



# COVID-19 emergency - Force majeure certificates issued by the Chambers of Commerce in Italy

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## The Circular of MISE dated March 25, 2020

On March 25, 2020, the Ministry of Economic Development ("*Ministero dello Sviluppo Economico*", MISE) adopted the Circular No. 0088612 addressed to Unioncamere, CCIAA and the relevant trade associations, providing for the possibility for the Chambers of Commerce to issue, upon request of the firms, a certificate attesting the state of sanitary emergency of COVID-19 in Italy and the subsequent restrictive measures imposed by law.

The publication of the Circular followed the request by Confindustria aimed at permitting the issuing of certificates of the Chamber of Commerce attesting the existence of "force majeure" events, in line with the practice of the Chamber of Commerce of some foreign jurisdictions.

In fact, as informed by the MISE, a lot of supply contracts with foreign suppliers provide for clauses requiring the delivery of such certificates by a party in order to be able to invoke the existence of force majeure circumstances, which led to a breach of contract.

The certificate shall be issued in English and can be submitted by Italian firms to foreign counterparties they have ongoing supply contracts with, in order to communicate impediments in the execution of their contractual obligations because of the health emergency due to COVID-19.

In terms of the exact contents of such certificate, the Chamber of Commerce attests to have received a declaration from the requesting firm, according to which it cannot fulfil its contractual obligations for unforeseeable reasons that are independent from its will and capacity, due to restrictions imposed by the governmental authorities and the current state of emergency.

Hence, when issuing the certificate, the Chamber of Commerce has to rely solely on what was declared by the requesting firm that intends to invoke the "force majeure" clause.

Consequently, as indicated in the declaration scheme circulated by Unioncamere, the Chamber of Commerce will not assume any responsibility regarding the truthfulness of the facts and events related to the received declaration and it will have no verification obligation of the latter.

Therefore, it is not possible to exclude that the foreign counterparties may challenge, on a case by case basis, the existence of the actual impossibility of fulfilling contractual obligations due to a "force majeure" event, taking into account various factors, such as the occurrence of the event on contractual performance and the absence of alternative solutions

for the fulfilment of the obligations.

## Confindustria's proposal of amendment of the "Cura Italia" Law Decree

It should be noted, that the aforementioned Circular of MISE includes the possibility for Italian firms to use the Chamber's "force majeure" certifications within the context of international contracts with foreign counterparties.

The possibility of using such documents in connection with national contracts, concluded with Italian counterparties therefore seems to have been banned (or at least not expressly allowed).

However, firms also could be interested in presenting such certificate, declaring that the breach of contract is due to a force majeure event also to its national counterparties within national contracts. The document could in fact serve as proof, required according to Article 1218 of the Italian Civil Code in order to justify the breach of contract or delay in the fulfilment of contractual obligations for reasons that are not attributable to it.

In the light of such considerations, Confindustria, in order to extend the scope of the Chambers's declarations, proposed an amendment consisting of enabling the Chambers of Commerce to issue "force majeure" certificates attesting the temporary or definitive impossibility of the due contractual obligation or the relevant excessive onerousness ("eccessiva onerosità") regardless of the national or international nature of the contract. The proposal was made in the context of the conversion proceeding of the "Cura Italia" Law Decree.

According to the new paragraph 2 bis of Art. 91, as proposed by Confindustria, the certificate shall be issued to firms party to contracts having deferred, continued or periodic execution, if at least one of the following situations occurs:

- activity suspension according to the containment measures;
- activity suspension of the company departments non-essential for production according to the containment measures;
- activity suspension due to workplace adjustments according to the anti-contamination security protocols; and
- certified and significant delays in supplies related to the suspension of the suppliers' activities, to the difficulty of freight transportation or to prohibitive measures from other countries applicable to suppliers.

The MISE would also have the possibility to determine further conditions for the issuing of such "force majeure" certificates by means of a Decree within 15 days of the enactment of the law converting the "Cura Italia" law Decree.

One of the most significant aspects of the proposed amendment text, is that the obtainment of the "force majeure" certificate would exclude the debtor's responsibility pursuant to Articles 1218 und 1223 of the Italian Civil Code.

The value of such certificate of the Chamber Commerce would therefore be different to the one that the Chamber of Commerce can issue according to the Circular of the MISE.

In fact, with the latter, the Chamber of Commerce solely acknowledges the fact of having received a declaration from the requesting firm, in which it affirms not to be able to fulfil its contractual obligations due to the restricting regulations adopted by the Italian government in order to contain the risks resulting from the current health emergency.

In the new "force majeure" certificates provided for by the amendment under discussion, however, the Chamber of Commerce would certify the actual temporary or definitive impossibility of the due contractual obligation or the relevant excessive onerousness ("eccessiva onerosità") given the occurrence of certain circumstances affecting the firm due to the COVID-19 health emergency. Therefore, the occurrence of such circumstances would be sufficient in itself to demonstrate that the breach of contract or the delay is due to a cause not attributable to the debtor, as provided for by Article 1218 of the Italian Civil Code, in order to exclude the compensation obligation for the party in breach of contract.

The certificate would have to be issued by the competent Chamber of Commerce (namely the one of the territorial area in which the firm has its registered office) within 15 days.

The amendment proposed by Confindustria would be of help to Italian firms in managing disputes with national and international counterparties, permitting them to invoke the event of "force majeure" for COVID-19 and to avoid the payments of penalties or other consequences that could compromise its own commercial relations.

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