



## COVID-19: Force majeure during the state of emergency declared due to the COVID-19 pandemic

### I. LEGAL FRAMEWORK

The Civil Code defines force majeure as any **external, unpredictable, absolutely invincible and inevitable event**. Insofar as the debtor is able to prove force majeure, he/she is exempted from liability for the period affected by the force majeure event, unless the parties agree otherwise.

### II. DOES THE DECLARED STATE OF EMERGENCY QUALIFY AS FORCE MAJEURE?

In the context of the declaration of the state of emergency as a result of the Covid-19 pandemic, economic operators may only invoke the non-performance of contractual obligations due to force majeure if they are able to demonstrate that they have been objectively affected in terms of their ability to fulfil their obligations.

Through GEO 29/2020 it can be understood that the legislator has established **a legal presumption of force majeure** in favour of small and medium-sized enterprises, as defined in law, with respect to utility bills and lease contracts for registered headquarters or secondary offices, with the consequence of the deferred payment thereof.

With regard to other types of contracts in progress, the law establishes only a **simple presumption**, in the sense that SMEs can only invoke force majeure after an attempted renegotiation of the contract in question, demonstrated based on documents communicated between the parties by any means. The presumption may be overturned by the interested party by any means of evidence.

Furthermore, additional substantive conditions of force majeure have been established in relation to common law, namely that the unforeseeable, absolutely invincible and inevitable circumstances result from an action by the authorities in applying the measures required to prevent and combat the pandemic caused by infection with Covid-19, which has affected the activity of the SMEs in question, as attested by a state of emergency certificate.

Therefore, in the normative acts issued in relation to the state of emergency declared in Romania, the means of invoking force majeure is regulated only for SMEs, as they are defined in law, in their relations with the public authorities and/or other contractual partners.

With regard to other economic agents, other than SMEs, these will have to demonstrate force majeure under common law and in keeping with contractual provisions. However, they will be able to rely on their state of emergency certificates or force majeure certificates in proving the force majeure event in relation to their contractual partners.

### III. HOW TO INVOKE FORCE MAJUERE. DIFFERENCES BETWEEN THE FORCE MAJUERE CERTIFICATE AND THE STATE OF EMERGENCY CERTIFICATE

SMEs will be able to invoke force majeure based on a state of emergency certificate issued by the Ministry of Economy, Energy and the Business Environment.

Other economic agents will be able to invoke force majeure under the conditions stipulated in the contracts. As a general rule, a first step is notification of the other party and an attempt to avoid the negative effects generated by the impossibility of performing a contractual obligation.



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It is possible that some contracts contain provisions regarding the obligation to obtain a *force majeure certificate from the Chamber of Commerce*, which justifies the intervention of the unpredictable, absolutely invincible and inevitable event. However, the opinion of the Chamber of Commerce is that these force majeure certificates do not guarantee the qualification of the event as force majeure, being subject to the analysis of the courts.

Therefore, it is very important to take into account the fact that in the present situation the unpredictability relates to the time of the birth of the affected legal report, such that the measures taken by the authorities in accordance with the normative act establishing the state of emergency are not considered unpredictable.

In order to benefit from the effects of force majeure, it is essential that the event so qualified should have occurred before the obligation resulting from the contract concluded between the parties became due or the debtor was delayed for non-performance. Therefore, it is not possible to invoke the unpredictability of the contracts concluded after the declaration of the state of emergency or in the case of recently concluded contracts during a period when the pandemic was already known.

#### IV. THE CONSEQUENCES OF FORCE MAJEURE

As a general rule, the invocation of force majeure leads to the exemption from liability for obligations whose performance is partially or totally prevented by the force majeure event, although the parties may also foresee other effects.

Thus, the parties may agree that the circumstances of force majeure shall suspend, postpone or even release one party or the other from its contractual duties.

Moreover, force majeure may even lead to the termination of the contract if the impossibility of execution is total and definitive and concerns an essential contractual obligation, or it may have as a result only the suspension of the contract (if the impossibility of execution is only temporary or affects non-essential obligations). Good practice in commercial contracts recognises the right of the party not affected by force majeure to unilaterally terminate a contract in which the other party invoked force majeure as a cause of liability exemption and the factual status is extended for a significant period (3 to 6 months).

It should be emphasised once again that although the state of emergency declared due to the Covid-19 pandemic and the measures taken by the public authorities in this respect comprise an exceptional situation, this does not automatically attract the incidence of force majeure in ongoing contractual relations.

A contract has a binding force between the parties and therefore the factual situation must be analysed in concrete terms, on a case by case basis, with respect to the obligations assumed and the possibility of safeguarding the contract.

*Source: GEO no. 29/2020 regarding some economic and fiscal-budgetary measures published in the Official Gazette no. 230 of March 21, 2020, Civil Code of 2009 (Law no. 287/2009), Order 791/2020 regarding the granting of state of emergency certificates to the economic operators whose activity is affected in the context of the SARS-CoV-2 pandemic, the Official Gazette no. 248 of March 25, 2020.*



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Kind regards

**Your TPA Team**

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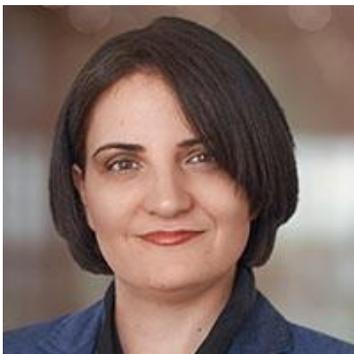
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