Covid-19 and contract disruption under Greek law

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1.How are contracts affected by the Covid-19 pandemic?

The Covid-19 pandemic affects contracts in three ways:

The first involves the relevant health crisis. The spread of the virus itself creates impediments for the proper fulfilment of contractual obligations of certain types. Sickness, hospitalization and the fear of exposing oneself to the virus, especially for vulnerable individuals, create impediments to the fulfilment of contractual obligations.

The second way involves all government measures which aim to limit the spread of the virus. These measures include prohibitions and/or limitations on travel and transport, closure of businesses etc. It is obvious that under such circumstances, a great number of contracts is affected.

The third source of contract disruption involves the so-called Covid-19 recession, namely the economic and financial crisis caused by the government measures against the spread of the Covid-19 disease. This economic disruption has led to significant volatility in the cost of raw materials, the cost of labour and the cost of energy. It is therefore obvious that the contractual equilibrium, the balance between the value of performances that are exchanged, is significantly affected in many contracts.

2.Is there a single method to resolve all the contractual disruption caused by the pandemic?

No. Each case of contract disruption related to Covid-19 requires an individual legal assessment. For a proper evaluation of the legal situation, every interested party should first set up a case profile. Preliminary questions that could provide guidance include:

Which of the parties is affected? Which party owes monetary performance, which party owes non-monetary performance? Is the contract a one-off contract, an instalment contract, or a long-term contract with recurring performances? What is the nature and what are the processes behind each individual obligation under the contract? Which contractual obligations are affected? Is performance still possible, even if it has become significantly more onerous? Is counter-performance expected to remain possible? Does the pandemic itself impede performance, or is it a result of a government measure taken in response to the pandemic?

However, the review of the Greek Law concepts which are relevant to such contract disruptions can lead to some helpful conclusions.

3.Does Covid-19 emergency legislation provide solutions to contract disruptions related to the pandemic?

It should be noted that **Covid-19 emergency legislation** has a very limited scope and it will not provide solutions in most cases. However, in every case of Covid-19 contract disruption, it is recommended that relevant research into the Covid-19 emergency legislation be undertaken.

4.Which Greek Private Law concepts are relevant to contract disruptions caused by the pandemic?

There are several Greek Private Law concepts which are relevant to Covid-19 contract disruption:

· Contract interpretation (articles 173 and 200 of the Greek Civil Code or “GCC”)

· The fault principle (Article 330 GCC)

· Impossibility of performance without fault (Art. 336, 363 and 380)

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· Delay of performance without fault (Art. 342)

Unforeseeable change in circumstances (pursuant to Art. 388 GCC)

Performance of the contract in good faith (pursuant to Art. 288 GCC).

5.How is contract interpretation relevant to Covid-19 contract disruptions?

Contract interpretation serves the purpose of discovering the enforceable content of the agreement.

The practical use of contract interpretation in the case of the pandemic is to identify and clarify specific contract rules which can be applied for the resolution of Covid-19 related disruptions.

For example, one needs to ask if the contract contains enforceable provisions for delay or impossibility of performance due to Covid-19 impediments, or if it grants the parties a right to terminate or otherwise dissolve the disrupted contract.

The Greek Civil Code contains two provisions on the interpretation of the contract, namely Art. 173 and Art. 200.

However, Greek case law does not apply these rules separately, but it has shaped uniform rules for contract interpretation.

We can distinguish two types of contract interpretation:

The first one is **explanatory interpretation**: Its goal is to discover the true meaning of the contract itself, which will be sought mainly in the contract text.

Explanatory interpretation is a two-step process:

If it is proven that the parties did in fact construe the contract text with the same meaning at the time of contract conclusion, then this meaning is binding. This is a question of fact.

If, on the other hand, the parties construed the contract text differently from one another at the time of contract conclusion, then only one meaning will eventually prevail. This evaluation is a question of law and it will be based not only on linguistic criteria, but also on factors which lie out of the contract text, such as the scope of the contract, business practices, circumstances at the time of contract conclusion etc.

