

APRIL 7TH 2020

## COVID 19 IMPACT OF THE STATE OF EMERGENCY ON CIVIL CONTRACTS

A number of legitimate doubts have arisen as to whether the state of emergency recently declared, and yesterday extended until 17<sup>th</sup> April, with the aim of mitigating the effects of the Covid 19 pandemic, is likely to constitute unforeseeable circumstances or of *force majeure*<sup>1</sup> or an abnormal change in circumstances justifying the impossibility of fulfilling contracts or their alteration.

Following, we try to clarify some of them:

### 1. What is meant by unforeseeable circumstances or *force majeure*?

The Portuguese courts have defined an unforeseeable circumstance or a case of *force majeure* as a natural event or human action which, in itself and in its consequences, is unavoidable, unpredictable and insurmountable, making the fulfilment of an obligation arising from a contract impossible or overtly disproportionate, with no fault of the obliged contractors, thus exempting them from liability and the consequent obligation to compensate.

Classic examples of unforeseeable circumstances or cases of *force majeure* are extreme natural phenomena such as hurricanes, typhoons and storms, but also human acts such as wars, revolutions, strikes, among others.

Pandemics, such as that of Covid 19, can, in theory, also be considered an unforeseeable circumstance or a case of *force majeure*.

### 2. Does the state of emergency constitute a case of *force majeure* justifying non-compliance with the contract?

The analysis must be done on a case-by-case basis as it depends, of course, on the type of contract at hand.

Take the following examples:

Example 1 = A has contracted with B (company dedicated to the promotion of events) to hold his wedding party on 4<sup>th</sup> April 2020. Due to the prolonged state of emergency, B was

---

<sup>1</sup> The expressions are used interchangeably here.

prevented from doing so by the closure of its premises and the suspension of activities decreed by the Government.

The situation described above will constitute a case of *force majeure* preventing B from fulfilling his obligation to hold A's wedding party, in this case due to objective impossibility.

Example 2 = A (client) mandates B (lawyer) to prepare and file a law suit by the end of March. Due to the state of emergency, B was forced to leave the office and stay at home.

The situation described in this second example no longer constitutes a case of *force majeure* once it must be assumed that the service that B has agreed to undertake can be provided from home.

The above examples relate to two types of service contracts whose performance is affected differently by the state of emergency under which we live.

In the first case, it would be defensible to invoke *force majeure* as a reason that prevents the fulfilment of the contract, given the causal link between the measures taken to execute the state of emergency and the interruption of work, which would not be the case in the second.

Therefore, only depending on the specific case, may a certain situation call upon the concept of *force majeure* with certainty.

### **3. What is meant by abnormal change in circumstances?**

The legal regime of termination or modification of the contracts due to abnormal change in circumstances is generally provided for in articles no. 437 et seq. of the Civil Code.

From a legal standpoint, an abnormal change in circumstances corresponds to an anomalous and supervening change in the context under which the parties agreed the contract, which renders it unenforceable on the party affected by the change, giving them the right to terminate or modify the contract, on the basis of equity.

If the affected party chooses to terminate the contract, the other party may oppose such a decision by declaring that it accepts the modification of the contract in the manner referred to.

It should be noted that it is not any change in circumstances that gives the party affected the right to withdraw from or amend the contract, but only that change which implies a serious

opposition to the principles of good faith and which is not covered by the risks inherent to the contract.

#### **4. Does the state of emergency entail an abnormal change in circumstances?**

The answer also depends on the specific case.

Let's take another example:

A (owner of the work) hired B (building contractor) to carry out a work, agreeing that for the materials necessary to it, which B was in charge of obtaining, A would pay B €50,000.00.

As a result of the state of emergency declared in the meantime, and in particular of the restrictions imposed on freedom of movement, the price of materials increased by 80%.

In such a situation, B could claim that the state of emergency led to an abnormal change in the circumstances in which he contracted with A, since it cannot be invoked that such an abrupt and significant increase in the price of materials was covered by the risks of the contract.

In this case, B would have the right to terminate the contract or require A to modify it so that A, wanting to keep the contract, would bear all or part of the increase.

Should B only intend to terminate the contract, A could oppose such termination by agreeing to modify the contract to support all or part of the increase in the materials.

However, if the increase in materials had only been of 5% or 10%, it could hardly be argued that this would constitute an abnormal change in circumstances, insofar as such an increase is possible under normal market conditions and would, in principle, be within the contractor's profit margin on the resale of the materials. This means that it would be covered by the risks inherent to the contract and would not affect the principles of good faith which require B to perform the contract despite this increase.

