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Impact of Coronavirus Emergency on Contract Law

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Covid-19 pandemic and Greek Contract Law

Zafeirios N. Tsolakidis

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* Associate Professor of Civil Law at National & Kapodistrian University of Athens.

I. The Covid-19 pandemic and its impact in contracts

The legislative act[1] "Urgent measures to prevent and limit the spread of coronavirus" was issued on February 25th, 2020 and on February 26th, 2020 the first case of Covid-19 coronavirus in Greece was confirmed. The World Health Organization declared the outbreak of Covid-19 as a pandemic on March 11th, 2020. Following the first legislative act, eight more and numerous ministerial decisions were issued, imposing measures which aimed at limiting the spread of the coronavirus by restricting social and trade contacts [suspension of the operation of businesses and shops, prohibition of activities, etc (lockdown)].
The pandemic itself, as well as the drastic regulatory measures taken to limit it, have had a direct or indirect effect on contractual relations in many different aspects. To name only a few, one could mention effect of the pandemic itself on contracts (e.g. inability of an enterprise to handle orders because its staff has fallen sick), effect of measures against the pandemic on contracts (e.g. failure to perform because the debtor's business was locked down) and legislation directly affecting existent contracts (e.g. legislative acts reducing the rent when the lessee's enterprise was locked down).
The purpose of this short essay is to present how the above-mentioned consequences of the pandemic[2] on existent contracts are regulated by Greek Law. For this purpose, three topics are examined: general contract law provisions on breach of contract that are applicable to regulate the effects of the pandemic; special regulation during the pandemic period which directly affects existent contracts; means that the contracting parties may use to face the effects of the pandemic on contracts.

II. General Contract Law Provisions

II.1. Impossibility

The proper and timely performance of contractual obligations has been hindered in a great extent, either directly by the pandemic, or because of the lockdown measures implemented by the State. In such cases, the debtor was not able to perform in time.

[1] According to art. 44 of the Greek Constitution, in urgent cases, the President, on proposal of the Cabinet, can issue legislative acts, which must be submitted to Parliament's approval within forty days of their adoption.

[2] Henceforth, mention to the effects of the pandemic on contracts shall be considered to cover both the direct effects of the Covid-19 pandemic itself and the effects of the special legislation that was implemented to face the pandemic (social distancing measures, enterprise lockdown etc).

In Greek law, by "impossibility" is meant irretrievable (not temporary) impossibility[3]. As a result, the above-mentioned delay would not lead to impossibility of performance. An exception would be accepted in two instances:
(a) In the case of fixed-day contracts, when the performance of the obligation is, by its nature, in accordance with the contractual purpose only within a specific period, while late fulfilment renders the performance useless for the creditor[4].
(b) When this is demanded by the principle of good faith (Art. 288 of the Greek Civil Code, henceforth GrCC), when, for instance, the nature of the performance is such that it would be of little use to the creditor if he were to wait for an undefined period of time.
In these cases, even the temporary delay of the debtor shall be considered *an impossibility to perform*. The debtor will not be at fault, since the impediment (the pandemic and the State measures) are to be considered a force majeure event[5]. Therefore, in the case of reciprocal contracts, according to art. 380 GrCC the debtor is released, and the creditor is also released from the duty to fulfill the counter-performance. If the counter-performance is already fulfilled, it is sought by means of the provisions of unjust enrichment (art. 904 GrCC).

II.2. Debtor's default

When the debtor delays fulfilling the performance, he is not necessarily in default, since he must be at fault for the delay (art. 342 GrCC). As it has already been noted, the delay because of the pandemic or of the State measures cannot be attributed to the debtor's fault. As a result, the debtor is not in default and the creditor is not entitled to rescind the contract.
However, art. 401 GrCC reads: "*If it has been agreed that the performance is to be fulfilled exclusively at a specific time or within a certain period, in case of doubt the creditor is entitled to rescind the contract because of the delay, regardless of the debtor's fault*". According to the Greek Supreme Court, the rule applies when "*the delayed fulfillment of the performance is feasible, and, possibly, useful to the creditor also at a later time, although it has been agreed that it cannot constitute proper fulfillment*"[6]. If this provision is met, the creditor will be entitled to rescind, even though the delay because of the pandemic will not lead to the debtor's default.
Otherwise, the only solution for the creditor would be to refer to the principle of good faith and claim that, given the specific circumstances, it cannot be reasonably expected

[3] Stathopoulos, *Law of Obligations, General Part*, (5th ed., Sakkoulas 2018- in Greek) § 19 nr. 70; Ap. Georgiades, *Law of Obligations*, *General Part*, (2nd ed., P.N. Sakkoulas 2015-in Greek) § 24 nr. 39; Areios Pagos (Greek Supreme Court, henceforth AP), 514-515/2010.

[4] Stathopoulos, op. cit., § 17 nr. 15, § 19 nr. 71; Ap. Georgiades, op. cit., § 24 nr. 40, § 52 nr. 36; AP 1636/2018 1369/2007.

[5] According to Greek jurisprudence, force majeure events are events that cannot be predicted or averted even by measures of extreme care and prudence. Indicatively AP 1059/2019; 275/2019; 599/2018.