The second type is **supplementary interpretation**. This is a process where the judge can fill involuntary gaps in the contract by invoking the presumed will of the parties. Supplementary interpretation is not significant for Covid-19 issues since it is very hard to presume what the parties would have agreed for unforeseeable events such as the pandemic.

6.Are there specific types of contract clauses which address contract disruptions related to the pandemic?

Force majeure and other similar clauses are crucial for Covid-19 issues.

There are three types of such clauses:

(a) Force majeure clauses essentially free both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties occurs. Such clauses are relevant for contract disruptions related to the health crisis and the government measures which aim to contain the spread of the disease.

(b) Hardship clauses are applicable in case of unforeseeable events which fundamentally alter the equilibrium of the contract, resulting in an excessively onerous performance for one party. Such clauses are relevant for contract disruptions associated with the Covid-19 recession.

(c) Material adverse change (MAC) clauses aim to give the buyer of a company the right to walk away from the acquisition before closing, if events occur that are detrimental to the target company. Such clauses are also relevant for Covid-19 recession disruptions.

7.What is the scope and the application of typical force majeure clauses? What is their legal effect under Greek law and how do they compare to Greek law default rules?

Usual criteria for force majeure events in force majeure clauses include: (a) Inability to perform, (b) Lack of ability to control or to prevent the occurrence of the impediment, (c) Unforeseeability of the impediment at the time of contract conclusion and (d) Unavoidability of contract disruption.

Regarding legal consequences, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend adverse legal consequences of non-performance for the duration of the force majeure event. In

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most cases the affected party will be obliged to promptly notify its counterparty regarding the disruption. In case of permanent frustration of the contract, a right to terminate may be granted to the affected party.

In effect, force majeure clauses will cover non-performance which is directly attributable to either the health crisis itself or to government measures for the containment of the disease. However, force majeure clauses will not cover issues associated with the Covid-19 recession and the relevant economic crisis.

Furthermore, most force majeure clauses would be deemed enforceable under Greek law.

It should also be added that the legal consequences of force majeure clauses are very similar to Greek law default rules (GCC).

However, force majeure clauses have some considerable advantages over Greek law default rules:

They allow a party autonomous contract risk allocation, even in divergence from the default rules (e.g. a party undertakes some or all force majeure risks for a higher price.)

They provide more legal certainty because they provide more specific legal consequences and they therefore help prevent litigation.

8.What are the scope and the application of typical hardship clauses? What is their legal effect under Greek law and how do they compare to Greek law default rules?

Hardship clauses cover cases in which unforeseeable events that fundamentally alter the equilibrium of a contract occur, resulting in excessive burden being placed on one of the parties involved.

Usual criteria for hardship include (a) Excessively onerous performance, (b) Lack of ability to control or to prevent the occurrence of the impediment, (c) Unforeseeability of the impediment at the time of contract conclusion and (d) Unavoidability of contract disruption.

Hardship clauses typically recognize that parties must perform their contractual obligations even if events have rendered performance more onerous than would reasonably have been anticipated at the time of the conclusion of the contract. However, if continued performance has become excessively burdensome because of an event beyond a party's reasonable control and which it could not reasonably have been expected to have taken into account, the clause can obligate the parties to adapt the contract to the new environment and thus re-establish a reasonable contract equilibrium.

Hardship clauses are better suited to deal with issues related to the Covid-19 recession and not to the health crisis or to government measures for the containment of the disease.

Hardship clauses differ from Greek law default rules (GCC) in two ways:

(1) Greek law does not expressly provide for an obligation to renegotiate a contract.

(2) Under Greek law, a general and all-encompassing waiver of the right to seek judicial adaptation of the contract by the Court (Art. 388 and 288 GCC) is generally unenforceable in the sense that the relevant provisions for judicial contract adaptation are deemed compulsory law. To this end, hardship clauses which include such a waiver could be deemed invalid pursuant to Greek law. However, a specific and concrete risk allocation by the parties is generally allowed.

9.What are the scope and the application of typical MAC clauses? What is their legal effect under Greek law and how do they compare to Greek law default rules?

