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STUDIO LEGALE E TRIBUTARIO

DECREE OF MARCH 8, 2020 NO. 11
REGARDING
"EXTRAORDINARY AND URGENT MEASURES TO COPE WITH THE EPIDEMIOLOGIC EMERGENCY CAUSED BY COVID-19 AND LIMIT ITS NEGATIVE EFFECTS ON THE PERFORMING OF JUDICIAL ACTIVITY"..

Update of March 11, 2020

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BUSINESS ISSUES

The rapid outbreak of COVID-19 already has an heavy impact, since its first appearance in China, on the international markets and, necessarily, on many Italian companies using items arriving from China in their production cycles.
The Government of China, which is the first country affected by COVID-19, has immediately tried to include the epidemiologic event in the so called cases of "force majeure" to face the serious consequences of delay, non-delivery and/or other defaults of the Chinese companies, most of all if active in the worst hit areas, towards the counterparties, internal or international partners.

The spread of COVID-19 virus in the Western world and in Italy in particular and the recent provisions issued by the Italian government (Prime Ministerial Decree of March 1 and 4, 2020, then replaced by Prime Ministerial Decree of March 8, 2020 which provides measures to limit the spread of COVID-19 and the epidemiologic emergency management in Venetian and Lombardy, then including all national territory with Prime Ministerial Decree of March 9, 2020, as well as with the Directive no. 14606 of March 8, 2020 of the Ministry of the Interior to the Prefects for the implementation of the surveillance of the "enhanced restraint areas"), leads to severe restrictions on mobility of people (prohibition to all movements which are not justified by proven business needs, situations of need, health reasons) with subsequent consequences on the circulation of goods.

Such exceptional occurrences and subsequent restrictive measures aim to have a definite impact on the regular performance of the production, distribution and delivery activities of the Italian companies and, more in general, on their capacity to correctly execute the current contracts with both Italian and foreign counterparties.
The severity and uniqueness of this situation lead to an evaluation of the chance that the health emergency and the subsequent measures of the public authority may be considered as "event of force majeure" or, anyway, represent events exempting from liability which may involve the Italian companies as regards the breach of or delay in the execution of contractual obligations taken before the occurrence of the same events.

Within the scope of international contracts and, most of all, in those contracts with prolonged duration, it has become common practice to insert a clause of so called *Force Majeure* expressely identifying the cases of force majeure and the operating method of the relevant consequences on the obligations of the parties and on the contract.
Sometimes the so called clause of hardship is inserted in the contracts; this clause regulates the cases of occurred overcharging and shall apply if the performance of one of the parties becomes too onerous, such to involve a disproportional sacrifice of a party to the benefit of the other party, due to events occurred at the conclusion of the contract and through a third party or through specific negotiation between the parties.

In the absence of such clauses (*Force Majeure* or hardship), in order to establish the impact of the extraordinary events involving Italy on the possible breach of the current contracts, the applicable law to the contract shall apply.
If such law is the italian law, it is important to highlight that the regulation of the Italian Civil Code anyway does not directly outline the notion of "force majeure" as exempted from the liability of the contractual obligations breach.

Italian law provides two cases: (a) occurred impossibility of performance and (b) occurred overcharging of the performance.

In the first case, the performance becomes impossible and expires and the party who is not subject any longer to its obligation cannot claim a consideration and must return what it has already received according to the provisions relevant to recovery of undue payments.
The temporary impossibility, until its duration, is exempt from the liability related to the delay of fulfilment.

In the second case, (occurred overcharging of the perfomance), the debtor may claim the termination of the contract, unless the counterparty offers to fairly change the terms and conditions of the contract.

To the end of establishing if an event has the proper exemption features, many aspects are left to the interpretation of case law. Specifically, the common causes of impossibility not attributable to the debtor are determined in *factum principis* (order or ban of the authority), in unforeseeable circumstances, under force majeure and in the fact of the creditor.

The natural disasters such as earthqquakes, epidemics, floodings, hurricanes, terrorist and war acts fall within the cases of “force majeure”, which make the performance impossible and exempt from liabilities; any event shall be examined and assessed in its specific seriousness, considering the circumstance of each single case.

