
# COVID-19 AND BUSINESSES: Issues arising from responsibility for the protection of employees' health and the proper performance of contracts

The rise in the number of cases of contagion from **Covid-19 ("Coronavirus")** in Lombardy and other Northern Italian Regions has caused the competent Public Authorities to adopt urgent measures to fight and limit the spread of the virus, and this is accordingly starting to have an impact on our economy. It is necessary, therefore, to ask ourselves what the scope of these changed scenarios might be and the consequences they could have on our worlds of law and economics and upon those who are most directly engaged in them.

## Labour law issues: occupational health and safety

These circumstances have required employers to prepare special measures to be taken in the workplace in order to counter the Coronavirus.

In fact, as required by Article 2087 of the Italian Civil Code and the Consolidation Act on Safety, employers are under an obligation to safeguard the **physical integrity** of their workers and a **salubrious and risk-free working environment**, including safeguarding against biohazard exposure.

In adopting any appropriate prevention and protection measures, employers must abide by the principles of the utmost caution and prudence and the applicable best practice, also in order to avoid committing any acts that would involve administrative liability for criminal offences referred to in Legislative Decree 231/2001 in any case of breach of regulations governing health and safety at work.

Indeed, the employers' guarantee obligation prescribed in Article 2087 of the Italian Civil Code has a **broad** and **extensive** scope, justified both by the constitutional importance of the right to health and by the fact that private business initiative cannot be conducted in conflict with workers' health.

Consequently employers are bound to take not only the prevention and protection measures mandatorily prescribed by law, but also such measures as are necessary and appropriate in actual situations according to the particular nature of the work involved and in the light of experience and technical knowledge.

Accordingly, as we have to comply with the special measures that have been handed down (including Decree Law 20, the implementing Decree issued by the Prime Minister and the Ministry for Health's Order of 23 February 2020), we now provide some operational suggestions to follow in these circumstances, at least for the next 15 days, distinguishing between legal obligations and voluntary precautions/practices:

- identify workers from contagion clusters (11 municipalities at present) and require them to observe the restriction on their movements imposed by the prohibition on leaving the municipal districts concerned (**legal obligation**);
- in consultation with the company doctor and the prevention and protection service, prepare disclosures regarding the Coronavirus for all workers, also setting out the prevention and protection measures to be taken in order to avoid the risk of its spread (**legal obligation and practice**);

- prefer/promote recourse to **smart working** or **teleworking** in order to reduce workers' business trips or journeys (**legal obligation for red areas, practice for others**).

  In this regard, under Decree Law 6 of 2020, as finally amended on 25 February, until 15 March 2020 employers with their registered office or operational headquarters in the "red and yellow areas" (at present, Emilia Romagna, Friuli Venezia Giulia, Lombardy, Piedmont, Veneto and Liguria) may introduce smart working immediately **even without an individual agreement with the worker**;

- cancel workers' business trips or journeys in the areas considered at risk (**obligation and, apart from the red area, practice**);

- reinforce filters for entering the company, preventing/limiting access by non-employed personnel (collaborators, visitors, suppliers, customers, etc.). Should this not be possible, prepare a self-declaration form on which any movements to foreign countries/Italy/municipalities included in the contagion cluster and/or any contacts with persons coming from areas at risk during the previous 15 days should be stated (**practice**);

- not allow access to particularly crowded places (*e.g.* company canteens, indoor auditoriums, indoor libraries, gathering places, etc.) (**practice**);

- create a dedicated free phone number or email address to provide information and support to workers (**practice**).

Naturally it is possible that operational practices will be modified and further steps/safeguards introduced if the competent Authorities themselves promulgate further measures.

Furthermore, especially in complex organisations and as we are facing an extraordinary situation, the top management and key functions (the employer in a broad sense) should be involved in decisions regarding the precautions and practices to follow in order to comply with the guarantee obligations under Article 2087 of the Italian Civil Code, as these are corporate policy matters, at least as regards decisions on the adoption of best practices, which, as such, should be generally agreed and consistent.

The willing cooperation of the company doctor and the prevention and protection service in working out these practices and setting out and adopting prevention and protection measures is also essential in this regard.