MAC clauses are usually used in the context of the acquisition of a target company or business. A MAC clause aims to give the buyer the right to walk away from the acquisition before closing, or to renegotiate key terms such as price, if events occur that are detrimental to the target company.

In the context of lending transactions, a MAC clause is a clause which acts as a "catch all" provision and aims to allow the lender to call a default if there is an adverse change in the borrower's position or circumstances. For example, a large negative variation shown in successive financial statements of the borrower.

MAC clauses usually include extended definitions of MAC events, which take the form of carve-in lists, i.e. positive definitions for MAC events, and carve-out lists, i.e. negative definitions.

MAC clauses “compete” with Art. 388 GCC regarding the unforeseeable change in circumstances.

A MAC clause will be generally deemed enforceable under Greek law, provided that it is specific enough. If, on the other hand, a MAC clause is drafted in a vague and unilateral way, in the sense that it burdens one party with all unforeseeable risks, then it might be deemed as invalid. Therefore, the more specific a MAC clause is, the more probable it is to be enforceable under Greek law. Carve-in and carve-out lists of events, or even numeric definitions, help to this end.

It should be noted there is no significant Greek case law regarding MAC clauses.

10.What if the contract does not contain force majeure or other similar clauses?

In case the contract does not contain relevant clauses for Covid-19 disruptions, solutions can be provided by Greek law default rules. Greece is a civil law country, therefore most of the important general default rules can be found in the Greek Civil Code ("GCC").

11.What does GCC provide for non-performance in situations where external events, such as a pandemic, have affected the execution of the contract?

The Greek Civil Code does not provide for a single instance of non-performance; it only provides for special categories of non-execution. These are (a) impossibility of performance and (b) default, namely a party being in arrears through its own fault.

All other cases of non-performance fall within the notion of "improper performance", which has been shaped by Greek case law.

As a principle, the **liability of a party for non-performance** requires fault (intent or negligence) of the debtor (***fault principle***).

In any case of non-performance, the debtor is presumed to be at fault, and the debtor bears the burden of proof that he is not at fault.

In general, fault is excluded in case of force majeure events.

Pursuant to the subjective theory, which is **prevalent in Greek case law**, **force majeure** encompasses events which **(a) could not be foreseen** and (**b) could not have been averted** even by measures of extreme care and prudence on the part of the debtor. On the contrary, force majeure does not require that such events be "external" to the debtor.

The **first wave of the Covid-19 pandemic**, including the health crisis as well as relevant government measures for its containment, **can be safely considered as a force majeure event pursuant to Greek law**. **It is questionable whether events related to a second wave of the Covid-19 pandemic would also be deemed force majeure events. The main difference between the first and a potential second wave of the Covid-19 pandemic is unforeseeablity.**

A force majeure is legally relevant only as long as there is a **causal link** between **the force majeure event and the impossibility or delay of performance**. As soon as the force majeure event stops causing impossibility or delay of performance, a debtor who does not perform is at fault. E.g. a manufacturer cannot furnish products to a client because his factory had stopped operating due to Covid-19 lockdown measures. During the lockdown, the manufacturer is not at fault for delay of performance. As soon as the lockdown measures are lifted, the manufacturer is obliged to perform. Otherwise he will be deemed at fault and he will become liable for non-performance/breach of contract.

12.What is impossibility of performance and how is it applied in contract disruptions related to the pandemic?

Impossibility of performance (Art. 335 and 362 GCC) arises when a specific performance becomes **permanently, irretrievably impossible**. Temporary inability to perform means simply delay in performance, not impossibility. For example, if a manufacturer's factory closes due to lockdown measures, the performance (manufacturing and sale of goods) remains possible, therefore delay and not impossibility GCC rules apply.

On the other hand, in **fixed date contracts** impossibility will occur even if the impediment is only temporary. For example, an event organiser or an airline company have sold tickets with fixed dates. In all these cases the performance will be deemed (permanently) impossible, even though it is theoretically possible that the performance itself can be offered in the future (event or air travel at another date).

Impossibility without fault is not considered a breach of contract and **it does not trigger contract liability. Both parties to the contract are released from the obligation to perform** and, in effect, the contract is dissolved (Art. 380 GCC).