The coccured overcharging, according to the main interpretation, must be due to an event that is extraordinary (namely an event which is statistically uncommon, with exceptionla nature) and unforesseable (it must be such that the parties did not take it into account, on the basis of their knowledge and experience).

In the international contracts for the sale of goods, article 79 of Vienna Convention of 1980, (so called "CISG")unless otherwise expressely derogated, establishing a liability waiver for the breach not depending on the intention of the debtor, which is unforeseeable and unbeatable, shall apply.

With reference to the above, many elements must be considered and assessed to establish if a company is liable or not of its breach and of the subsequent damages.

The interpretation difficulties relevant to the events exempt from liability, which always require a specific evaluation for each case, as well as the differences existing in the various national laws on the captioned matter, lead to state that it is not possible to establish for sure and *a priori* that the epidemic caused by COVID-19 virus and the subsequent measures taken by the Italian Governement may represent in all relationships and for any breach events such to justify the termination of the contract for occurred impossibility and/or overcharging and/or to exempt the party in breach from liability.

Finally, in any case in which following extraordinary events related to the epidemic caused by COVID-19 virus a company is not able to perform, at least timely, its obligations or to receive the performance of the counterparty , the same:

i) First of all shall assess the content of the contractual agreements, pointing out the presence of any clauses of *Force Majeure* and/or *hardship*, whose content, operating method of the extraordinay situation provided therein and the consequences on the contract and on the breach will be carefully examined;

Ii)in the absence of the clause indicated under i) or in case of uneanforceability of the same, shall identify the applicable law and consider on the basis of the same the events of exemption from liability provided therein, whose occurrence will be carefully examined considering the obligations of the parties, their behaviour and the impact that the extraordinary events of which the exemption properties are highlighted had on the execution of the performances

Today, the main provisions are all contained in the Law Decree no. 9 of March 2, 2020.

More specifically, in addition to further measures for which reference is explicitly made to the analysis of the concerned provisions, the mentioned Decree foresees at Article 1 (general provision applicable to all national territory):

- the postponement from March 9 to March 31, 2020 of the deadline for the electronic transmission to the Italian Revenue Agency of the income tax statements issued to employees by their companies for the year 2020 related to the tax period 2019 of those individuals who are due to submit the income tax return by the 730/2020 form. The electronic transmission of the income tax statements issued to employees by their companies for the year 2020, containing exclusively exempt incomes or incomes that cannot be declared through pre-filled statement of income, may occur by November 2, 2020;
- the confirmation of the deadline of March 31, 2020 for the delivery to the taxpayers-substituted of the income tax statements issued to employees by their companies for the year 2020 and of the other certifications of the withholding agent related to the tax period 2019;
- the postponement from March 9, 2020 to March 31, 2020 of the transmission of the flows of information concerning the accounting results of the income tax returns with the 730 form to the withholding agents through the services of the Italian Revenue Agency;
- the postponement to March 31 of the deadline for the electronic transmission to the Italian Revenue Agency of the data concerning the deductible and detractable expenses to be used for the drawing up of the income tax returns, whose deadline is expired last February 28. Healthcare costs remain excluded from the postponement, because these had to be sent by January 21, 2020;
- the consequent postponement from April 15, 2020 to May 5, 2020 of the deadline for the availability of the pre-filled income tax returns by the Italian Revenue Agency;
- the advance application of all new deadlines related to 730 forms to the year 2020 that should have been applied since 2021. Accordingly, the 730/2020 form related to the year 2019 may therefore be submitted by September 30, 2020, independently of the adopted method of submitting (i.e. direct, through withholding agent, Caf (fiscal assistance centres), qualified professional).

To be thorough, we would also point out that Articles 2, 5 and 7 contain further provisions regarding the territories and municipalities belonging to the so called former “red zone”.

In particular, Article 2, concerning natural persons with residence or with executive offices in the so called former “red zone”1, or concerning legal persons with registered offices or administrative headquarters located therein, provides that the payment terms due from February 21 to April 30, 2020 originating from notices of payments issued by tax collection agents and from verification notices, are suspended.
Nevertheless, it should be carefully noted that, unless otherwise specified in the future, such payments, subject of suspension, shall be made in a single tranche within the month next to the conclusion of the suspension period and no refund shall be made for the amounts that have been already paid.

