasized that such judgments are not binding, however they help to see how the courts are dealing with it and perhaps use them as argument in the given gap in the legislation regarding force majeure.

## **Force majeure in ECJ**

European Court of Justice ("ECJ") through its judgments has interpreted and given the notion of force majeure in 1970. The court in its interpretation shapes the notion of force majeure by giving the main characteristics to be considered in an event of force majeure. Analyzation and interpretation of the ECJ decision of 1970 can be found referred or is the same as in the subsequent decisions of this court like decision no. 109 of the year 1986 and decision no. 296 of the year 1988, as well in the later decisions such as decision no. 578/19-1 of the year 2019. ECJ decisions consistently give the definition and condition required to be considered an event of force majeure.

On 18 May 1970 a German court has referred a request of Verwaltungsgericht, a part to a case, on the existence of force majeure to the European Court of Justice. To define whether force majeure existed, the ECJ conducted an analysis and concluded that: "Force majeure is not limited to absolute impossibility, but must be considered in the sense of unusual circumstances, beyond control of the undertaking, the consequences of which, in spite of all due care, could not have been evited without costly excessive sacrifice." In this case the ECJ identified four elements of force majeure, such as the lack of absolute impossibility, unusual circumstances, circumstances beyond control, inevitable consequences, irrespective of due care. In accordance with this judgment force majeure is defined as impossibility to fulfill the obligation of one party due to an event which is unusual and beyond control of the party, which consequences cannot be avoided irrespective of all due care.

Furthermore, in the subsequent judgments ECJ refers to judgment 11/1970 when analyzing and interpreting the notion of force majeure, but this time broadening the conditions of force majeure.

In the judgment 109/1986 the court refers to the event of force majeure as: "Whilst the notion of force majeure does not presume absolute impossibility, it nevertheless requires the fact of failure to fulfill the act in question due to circumstances beyond the control of the person claiming force majeure which are abnormal and unforeseeable and which consequences could not have been evited despite all due care." The court, unlike the previous decision (11/1970), decides to give one more element as a condition for the event to be considered as force majeure, the fact of being unforeseeable. This judgment has given the clearest definition of the force majeure notion and became a reference for the subsequent judgments related to force majeure such as judgment 296/1988 which while interpreting force majeure aims at answering the question if the fraud and negligence can be considered circumstances of force majeure. The court consistently has considered as force majeure the circumstance which: i) makes impossible performing an action, although such impossibility is not absolute, ii) is beyond the control of a person pretending force majeure iii) is abnormal iv) is unforeseeable, and v) it is inevitable despite the exercise of all due care of the person claiming force majeure.

ECJ decisions consistently have defined as condition of force majeure that circumstance which:

- i. Makes impossible to perform an action but not absolute impossibility
- ii. Beyond control
- iii. Abnormal
- iv. Unforeseeable
- v. Unavoidable despite all due care

ECJ has referred to interpretation of judgment 109/86 establishing the notion of force majeure in the subsequent judgments, like 578/2019-1.

## **COVID-19 as as circumstance of force majeure**

When the situation of COVID-19 arose in most of the countries of the world, the legal industry started to think and elaborate on whether COVID-19 can be considered a force majeure event. As we said in the head of this article, the Albanian legislation does not contain an express and clear provision or definition of force majeure, so the first thing to consider when analyzing the circumstances of force majeure is whether a contract includes any clause on force majeure. We are of the opinion that there is no provision which can cause parties or third parties to consider the event of COVID-19 automatically as an event of force majeure. There are two situations when analyzing and interpreting the existence of force majeure: 1) force majeure event is defined as such in the contract between parties and 2) there is no contractual provision defining or making reference to the event of force majeure.

## **Contracts with force majeure clauses**

If provided in the contract, force majeure is the event which will excuse a party from the fulfillment of the obligation, as such it was impossible for such party to fulfill the obligation due to the event. The force majeure events should be explicitly provided in the contract. Depending on the contractual provisions, COVID-19 will be considered as a force majeure event if the contract explicitly contains provisions such as: Acts of God, epidemics, infective diseases or health emergency, governmental acts that might affect the fulfillment of contractual obligation because of COVID-19, etc. If there is such a contractual provision parties can be released from liability for not fulfilling the contract obligations because of the measures against COVID-19, on the argument of existence of force majeure event.

## Contracts without force majeure clauses

If there is no force majeure clause in the contract it will be much more difficult for a party to claim that COVID-19 is a force majeure event. Since Albanian legislation has no clear definition on the notion of the force majeure and jurisprudence lacks in fully interpreting it, we have to wait and see if case law shall be established following the possible claims by parties suffering damages from COVID-19 event. The interpretation of Albanian courts can take into consideration European Court of Justice interpretation or in some cases the principle of force majeure in accordance with Lex Mercatoria.

As described above ECJ decisions consistently have defined 5 conditions for claiming the existence of a force majeure event. On the other side, Lex Mercatoria, which can be a law chosen by parties in a contractual relationship can have the same provision of some typical contractual clauses of force majeure such as "acts of governments or any other acts of authority whether lawful or unlawful"

## China and COVID-19 as Force Majeure

Legislation of Peoples' Republic of China has a definition of force majeure. The law promulgated with order no. 37 of the President "General Principles of the Civil Law of People's Republic of China" in article 153 has the provision as follows: "For the purpose of this Law, "force majeure" means unforeseeable, inevitable and insurmountable objective conditions."

Even though having the provision of concept of force majeure it was considered by authorities that the force majeure should be confirmed with a certificate evidencing the event of force majeure. Chinese Council on Promoting International Trade, a state entity, has issued 4318 Certificates of Force Majeure for the companies affected by COVID-19.

All certificates have a total value of 330.8 billion yuan (approx. 43 billion Euros). This certificate is an important evidence for the contractual parties which claim partial or full exemption from the liability for non fulfilment of contractual obligations.

The reasoning behind this solution through certificates proving force majeure is maintenance of social order and credibility of law and to not encourage finding clause of force majeure because of COVID-19 as a reason to terminate the contract or to avoid fulfillment of obligations. Claiming a force majeure just 'out of blue' may create room for abuse, so every case will have to be considered by analyzing as the circumstances of COVID-19 in the context of the consequences created to a party as a force majeure.

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### Reference

ECJ Decision 11/1970 INTERNATIONALE HANDELSGESELLSCHAFT v EINFUHR-UND VORRATSSTELLE GETREIDE

ECJ Decision 109/86 IOANNIS THEODORAKIS BIOMICHANIA ELAIUO AE v GREEK STATE

ECJ Decision 296/88 McNicoll MCNICHOLL AND OTHERS v MINISTER FOR AGRICULTURE

ECJ Decision 578/19-1, X v KUONI TRAVEL LTD

Decision no. 786, dated 27.09.2017 of Administrative Section of Supreme Court of Republic of Albania

Decision no. 164 dated 18.04.2002 of Criminal Section of Supreme Court of Republic of Albania

Decision no. 220, datë 05.09.2012 of Criminal Section of Supreme Court of Republic of Albania

The law promulgated with order no. 37 of the President "General Principles of the Civil Law of People's Republic of China"

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