[6] AP 1636/2018; 1369/2007. See also Stathopoulos, op. cit., § 21 nr. 104 ff.

from him to tolerate the delay. However, given that, according to Greek Law, breach of contract requires fault, rescission grounded exclusively in the principle of good faith will only be accepted in exceptional cases.

II.3. Creditor's default

Non acceptance of the performance is termed "creditor's default". If the creditor does not accept the performance, or if he does not co-operate in the preparation of the offer and the fulfilment, he is in default, even if he is not at fault for the non-acceptance. Fault is not a condition for creditor's default[7]. As a result, if the creditor were unable to accept the performance because of the pandemic and the State measures (e.g. his enterprise was locked down), he would nonetheless be considered in default.

According to art. 381 par. 2 GrCC (which governs reciprocal contracts), if an impossibility of performance occurs while the creditor is in default, the debtor of the impossible performance is released, but the creditor continues to owe the counter-performance. This rule, however, is obviously disproportionate when the creditor was in default without being at fault, especially if the non-acceptance of the performance was a result of force majeure. As a result, the prevailing view accepts that, if the performance becomes impossible while the creditor was in default due to force majeure both the debtor and the creditor are released[8]. For instance, if a farm agreed to supply a hotel group with meat for Easter meals, and the hotels were unable to accept the performance due to the lockdown, not only will the farm be released from the obligation to provide the meat (since that was a fixed-day contract), but the hotel group will also be released from its obligation to pay the agreed price.

III. New regulatory provisions

In certain cases, the extraordinary legislative acts were not limited in restrictive measures, but directly regulated private law relations, establishing or altering existing rights and obligations. The purpose of the legislation in such cases was not the limitation of the pandemic, but mainly the treatment of the economic consequences of the restrictive measures on certain categories of citizens, who are "severely affected"[9]. Indicatively[10]:

[7] Stathopoulos, Op. cit., § 20 nr. 5; Ap. Georgiades, op. cit., § 27 nr. 2; Tsolakidis, in *Georgiades (ed.)*, Short Commentary of the GrCC I, Introd. 349-360 nr. 5.

[8] Stathopoulos, Op. cit., § 21 nr. 92 ff.; Ap. Georgiades, Op. cit., § 29 nr. 23; Chelidonis, in *Georgiades (ed.),* Short Commentary of the GrCC I, 381 nr. 15.

[9] Enterprises which are considered "severely affected" and are entitled to several forms of State aid are defined by ministerial decisions.

[10] See further Tsolakidis, Pandemic and private law: legislative intervention in existing relationships, Chronicles of Private Law (Journal) [2020], p. 391 ff.

III.1. Contracts of Lease

According to the second article of the Legislative Act of 20.3.2020 (as amended by art. 26 of L. 4683/2020 and expanded by several ministerial decisions) lessees in certain contracts of lease[11] are released from the obligation to pay the 40% of the total lease for the months of March and April 2020. Thus, the provision alters existing obligations, regarding *the object of the performance*. It is explicitly stated that "The partial non-payment of the rent referred to in the first subparagraph shall not give the lessor the right to terminate the contract or raise any other civil claim against the lessee". The legislator seems to have "split the damage" of the lockdown between the lessor and the lessee, since the lessee is not completely released, even if he was locked down[12]. The question whether either part may seek a (further) judicial adjustment of the rent remains open (see IV, 2).

III.2. Commercial papers

According to the second article of the Legislative Act of 30.3.2020, between March 30th and May 31st, all maturity dates and terms for presentation or payment of commercial papers (checks, bills of exchange, promissory notes etc) owed by enterprises which were locked down or "severely affected" by lockdown measures are prolonged for 75 days after the maturity date contained in each paper. In these cases, the obligation is not affected regarding its amount, but only regarding the day it falls due. However, the debtor is not hindered to pay before the prolonged maturity date.

III.3. Flights, sea trips and travels

As mentioned above (II, 1), in case of an impossibility to perform in reciprocal contracts, if the debtor is not at fault, both he and the creditor are released. Performances already fulfilled are sought by means of the provisions of unjust enrichment. The provision of art. 908 GrCC imposes the return of the "thing received": the enrichment is to be returned in natura.

According to the Legislative Act of 13.4.2020 (art. 61, 65, 70, 71) in case of a cancellation or termination of a flight, a sea trip, a package travel or a contract between tourist enterprises, the entity (airline, tour operator etc) that has received a counter payment has the right, instead of returning the counter payment, to issue a voucher with a duration of 18 months. It must be noted that the consent of the creditor for the issue of a voucher instead

[11] Lease of an immovable used for the carrying on in it a trade or other occupational activity, if the enterprise was locked down or severely affected by lockdown measures; financial leasing contracts of movables and immovables concluded by such enterprises; lease of an immovable used as a main residence of employees working in the above-mentioned enterprises, whose employment contract has been suspended by their employer during the lockdown; etc.