The aforementioned provisions also apply to the assessment reports issued by the Customs Agency and to the related collection procedures and to all the injunction activities as per Italian Royal Decree No. 639 of April 14, 1910.

1 The municipalities set out in attachment 1 of the Prime Ministerial Decree of March 1st, 2020, that is in the Italian region of Lombardy: Bertonico, Casalpusterlengo, Castelgerundo, Castiglione D’Adda, Codogno, Fombio, Maleo, San Fiorano, Somaglia, Terranova dei Passerini, in the Italian region Veneto: Vò, result to be part of the so called *former* “red zone”.

In the end, the payments for individuals (located in the "red zone") who adhered to the procedure of facilitated definition of the fiscal charges entrusted to tax collection agents (Articles 3 and 5 of the Decree Law No. 119 of October 23, 2018 and Article 16-bis, paragraph 1, letter b), No. 2 of the Decree Law No. 34 of April 30, 2019 and Article 1, paragraph 190 of the Law No. 145 of December 30, 2018) are postponed.

In relation to the tourist accommodation businesses, the travel and tourism agencies and the tour operators that have tax domicile, registered offices or executive office in the State's territory, Article 8 of the Decree Law No. 9 of March 2, 2020 provided the suspension from March 2 (date of entry into force of the mentioned Decree Law) to April 30, 2020 of:

- terms related to the payments of the deductions at source that, pursuant to Articles 23, 24 and 29 of TUIR (Italian Tax Consolidated Text), the aforementioned individuals operate as withholding agents;
- terms related to the fulfilments and payments of the social security contributions and of the premiums for the compulsory insurance.

The payments referred to the previos period, shall be made, without the application of fines or interests, in a single tranche by May 31, 2020.

Moreover, for the above-mentioned individuals having tax domicile, registered offices or executive offices in the municipalities identified in Attachment 1 of the Prime Ministerial Decree of March 1st, 2020, no changes occur to the provisions of Article 1, paragraph 3 of the Decree of the Minister for the Economy and Finance of February 24, 2020, published in the Official Gazette, General Series No. 48 of February 26, 2020.

Nothing has been provided yet with reference to the possible postponement of the terms of submission of the VAT return, related to the tax period 2019, currently planned for April 30, 2020.

Carrying on with analysis on tax litigation matter, with general application throughout the national territory, the Government, by means of Articles 1 and 2 of the Decree Law No. 11 of March 8, 2020, enacted a set of urgent provisions to cope with the epidemiological emergency caused by COVID-19 regarding the functioning of civil and criminal law. Such provisions, as expressely provided for by the law, are also applicable, where compatible, to the proceedings related to the tax commissions.

Pursuant to the above-mentioned Article 1, paragraph 1, from March 9 (day following the entry into force of the mentioned Law Decree) to March 22, the hearings of tax proceedings (as well as civil and criminal hearings, to which reference should be made to the specific report for the related exceptions) pending in all legal offices are deferred on the Court's own motion to a date after March 22.

From March 9 to March 22 are also suspended the terms for the accomplishment of any action inherent to the deferred proceedings, pursuant to Article 1, paragraph 1, of the Decree Law No. 11 of March 8, 2020. Moreover if the expiry of such terms starts during the suspension period, the same start is deferred at the end of such period.

Attention should be paid to the fact that, after reading textual data of the regulation, it results that the deadlines to consider as suspended are exclusively those related to the proceedings whose hearings, planned in the suspension period (March 9-22), result deferred on the Court's own motion. In this regard, it should be noted that the related explanatory memorandum clarifies the general scope of the provision that makes reference to all pending (civil, criminal and tax) proceedings and processes «even when the hearing in the period concerned is not scheduled) providing the suspension of all terms for the fulfillment of any court proceeding, included the notices of appeal».

With reference to the performance of services inside the legal offices, Article 2 of Decree Law No. 11 of March 8, 2020, grants the heads of such offices the power (after the necessary consultations), in the period between March 23 and May 31, 2020, to adopt the following measures:

- limitation of access to the public;
- limitation of opening hours to the public, or the closure (for the offices that do not offer urgent services);
- regulation for the access to services, with prior booking, even through telephone or means of communication, as well as through any other measure aiming at avoiding as
- the adoption of binding guidelines for the schedule and the discussion of hearings;
- the celebration of hearings in camera;
- the provision of the conduct of the hearings that do not require the presence of i different from the representatives of the parties and by the parties by means connections;
- the provision of postponement of hearings to a date after May 31, 2020.

the conduct of the hearings that does not require the presence of individuals different from the representatives of the parties by means of electronic exchange and filing of written notes containing the only applications and conclusions, and the subsequent adoption of the court order outside the hearing.