On the other hand, impossibility with fault entitles the counterparty to seek compensation for breach of contract (Art. 382 GCC).

Impossibility includes the following subcategories, depending on the specific circumstances:

(a) **Legal impossibility**, which occurs when the fulfilment of the performance is legally prohibited. Impossibility due to pandemic related government measures (e.g. closing of restaurant and food service industry, transport

industry, tourism industry etc) fall under this category.

(b) **Material impossibility**, which occurs when the natural existence of the thing owed (performance) is destroyed. This category is usually not relevant to Covid-19 contract disruptions.

(c) **Economic impossibility** is synonymous with economic difficulties in the fulfilment of the performance. It does not usually constitute impossibility of performance pursuant to the provision of the Greek Civil Code and it cannot lead to the debtor's release from contract liability. In case money is owed, impossibility of performance is always excluded. In all these circumstances, the debtor can only invoke unforeseeable change of circumstances (Art. 388 GCC) or performance in good faith (Art. 288 GCC) and seek a judicial adaptation of the contract.

13.What is delay of performance and how is it applied in contract disruptions related to the pandemic?

In case the performance is delayed without the debtor being at fault, the **debtor continues to owe performance** and the **contract is not dissolved**. The creditor is obliged to wait for execution of the contract.

The debtor is not liable for breach of contract and the creditor (counterparty) may not seek default interest (Art. 345 GCC) unless he files a relevant lawsuit (Art. 346 GCC).

However, the contract must be executed as soon as the force majeure impediment ceases to exist; if not, debtor will be in default.

The counterparty (creditor) may terminate the contract in the following cases:

The element of time has been agreed as an important aspect of the performance itself

The delay has rendered the performance useless or considerably less valuable for the creditor

When the impediment which prohibits the debtor from performing is lifted, e.g. when lockdown measures are lifted, and the performance ceases to be legally impossible, then any further delay will result in **default of the debtor**.

14.What is an unforeseen change of circumstances and how can it resolve contract disruptions related to the pandemic?

In the aftermath of WWII, a truly innovative provision was included in the Greek Civil Code, namely Art. 388 GCC regarding unforeseen change of circumstances.

This GCC provision is based on the old legal maxim *rebus sic standibus*, meaning "things thus standing". This legal doctrine allows for a contract to become inapplicable or adjusted because of a fundamental change of circumstances. It serves as an exception to the general rule *of pacta sunt servanda* (promises must be kept).

The requirements for the application of Art. 388 GCC include the following

Reciprocal contract. Unilateral contracts, such as guarantees, or mandates are excluded.

Change in circumstances, upon which the parties based the conclusion of the contract. Both objective and subjective criteria can be used for the assessment of this condition.

The change in circumstances must be subsequent to the conclusion of the contract.

The change in circumstances must be **unforeseeable and exceptional.**

The debtor (the affected party) **must not be at fault** regarding the inability to foresee the change in circumstances.

As a result of the change in circumstances, the performance for one party must have become **excessively onerous.** Mere losses or difficulties in performing do not suffice. On the other hand, the complete economic ruin of the of the debtor is not required.

The contract **must have not been already executed in its entirety**.

A causal link between the change in circumstances and the excessive burden for the debtor must exist.

The legal consequences of the application of Art. 388 GCC are the following:

The judge may adjust the contract. The judge has broad powers to restore the equilibrium of the contract by either reducing or otherwise adjusting the performance of the debtor (e.g. by reducing the price of sold goods, by reducing the rent etc) or by increasing the counter-performance of the creditor (e.g. by increasing the price of sold goods, or by increasing the rent) or by setting a new time limit for performance or by abolishing onerous contractual terms etc.

The judge may decide upon the **partial or total dissolution** of the contract. Consequently, the obligation to perform becomes extinct and any performances that may have been received are returned by means of unjust enrichment (Art. 907 et se. GCC).

The legal effects of Art. 388 GCC require a *res judicata*, i.e. a final court decision issued (usually) by a second instance court. Therefore, interim measures or injunctions are almost always a necessity.

