



## Suspension and termination of contracts - Italy

Parties to a contract may be seeking to delay or avoid performance (or escape liability for non-performance) of their contractual obligations, or even terminate contracts, either because COVID-19 has legitimately prevented them from performing their obligations, or because they are seeking to extricate themselves from what in the new global circumstances is a bad, or worse, deal. Things to consider include:

### Suspension under express terms – force majeure

Usually contracts include detailed 'force majeure' provisions, providing that upon occurrence of events which are outside the invoking party's control and impede proper performance of its obligations, if certain tests are met the invoking party will be excused. Usually, these tests require *inter alia*, to check if:

- pandemic or epidemic are included amongst the force majeure events;
- the relevant event was unforeseeable and unavoidable using the appropriate standard of diligence;
- the invoking party informed other party in the agreed timeframe.

Depending on the text of the relevant clause, effects of force majeure usually include:

- excusing failure to perform;
- extending time for performance (subject to each party's obligation to bear its own costs incurred due to occurrence of force majeure);
- relief of the non-affected party from the obligation to pay the consideration strictly related to the obligations non-performed due to force majeure; and
- prompt resumption of the relevant obligations upon end of the force majeure events.

If no specific force majeure clauses are provided for in the contract, a party may still try to invoke "Supervening impossibility" under article 1218 of the Italian Civil Code. According to this provision, a party can avoid liability for failure to fulfil an obligation if it can demonstrate that:

- it is impossible for that party to perform its obligations;
- the impossibility is due to causes not attributable to the party invoking force majeure; and
- the impossibility is "absolute" and "objective" (i.e. a "subjective" impossibility may not excuse the non-performing party).

In addition, pursuant to article 1256 of the Italian Civil Code, if the supervening impossibility is temporary, the obligor is excused for late performance.

### Termination under express terms or under Italian law principles

Where a contract has become uneconomic or it impossible to perform it, a party may wish to limit its losses by terminating the contract. The parties have different options:

- First the parties should verify whether there are specific termination provisions under the contract. There may be, for example, a right for one or both parties to terminate (or withdraw (*recesso*) on notice and without cause. Or there may be specific termination rights

that are triggered in the circumstances that have arisen (e.g. conditions subsequent or termination for prolonged force majeure events). Any contractual requirements, such as notice period provisions, should be strictly observed. In addition, possible compensation provisions must be carefully examined to assess the direct economic impact of termination/withdrawal.

In addition to specific termination terms under the relevant contract, a party may still be entitled to terminate or withdraw under certain statutory Italian law provisions or principles, to the extent that they have not been waived by the parties:

- Under article 1256 of the Italian Civil Code a contractual obligation is terminated due to supervening impossibility not attributable to the obligor. If the supervening impossibility is temporary the obligation will terminate at the point in time when the obligor can no longer be deemed liable or the creditor can no longer be deemed to have interest in the performance.
- Under article 1464 of the Italian Civil Code if the supervening impossibility regards only a portion of the contractual obligations, the creditor is entitled to withdraw from the contract if it does not have any interest in the partial performance.

The test to be met to legitimately invoke the supervening impossibility is that examined above for “supervening impossibility”. According to case precedents, orders of public authorities or new governmental regulation (so called *factum principis*) can be, at least in theory, legitimate circumstances of supervening impossibility.

- Pursuant to article 1467 of the Italian Civil Code if under a contract providing for obligations to be executed over a period of time, the obligations of a party become excessively burdensome due to extraordinary and unforeseeable events, such party may apply to the relevant court to terminate the contract. However the other party may propose to amend the agreement in order to avoid the termination. The termination remedy does not apply if the increased burden falls within the typical economic risk regarding the contract.
- In accordance with the assumption principle (“*presupposizione*”) developed by case precedents, a party to a contract (obligor) may withdraw if a matter of fact or law which was known by all contractual parties to be the reason for the obligor to enter into the contract, does not longer exist due to objective and unforeseeable events.

## Other contractual provisions

COVID-19 may have an impact on other provisions:

- Material adverse change/effect clauses: a party may be entitled to invoke the occurrence of a material adverse change /effect to terminate (or withdraw from) a contract or prevent a contract subject to condition precedent from becoming effective or to request additional assurances /security to the counterparty.
- Change in law clauses – contracts may include provisions allowing a party to request amendments to the agreed commercial terms if a change in law occurs and providing the right of such party to withdraw (*recesso*) from the contract if an agreement is not reached.
- Price adjustment clauses – Parties may be entitled to an increase of the contract price. Under Italian law a party to certain types of contract may be entitled to a price adjustment regardless of an express provision being included in the contract (e.g. under articles 1660, 1661 and 1664 of the Italian Civil Code. in relation to works contracts and service agreements) unless such right is contractually waived.
- Limitation or exclusion clauses – parties may increasingly seek to rely on limitation or exclusion clauses to limit or exclude liability for non-performance, particularly if there is no force majeure clause or it cannot be invoked.
- Suspension right clauses: a party may be entitled to suspend performance of its obligations, if the other party is not performing its obligations. This right is also provided by article 1460 of the Italian Civil Code.

**Immediate steps**

Identify any agreements where performance is or may be affected

Identify relevant force majeure clauses and comply with any notification and/or mitigation requirements

Consider any other relief that may be available under the contract or under statutory provision of Italian law

Verify if the contract set forth specific duties of the parties upon occurrence of extraordinary events

Ensure appropriate records are kept to support your position if a dispute arises

Consider to discussing in good faith with counterparty in order to reach an agreement of mutual satisfaction

**Looking further ahead**

Consider collaborations to ensure continued production of essential products

Continue monitoring the situation and identify any performance issue

Maintain comprehensive and detailed records including the effect on the business and steps taken to mitigate

Consider to appoint dedicated staff to monitor performance of contracts