Smart working

As well known, the Prime Ministerial Decree of March 1, 2020 extended - to all national territory for the duration of six months - the possibility for private employers to unilaterally use, namely without the need to individual agreement with employees who are involved (therefore notwithstanding the institutional law which, on the contrary, provides for the need to reach an agreement) smart working pursuant to Articles 18 to 23 of Law of May 22, 201 no. 81.
Without prejudice to the not necessity of the individual agreement, the smart working is subject to its ordinary legal discipline, with the sole other exemption that the mandatory information to the employee regarding health and safety at work provided for by Article 22 of law may be sent also electronically to the involved employee and in the standardized format available on INAIL website.

Unless it is a mere extension of the number of smart working days by an employer who already ordinarily use it on the basis of individual agreements already in force with the employees, we point out that there seem to be some interpretation problems: the possible use of work tools – such as PC and smartphone - belonging to the empolyees would anyway assume their consent and a remuneration for such use (beyond the refund of the costs for the electric use and the Internet), while the procedures for the exercise of control of the performance (which would be agreed according to Article 19) anyway cannot be exercised with procedures in breach of the privacy right. The discipline of the employee right to disconnection from work tools and that related to the effective working hours during the day (the employee in smart working is not subject to bonds but only to the maximum working time), which according to Article 19 of Law no.81 would be included in the agrerement, are hardly consistent with the unilateral employer measure.

The employee, pursuant to Prime Ministerial Decree of March 1, 2020, would not refuse to negotiate in good faith his/her smart working period but and individual agreement seems to be anyway difficultly unavoidable, according to our opinion.

COVID-19 and Risk Assess Document (RAD)

It is well known that Article 2087 of the Italian Civil Code provides for the employer a general obligation and wide safeguard of the health of his/her employees and a liability which has a contractual basis: the employee must therefore demonstrate to have contracted the disease which, as it is the case for COVID – 19 virus, is a widespread disease, just during working time, and, subsequently, the employer must demonstrate to have made any reasonable effort to avoid this occurrence.

That being said, according to our opinion, it is appropriate, pursuant to the general obligation, that the employer provides a review of the RAD in relation to the specific biohazard in order to provide the necessary individual and collective protection and prevention measures. This latter may, in some cases, constitute the difference between the force majeure forcing the cessation of the production activity without pay burdens and the normal risk of the company which does not allow to unilaterally retain the remuneration also in the absence of work performance.

PRIVACY ISSUES

As regards privacy aspects, it is important to always consider the limits established by the provisions related to the personal data protection.

To this regard, on March 2, 2020, the Data Protection Authority issued a special media alert regarding the collection of information in relation to the presence of symptoms of Covid-19 and the last movements of visitors, users and employees.

In particular, the Data Protection Authority recommends to limit as much as possible the implementation of collection practices put in place **on systematic and indiscriminate basis**. The Data Protection Authority indeed explains in the media alert that the activities of prevention of Covid-19 spreading should be limited to the bodies institutionally delegated to guarantee the compliance with the public health rules, including the healthcare professionals and the system deployed by the Civil Protection.

Therefore, any containment measure taken by the employer shall respect the principle of minimization of data collection, therefore collecting data deemed as essential in order to allow the efficiency of the adopted measures.

Now, the emergency provision adopted in the last few weeks provides that anyone in the last 14 days who staied in the epidemiological danger zones, as well as in the townships of the former red zone or has close contacts with persons tested positive for Covid-19 must inform the local health authority, also through the family doctor, who will carry out the medical examinations provided for as, for instance, the self-isolation.

Therefore **the obligation of the employee to inform the employer of any dangerous situation for health and safety on the workplace** remains essential.

DISCLAIMER

The information contained in this document must not be considered as exhaustive, nor is it intended to express an opinion or provide legal or tax advice, nor does it exclude the need to obtain specific opinions on individual cases.

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