A general waiver of Art. 388 GCC will be deemed as unenforceable. On the contrary, concrete risk allocation is allowed.

Art. 388 GCC is obviously relevant for Covid-19 recession related contract disruptions.

The application of Art. 388 GCC is rather probable for contracts which were concluded before the outbreak of the pandemic. On the contrary, the condition of unforeseeablity makes the application of Art. 388 GCC less likely for new contracts, i.e for contracts that are concluded after the outbreak of the pandemic.

15.What is performance in good faith and how can it resolve contract disruptions related to the pandemic?

In recent years, Greek case law has gone beyond the strict requirements of Art. 388 GCC (unforeseeable change of circumstances) in order to allow further judicial intervention in cases of supervenient hardship.

The legal basis for such extensive judicial intervention in contracts is Art. 288 GCC which dictates that the performance of a contractual obligation is subject to the principle of good faith.

Greek case law invokes Art. 288 GCC in order to adapt contracts to changed circumstances in cases where the conditions of Art. 388 GCC are not met.

The conditions for the application of Art. 288 GCC pursuant to the above case law are:

·A permanent change in circumstances

·An excessive onerous performance for the debtor

·A causal link between the change in circumstances and the excessive burden for the debtor.

Therefore, a judicial adjustment of the contract pursuant to Art. 288 GCC can take place even if:

·The contract is not reciprocal, for example in case of a guarantee

·The change in circumstances was foreseeable

·The parties had foreseen the change in circumstances, but they had not foreseen the extent of the change in circumstances.

The legal consequences are very similar to those of Art. 388 GCC:

Adjustment of the contract by the judge, which can take many different forms:

reduction or increase in contract price

granting of a grace period for performance

partial or total dissolution of the contract

It should be noted that the effects of contract adjustment or dissolution require a res judicata, i.e. a second instance or equivalent court judgment.

Legal consequences are deemed retroactively effective, i.e. from the time of filing the relevant lawsuit.

Greek case law has applied Art. 288 GCC for the judicial adaptation of the following contract types

Sale and purchase contracts

Construction contracts

Commercial lease agreements

A waiver of Art. 288 GCC is invalid, since it is deemed that good faith cannot be set aside by the parties. However, a specific risk allocation can minimize chances for judicial interventions in the contact pursuant to Art. 288 GCC.

In essence, Art. 288 GCC could act as a way out of the unforeseeability restrictions in Art. 388GCC. Therefore, the Application of Art. 288 GCC could be deemed applicable even for contracts concluded after the outbreak of the pandemic.

16.What about contracts which were under negotiation but not yet concluded during the outbreak of the pandemic? Can a party seek damages in case the counterparty leaves the negotiation?

Many contract negotiations which had launched before the outbreak of the pandemic will be abandoned or, a party may try to renegotiate key terms of the intended agreements, such as the contract price.

In general, they can do so without limitations or adverse legal consequences, since the relevant GCC provision for liability at the stage of negotiations (Art. 198 GCC) requires fault. The change in circumstances brought by the Covid-19 pandemic will usually exclude fault for any party that leaves a contract negotiation.

However, the legal status is different if the parties have already entered into a preliminary contract (Art. 166 GCC). A preliminary contract is an enforceable agreement that obligates both parties to sign the final contract. A preliminary contract is subject to the same rules as a full contract, including impossibility and delay without fault, unforeseeable change of circumstances and performance in good faith. Therefore, a party cannot simply walk away from a preliminary contract, since this would be deemed as non-performance (to conclude the final contract) and, potentially, as breach of contract.

17.What about contracts that are concluded after the outbreak of the pandemic? Do the above rules for contract disruption apply to them as well?

Parties must be very careful with **new contracts**, i.e. contracts which are negotiated and concluded after the outbreak of the pandemic.

The main difference here lies with the requirement of unforeseeablity in many legal concepts of Greek law, such as impossibility and delay of performance without fault and unforeseeable change in circumstances pursuant to Art. 388 GCC. It is therefore highly recommended to use the most detailed possible force majeure and hardship clauses in new contracts. This will provide legal certainty and prevent lengthy and costly litigation.