[12] According to art. 596 GrCC "*The lessee shall not be released from the obligation to pay the rent if he is prevented from using the leased thing for reasons relating to him*". Greek theory and jurisprudence conclude an e-contrario rule, that the lessee is released if he is prevented to use the leased thing by force majeure.

of the return of the enrichment in money is not necessary[13]. The effect of the issue of the voucher is that the monetary claim is not considered due and actionable. Henceforth, there are two options: If the receiver of the voucher uses it, the monetary claim is discharged; if the receiver does not use the voucher within the 18 month period, the monetary claim becomes due and actionable again and the creditor is entitled to seek the reimbursement.

III.4. Employment Contracts

Certain extraordinary provisions aim to aid employers that have been locked down, or seriously affected by the restrictive measures. For instance, they had to right to suspend the employment contracts of their staff during the lockdown (art. 11 par. 2 of the Legislative Act of 20.3.2020). However, if they exercise that right, they are not allowed to terminate the employment contracts and are also obliged, after the suspension, to keep the same number of employees for a period equal to the suspension period. Respectively, employers who adopted a system of distance-(tele)working or exercised the right to move employers to other companies of a group are, as long as they retain the measure "expressly prohibited to terminate employment contracts for all their staff, and if they do so the termination is void".

IV. Pandemic and contractual clauses

IV.1. Force majeure clauses

The contracting parts might have regulated the effect of force majeure events in their contract by adopting provisions regarding the adjustment of rights and obligations in case of unpredicted or unavoidable events. This would be the case with the internationally known as "hardship clauses" or "MAC clauses"[14]. As is obvious, this option will be more important in the future, since a comeback of the pandemic is expected in the forthcoming months. In this case, the question could be raised whether the pandemic could still be considered a force majeure event. However, it has to be noted that Greek jurisprudence, when defining force majeure events, emphasizes not mainly in their unpredictable but in their *unavoidable* nature "even with measures of extreme diligence and prudence"[15].

[13] In this sense, it is highly likely that the regulation under discussion will be judged to contravene the European Union Legislation, since its provisions read that the issue of a voucher instead of monetary reimbursement requires the consent of the creditor [Art. 7 par. 3 of Regulation (EC) No 261/2004 of 11 February 2004; Art. 18 par. 3 of Regulation (EU) No 1177/2010 of 24 November 2010].

[14] See Karampatzos, Pandemic (Covid-19): Contractual relations and emergency law – in particular force majeure clauses, Chronicles of Private Law [2020], 378 ff.

[15] AP 1059/2019; 275/2019; 599/2018.

Art 332 par. 1 GrCC forbids clauses that exclude liability from willful conduct or gross negligence. Par. 2 extends the prohibition to limitation of liability for slight negligence, when, among others the exoneration was contained in a contract term which was not an object of individual negotiation. Art. 2 par. 7 L. 2251/1994 (on the protection of consumers) regards General Terms of Business as void if, among others, they "excessively preclude or limit the liability of the supplier". However, contractual regulation of the effects of force majeure events, as the current pandemic, will not probably be considered to be forbidden by these rules.

It is not certain that any hardship or MAC clause also covers the current pandemic. This judgement requires an interpretation of the clause, which (when Greek Law is applicable) is regulated by art 173 and 200 GrCC[16]. For instance, it is a matter of interpretation if the parts, that did not refer to a "pandemic" or a "health emergency", nor did they include a "catch-all provision" (such as "any similar cause beyond the debtor's control"), meant to exclude or limit liability also for cases similar to the covid-19 lockdown.

IV.2. Judicial adjustment

As has already been mentioned, the pandemic and the lockdown measures are to be considered events beyond the parties' control. Greek Law provides possibilities for a party to seek the judicial adjustment of an existing contract, under certain conditions. Specifically:

(a) Art. 388 GrCC lays down that when a change in the circumstances upon which the parties based the conclusion of a reciprocal contract has subsequently occurred, if the cases that have brought about the change were exceptional and unforeseen and, as a consequence, the performance of one of the parties has become excessively onerous, that party has the right to seek judicial adjustment or (total or partial) dissolution of the contract.

(b) The Greek jurisprudence accepts that, whenever the conditions of art. 388 GrCC are not met, there is a possibility of resorting to art. 288 GrCC (obligation to perform according to the principle of good faith). This is considered the case when the change was not completely unforeseen, but the turn of events exceeded the risk that the parties calculated and undertook, or when the performance has not become impossible, but still the balance between performance and counter performance has changed to an extent that contravenes good faith[17].

The above mentioned rules will most probably ground claims for adjustment of continuous contracts (long term-leases, credit contracts, service contracts) on the basis that the pandemic, and the financial recession which will follow constitutes a material, unforeseen

[16] Art. 173 reads: "When interpreting a declaration of will, the true intention shall be sought, without adherence to the words". Art. 200 reads: "Contracts shall be interpreted according to the requirements of good faith, considering also common usage".

[17] AP (plenum) 3/2014; AP 1396/2019; 1088/2017; 334/2015; 1353/2013; 806/2012.

change of circumstances, which severely altered the balance between performance and counter-performance, and justifies the judicial (ex nunc) adjustment of the contract.