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COVID-19

Letters of commitment to hire: impact of the Coronavirus emergency

More and more often, companies have to deal with situations where they are unable to meet commitments to hire they had undertaken in writing before the COVID-19 emergency, because of the hardships they are experiencing as a result of the government restrictions.

It is therefore important for them to understand whether and to what extent they are entitled to claim force majeure or "*impossibilità sopravvenuta*" (unexpected impossibility to comply) as a remedy to excuse non-performance of their contractual obligations, should they decide not to go forward with the hiring process.

We provide below an overview of the possible cases.

1. COMMITMENT TO HIRE OR LETTER OF INTENT?

It is first of all necessary to analyze the exchanges between the parties concerned to establish the exact nature of their undertakings, because in some cases the letter signed could constitute a generic **letter of intent** reached in negotiations between the parties, rather than an actual commitment to hire. If this was the case, the Company's withdrawal from the negotiations could give rise to pre-contractual liability pursuant to article 1337, should it be possible to demonstrate that the letter of intent had resulted in the worker's legitimate expectation that an employment contract would be concluded.

Despite some disagreement, the majority of court decisions are in favor of the application of the rules on **tort liability**; this has two consequences:

- On the one hand, the Company will not be able to invoke the remedies to avoid contractual liabilities, such as *force majeure* and "*impossibilità sopravvenuta*" (unexpected impossibility to comply);
- On the other hand, the allegedly harmed worker will have the burden of proving the company's liability for damages due to willful misconduct or gross negligence.

2. LETTERS OF COMMITMENT TO HIRE: BREACH OF OBLIGATION

A **commitment to hire** arises if the letter clearly states the company's intention to hire the worker; the letter may be signed either by the employer alone or by both the employer and the worker: in either case it constitutes a **preliminary employment contract** (provided that it contains the essential elements of such a contract, i.e., level of employment, position, remuneration, term of employment etc.) and therefore compels the company to hire the candidate on the agreed terms and conditions. The employer's failure to comply with the obligations assumed under a preliminary employment contract may give rise to contractual liability pursuant to article 1218 of the Italian civil code; in this event, the worker may take legal action to claim:

- The issue of a court decision producing the legal effects of the employment ("*sentenza costitutiva*"), or, as an alternative
- The termination of the contract.

In both cases, the worker may claim damages and will only have the obligation to prove the fact which caused the damage (i.e., the company's failure to employ him/her), whereas the employer will have the burden of proving that breach of its obligations was due to reasons beyond its reasonable control and, if applicable, may invoke the reasons for extinction of the obligation.

3. THE REASONS FOR EXTINCTION OF THE OBLIGATION: *IMPOSSIBILITÀ SOPRAVVENUTA* (UNEXPECTED IMPOSSIBILITY TO COMPLY WITH THE OBLIGATIN) AND FORCE MAJEURE

Article 1256 of the Italian civil code provides that an obligation ceases to exist when performance of such obligation is impossible for reasons beyond the obligated party's control. Such impossibility must be absolute and objective: it must not be merely a difficulty or an increased burden, but an impediment which cannot be removed; in other words, the obligation cannot technically be performed. Furthermore, impossibility to perform must arise at a later time and must be beyond the defaulting party's control.

If, instead, performance of an obligation is only temporarily impossible, as long as the state of impossibility persists the defaulting party will not be liable for late performance.

Some court decisions have stated that an **order by an Authority** ("*factum principis*") can be regarded as a case of impossibility to perform, provided that:

- any such measure was not reasonably and easily predictable, by exercising ordinary care, at the time the obligation was undertaken, and
- the defaulting party has exercised his ordinary care in seeking to override the public authority's resistance or refusal (Italian supreme court decision no 14915/2018).

Force majeure is often regarded as an excuse for non-performance: it is defined as an unpredictable event which cannot be averted, an external force which poses an absolute obstacle (such as riots for instance).

Can an epidemic, like the COVID-19 outbreak, be regarded as an event of force majeure? Some legal systems consider epidemics as Acts of Gods – which are events not controlled by humans – rather than as cases of force majeure – which may be the result of human actions. **The Italian civil code, however, makes no express provision for force majeure**: its notion is the result of expert and court interpretations and therefore has significant application issues.

4. LETTERS OF COMMITMENT TO HIRE AND POSSIBLE REASONS FOR EXTINCTION OF THE OBLIGATION

Let us now ask ourselves whether the above reasons for extinction of an obligation apply to noncompliance with a preliminary employment contract resulting in the company's failure to employ the worker.

Italian Supreme Court decisions tend to go in the direction of rejecting **economic hardships and business crises as sufficient basis to excuse the employer from breaching his obligation to hire**. The Supreme Court has expressly declared that nonperformance with this obligation may be excused only by the occurrence of an event which makes it objectively and absolutely impossible to perform the obligation (e.g., the cessation of business or the unavailability of the company's premises – decision no. 11121 of 26 July 2002), but not by mere financial difficulties (decision no. 1399 of 20 January 2009) or manufacturing problems, including in connection with a business crisis that has been formally ascertained (decision no. 9307 of 13 July 2000).

These court decisions were obviously issued at a time when the adverse economic impact of the pandemic could not possibly be predicted. Nonetheless, we cannot disregard the approach taken in these decisions, which is consistent with the general principles on the matter: however significant, economic hardships do not per se make it technically impossible to perform an obligation.

5. DECREE *CURA ITALIA*: FORMALIZATION OF FORCE MAJEURE?

Article 91 of Decree-Law no. 18 of 17 March 2020 ("*Cura Italia*") - concerning "*provisions on late or non-compliance in connection with the implementation of the containment measures, and on the advance payment of price in public contracts*" – introduced a provision providing protection for parties in breach of their contractual obligations as a result of the restrictive measures put in place to cope with the COVID-19 emergency.

The rule provides that "*Compliance with the containment measures under this decree shall be evaluated to exclude, within the meaning and for the purposes of article 1218 and 1223 of the Italian civil code, the defaulting party's liability, also in connection with applicable time bars or the infliction of penalties for late or non-compliance*".

Although some experts consider this rule as the standardization of the case of force majeure, the Decree does not introduce a general principle but simply strengthens the existing provisions. The rule simply provides that the Judge shall "evaluate" whether compliance with the emergency rules constitutes grounds for the exemption from contractual liability.

It will therefore be possible to evaluate the scope of this provision only at the time of its interpretation by courts. For the time being, the provision has been solely incorporated in the "*Protocollo condiviso di regolamentazione delle misure per il contrasto e il contenimento della diffusione del virus COVID-19 negli ambienti di lavoro del settore edile*" (protocol regulating the measures to combat and contain the spread of COVID-19 in workplaces of the construction sector) signed on 24 March 2020, which contains a standard clause for the exemption from liability with regard to building yard activities.

The broad scope of the rule could be useful to companies in the event of disputes deriving from the breach of preliminary contracts, including commitments to hire.

6. CONCLUSIONS

The circumstance that the employer may find it difficult, or even impossible, to hire a worker due to the public health emergency and the temporary shutdown or reduction of its activities, may not justify a definitive refusal not to employ him/her as originally agreed.

Instead, subject to a case-by-case evaluation, the company may invoke a temporary impossibility to comply with its commitment to hire and request that hiring be deferred until the situation goes back to normal.

In this event, the company concerned should send the worker a letter outlining:

- its objective difficulties in complying with its commitment due to the public health emergency, briefly specifying the reasons for its inability to hire him/her;
- the need to postpone employment to a subsequent time, when business activities are resumed.

For additional information, please contact:

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