#### **5. What is the difference between a case of *force majeure* and abnormal change of circumstances?**

Cases of *force majeure* invariably make it impossible to fulfil the obligation under the terms of the contract.

The abnormal change of circumstances does not prevent the fulfilment of the contract but, not being covered by the risks inherent to it, makes its fulfilment, in light of the principles of good faith, excessively onerous and, as such, unenforceable.

### **6. How can I know whether the state of emergency constitutes a case of unforeseeable circumstances or *force majeure* or an abnormal change in circumstances justifying the breach of the contract or an amendment of the contractual terms?**

It is therefore of crucial importance knowing whether the state of emergency is such as to qualify it as an unforeseeable circumstance or a case of *force majeure* that renders the non-performance of a contract lawful, or whether it constitutes an abnormal change in the circumstances in which the parties took the decision to contract, justifying its termination or, at least, its modification.

The previous and correct legal classification in a given contractual context, as set out above, may mean the difference between the legitimate refusal to comply with the contract or the request to modify it, and the (unjustified) total or partial non-performance of the contract, giving rise to liability.

In the vast majority of cases, such qualification is difficult, requiring a case-by-case analysis, making use of complex legal concepts, to which the contribution of doctrine and jurisprudence will be fundamental.

As a preventive measure, we advise on carrying out a survey and analysis of the contracts currently in force in order to assess the existence of clauses dealing with events of *force majeure* and/or abnormal changes in circumstances, in order to verify whether they identify situations that may give rise to one of the above-mentioned figures and, in the affirmative, the procedures to be adopted, in particular with regard to the possible need to notify the counterpart, within a certain period of time, so that the claim may be met.

Should it be concluded that the state of emergency constitutes unforeseeable circumstances or a case of *force majeure* justifying non-compliance with a particular contract, the party which intends to invoke it must do so as soon as possible, by notifying the other party in accordance with the law or the contract.

The same applies to abnormal changes of circumstances: if it is concluded that, in a particular contractual situation, the state of emergency is such that it can be qualified as an abnormal change in circumstances, the aggrieved party must communicate it to the counterpart, justifying it, and informing of the intention to terminate or modify the contract, in which case the new conditions under which he wishes the contract to be performed.

In that first case - termination of the contract - the other party may, as described, object. In such instances, it must also be communicated to the counter party in an expeditious manner, conveying its acceptance to the respective modification and the new contractual terms in which it must be performed.

The adoption of the above recommended measures may prevent the parties from adopting extreme positions and culminating in litigation.

## 7. Conclusion

Only a case-by-case analysis of the specific contractual situations would enable an understanding of the state of emergency as an unforeseeable circumstances or a case of *force majeure*, an abnormal change in circumstances, or neither.

Depending on the assessment made the consequences will, naturally, be different and in some cases may justify the non-fulfillment of the contract *tout court* (unforeseeable circumstances or *force majeure*), in others the modification of the contractual conditions according to judgments of equity (abnormal change of circumstances) and, still in others, not constitute grounds for either because, as previously mentioned, there will certainly be cases in which the state of emergency will not translate into one or the other of the figures that we have been addressing.

It is therefore advisable, prior to a unilateral decision to terminate or modify a given contract, to assess the impact the state of emergency may have on its performance and determine whether this impact is grounds for unforeseeable circumstances or a case of *force majeure* or an abnormal change in the circumstances in which the contract was concluded. This is so because, as we have tried to explain, it is conceivable that, for several types of contracts, the state of emergency does not configure any of these cases, in which case, such a decision may expose the party to the duty to compensate the other party.

---

**PARES | Advogados** is available to provide more detailed information on this and other topics that will more adequately suit the specific needs of each client, being able to offer all necessary support on this matter.

---

**Pedro Carreira Albano**  
[pca@paresadvogados.com](mailto:pca@paresadvogados.com)

---

This Newsletter is intended for clients and lawyers, shall not constitute publicity and its copying, circulation or any other form of reproduction is prohibited without the express authorisation of its authors. The information provided is of general scope and does not preclude seeking legal advice prior to any decision regarding the matter at hand. For further information please contact **Pedro Carreira Albano** ([pca@paresadvogados.com](mailto:pca@paresadvogados.com)).

Rua Alexandre Herculano, n.º 23 - 2.º  
1250-008 Lisboa Portugal  
T. +351 21.093.64.04 F. +351 21.093.74.07  
[www.paresadvogados.com](http://www.paresadvogados.com)  
[geral@paresadvogados.com](mailto:geral@paresadvogados.com)