## Further issues: commercial contracts

The spread of the Coronavirus at global level has already had effects in many Italian companies during the last weeks, affecting various sectors of their business (from the making of their products to transporting and selling them), mainly (but not only) involving enterprises more active internationally than others and, more in general, businesses that involve Chinese partners, either directly or indirectly.

Now, on the other hand, with the appearance of the first large Italian focuses of infection in Lombardy and other Northern Italian Regions, these effects could become more worrying, also on nationwide or even local economic activities and not only on firms operating in the "red areas".

Even more than before, many enterprises now run the risk that, as a result of the situation that has arisen and the measures taken or to be taken, obligations entered into under signed commercial contracts may

not be fulfilled within the agreed times or may even not be fulfilled at all. It is vital, therefore, to grasp whether, in the light of the exceptional nature of the situation, an entity is liable for a possible delay/non-performance, or if the recent occurrences may in some way be considered as events of Force Majeure, constituting by themselves instances of automatic exemption from liability. Now, in Italian law a party who becomes non-performing is exempted from liability (i) if the service referred to in the contract becomes **excessively onerous** owing to "*extraordinary or unforeseeable events*" that justify the party concerned in requesting the termination of the contract; or (ii) if non-performance or delay in performing is due to the **supervening impossibility of delivering the service** for which the party is not to blame.

Although there is no precise definition of Force Majeure in the Italian legal system, the term encompasses natural and/or human events whose unforeseeable and extraordinary nature renders them, in actual practice, impossible to confront in that they are beyond the control of the parties, making the service totally impossible or excessively onerous. In international (and contract) practice, examples of "extraordinary and unforeseeable" events falling within the definition of causes of Force Majeure are, for example, earthquakes, hurricanes, wars, rebellion, etc..

We can say in the light of the above that:

- in all cases in which economic operators cannot fulfil their obligations (whether in the form of delay or absolute non-performance), as a result, for example, of an order by an Authority (the so-called "*factum principis*", *i.e.* the act of State), this circumstance may be valid as a reason for the party's exemption from liability, regardless of the express contract terms in place;
- where a contract specifically includes a Force Majeure clause, the text of the clause should be examined to assess its scope, enforceability and related effects - in any case, however, looking at the rules governing any conflicting laws and seeing whether there are any regulations for their application to be taken into consideration;
- where a contract does not mention the matter, assuming that the contract is governed by Italian law, the rules and principles briefly described above must be applied; we must add, however, that in this case the onus of proving an absence of negligence will be on the party invoking the protection of Force Majeure.

It is difficult at the moment to assert whether the spread of the Coronavirus in Italy, together with the measures that have been taken (and any further measures that may be taken) could have the effect of exonerating parties from liability for delayed or non-performance of contractual obligations, also since the future course of events is unpredictable. An appraisal of this kind cannot be uncoupled from an analysis of each specific case and must take a number of elements into consideration (*e.g.* the reasons given for the delay and/or non-performance, the effective significance of these reasons for the service that is the subject of the contract, the absence, or excessive cost, of alternative ways to perform, etc.). Certainly, also considering the dimensions that the phenomenon is assuming (at global level), it does not seem that we can rule out the possibility of the spread of the Coronavirus (and everything bound up with it) being a case in which a party may be exempted from liability for delayed or non-performance, especially if the present situation lasts for a long time or, in the worst case scenario, deteriorates.

The impacts of the spread of the Coronavirus could also be further investigated by considering the MAC/MAE (Material Adverse Change/Material Adverse Effect) Clauses that have gained ground in practice in the English-speaking world and are, in any case, frequently used in agreements for the acquisition of shareholdings and/or corporate groups and in more complex loan agreements. Pursuant to these clauses, the potential buyer or the bank may choose not to proceed with the completion of the

transaction or the actual disbursement of the loan if circumstances arise that have a substantial impact on the results of operations or financial position of the company concerned before the transaction is carried out or the loan is disbursed. Obviously the text of the contract must be analysed in detail in these cases too, in addition to any effective impacts that the phenomenon has on the results of operations and financial position of the company concerned.

Gianni, Origoni, Grippo, Cappelli & Partners has set up an in-house **Task Force** to constantly monitor the evolution of legislation in the regions affected by the Coronavirus and is at your entire disposal to support you in establishing, drawing up and putting into practice the most advisable strategies for cushioning the impacts of the spread of the Coronavirus on the operations of your enterprise and on the management of your existing commercial relations.

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