

THE CONSEQUENCES OF COVID-19 ON CONTRACTUAL RELATIONS IN GREEK LAW: A BRIEF GUIDE

31 MARCH 2020 • ARTICLE



The emergence of Covid-19 and its terrifying spread across the globe has already made a blistering impact on the health of citizens and the operation of civil society, while also having an inevitable impact on the development and prospects of commercial transactions.

"The meaning of "force majeure" is not defined in Greek law but has been developed in legal theory and judicial precedent."

Governments have responded to its initial disastrous effects on key sectors of the national and global economy with a raft of measures intended on one hand to prevent the virus affecting all of the economy, and on the other hand to support individuals and businesses affected. However, there is a deep and growing concern about the effects of the pandemic on commercial transactions across a range of sectors.

Given that we are faced with a phenomenon which few could have foreseen, the basic questions are whether Greek law provides a framework of rules which can regulate contractual relationships on the occurrence of unexpected events and in

particular whether Greek law recognises the concept of "force majeure", whether the pandemic would fall within this concept, and if not, how the pandemic could affect the performance of a contract, particularly if the parties have not included any suitable provisions.

WHAT IS "FORCE MAJEURE"

The meaning of “force majeure” is not defined in Greek law but has been developed in legal theory and judicial precedent from the basic equitable concept that a party to a contract is liable for breaching its obligations, provided that such breach is caused by its negligence or wilful default. Negligence is defined as a failure to apply usual transactional diligence. Therefore, where there is an event which does not result from negligence or wilful default and which could not have been foreseen by the reasonably careful and prudent person, this event would be considered as a “chance” or “accidental” event. Force majeure falls within the range of chance/accidental events; events which render it objectively impossible for a party to meet certain contractual obligations, assessed on the facts in each case, which were unforeseen and which the party was unable to avoid, even taking all careful and prudent measures (meaning that even the most careful and prudent counterparty could not have foreseen the event, not just the average counterparty). Events deemed to fall within this category include natural disasters such as earthquakes, floods and typhoons, as well as governmental interventions imposing compulsory measures. On the other hand, courts have found that the economic crisis, financial incapacity and storms were not force majeure – in the latter case, particularly when those storms had been predicted in weather reports or could have been foreseen by competent seafarers.

"Whilst the use of the phrase would not in itself bind a court, we can assume that the court would give this characterisation considerable weight."

Based on this analysis, the COVID-19 pandemic does appear to fall within the definition of force majeure, in that it is an event which could not have been foreseen or avoided – not only by the average counterparty, but also by the most careful and prudent. This interpretation is strongly supported by the raft of emergency legal measures introduced by the state to freeze the obligations of individuals and businesses towards tax, social security and other authorities as a first step in limiting the consequences of this unexpected and unavoidable event. This interpretation is further strengthened by the fact that the most recent legislation uses the particular term “force majeure”. Whilst the use of the phrase would not in itself bind a court, we can assume that the court would give this characterisation considerable weight.

THE CONSEQUENCES OF FORCE MAJEURE ON CONTRACTUAL RELATIONS

What then are the consequences of force majeure on contractual obligations? What happens when force majeure prevents the performance of some or all of a party’s obligations, whether at the place, within the time, or in the manner agreed? Greek law provides a framework of rules governing situations in which a party does not perform its contractual obligations in full as a result of events for which it is not liable; the counterparty may be released from all its obligations if it can establish that it is not responsible for its inability to perform. It should however be emphasised that law, good faith and responsible business practices all require that the party affected should promptly take all measures in its power to eliminate or mitigate the effects on its counterparty and to reduce the damage caused; this would include notifying the counterparty and accounting for any benefits received as a result of not performing its contractual obligations due to the force majeure event.

It should also be emphasised that a party's inability to perform one of its contractual obligations as a result of force majeure does not release it from its other obligations under the same contract, to the extent that force majeure does not prevent their performance and the contract remains in force. For example, the inability of a lessee to pay all or part of its rent during the period affected by force majeure does not release the lessee from its other obligations under the lease agreement, such as the payment of common expenses and council taxes, or its obligations to maintain the condition of the premises. Similarly, whilst a hotel management agreement may be suspended due to force majeure, the owner of the hotel continues to be obliged to repair and maintain the property pursuant to the agreement so that the hotel will be in condition to operate as soon as the suspension ends, even though the owner may not be obliged to pay the agreed hotel management fees during the suspension period.

A key criteria in reaching any decision about force majeure is the level of diligence of the relevant counterparty and any knowledge it may have had about the catastrophic consequences of COVID-19, in order to assess whether it could have avoided finding itself unable to perform its contractual obligations. The date on which the contract was signed would be relevant for this, given that a contract signed at the beginning of the pandemic cannot be assessed in the same way as one executed once the spread of the virus and its overarching consequences were already evident. Any party claiming that an event constitutes force majeure must be able to establish that it had a substantive impact on its ability to do business, in order that force majeure is not used as a general and unfair route for parties to attempt to avoid their contractual obligations, contrary to good faith and responsible business practice.

Finally we would note that Greek law also provides that in a case in which, due to unforeseen changes of the conditions or events which acted as the grounds for the parties to enter into the contract (acting in good faith and responsible business practice), the performance of one party's contractual obligations has become excessively burdensome, either excessively prejudicial to its interests or practically impossible, the Court has the power to order the adjustment of contractual obligations or even the termination of the contract. Therefore, the current situation – even if it were not deemed to constitute an event of force majeure – could form the basis for an application to the court for a contractual revision.

SUMMARY

In summary, the COVID-19 pandemic does appear to fall within the definition of force majeure, as it is an event which could not have been foreseen or avoided, not only by the average contractual counterparty but by even the most careful and prudent person. However, whether and to what extent the factual circumstances and the particular situation stemming directly or indirectly from the COVID-19 pandemic actually constitute events which could justify any failure or delay by a party to perform particular contractual obligations must be assessed on a case by case basis, looking at all the circumstances. This note can therefore only give an initial guide to the issues to date under Greek law arising from the COVID-19 epidemic and should not be relied upon to take any particular decisions. Each case will need to be assessed by legal advisors considering the specific facts of the case and possibly later by the courts, at a time when events are likely to have changed again, given that recent events are unprecedented on both a legal and societal level. We continue to follow events closely on all fronts and are available to provide you with detailed advice and guidance to suit your specific circumstances.

"A key criteria in reaching any decision about force majeure is the level of diligence of the relevant counterparty and any knowledge it may have had about the catastrophic consequences of COVID-19."

WATSON FARLEY & WILLIAMS

Senior Associate Vagelis Lioukos and Trainee Dionysis Pavlioglou also contributed to this article.

Maria Delagrammatika, a former associate in our Athens office, also contributed to this article.

KEY CONTACTS



NIKOLAOS KOSTIKAS

PARTNER • ATHENS

T: +30 210 455 7338

nkostikas@wfw.com



VAGELIS LIOUSKOS

COUNSEL • ATHENS

T: +30 210 455 7367

Vlioukos@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.