

## **CORONAVIRUS OVERCOMING THE DIFFICULTIES**

# **COVID 19: WHEN A DISASTER MOVIE BECOMES TRUE. PLANNING COMMERCIAL AND LEGAL PITFALLS AND CHALLENGES IN THE GLOBAL ENTERTAINMENT INDUSTRY. ITALIAN AND US APPROACHES**

DE BERTI JACCHIA FRANCHINI FORLANI  
STUDIO LEGALE

Disaster movies are one of Hollywood's oldest and most popular genres; during the Covid-19 outbreak, the Los Angeles Time has described how Hollywood is discovering that reality is more frightening than its own disaster movies.

An invisible enemy that has emptied our streets and cities, people locked in their houses, Heads of State announcing the state of emergency on television: the Hollywood creativity has often anticipated – and sometime overdone – all possible apocalypses, serving up countless imaginary catastrophes.

Having a look to the current events and the increasing numbers of infections and deaths, as daily reported by the WHO (World Health Organization), not even the most creative Hollywood screenwriter could have imagined and created a script on the huge impact and length of the pandemic spread of Covid-19. Indeed, the entertainment industry in general and Hollywood in particular has been one of the first players to fear and react to what, unfortunately, has become a worldwide emergency.

If the "quarantine of entertainment" will continue for more than few months, industry experts estimate that up to \$ 20 billion will be lost this year. So far it has been a *crescendo* of fatal news: actually, one of the first ones came from Italy that, as everyone is aware of, since mid-February, is heavily affected by the infections and every day is counting new infections and deaths. Already in February the shooting of "Mission: Impossible 7" stop was announced when Christopher McQuarrie had already scheduled three weeks of filming of this mother of all blockbusters with Tom Cruise in Venice, at that time already lashed by the virus.

But what could be the legal consequences of this forced stop, how can this be managed from a legal perspective and would it be possible to successfully go through this huge challenge that seems to be even harder than those usually featuring in the Mission Impossible franchise?

Thoughtful and comprehensive planning is surely one of the main ingredients for creating a good and useful recipe. But it might not be enough. Understanding the several legal issues associated with the Covid-19 outbreak might be even more important, not only to try to find solutions for future planning, but also to learn from the lessons that have been administered, with many disruptive consequences.

As a transactional lawyer, I wish to put my attention especially on contracts, focusing on at least one good lesson to be learnt out of this extraordinary event, together with one prediction. The lesson to be learnt is that transactional lawyers will need to take into due account the possible occurrence of events like the Covid-19 outbreak when negotiating and drafting new contracts within the entertainment industry (but not only), bearing in mind that the relevant contractual clauses shall have different nuances depending on the applicable law. The prediction is that one of the only few sure things regarding Covid-19, is that litigation on existing contracts is likely to spread even faster than the virus itself, which means a lot of potential work for “litigators”.

Many contracts in the industry are going to be breached, including films that might not be completed, release commitments that will not be met, deadlines (including for delivery) that are likely to expire and default in performance by both “above-the-line” talents and “below-the-line” players. The big question is whether performance and/or non-performance can be excused or delayed without liability to the breaching party. In this respect, reference is particularly made, among others, to potential claims relying on contractual force majeure provisions and claims of impracticability excusing performance. Further, as the entertainment industry is more and more globalized, with an ever-increasing number of international co-productions, both common law and civil law universes will be involved.

The doctrine of force majeure originated in civil law systems. However, although this concept appeared for the first time in the Napoleonic Code of 1804, there are not many Civil Law systems that expressly describe what should be understood by the term “*force majeure*”. Italian law does not provide for a clear definition of “*force majeure*”, as there is no statutory provision expressly dedicated to such event. An indirect reference can be found in Article 1467 of the Civil Code, mentioning “*extraordinary and unforeseeable events*”. It is therefore for the case-law to define this principle - which involves circumstances not attributable to the parties that make it impossible to fulfil contractual obligations – and its concrete applications, on a case by case scenario. It is believed that the spread of Covid-19 may, in principle, operate as a cause of force majeure in the event of delay or non-compliance with contractual terms and this regardless of the fact that a force majeure clause is included or not included in the contract, taking however into due consideration the peculiarities of each case as it will be considered and interpreted by the Court.

The provision of a force majeure clause in contracts has, in any event, become common practice in Italy and this also with the aim to facilitate the application of the concept by the Courts, based on the specific qualification contractually agreed upon by the parties. Typically, inclusion of a force majeure clause in a contract governed by civil law would allow the parties to avoid liability arising from default, when the latter is due to “*facts, absolutely unforeseen and unforeseeable according to best scientific knowledge and expertise, that are caused by events which are totally out of parties’ control and which are not linked to any acts or omissions by same parties*” (General Terms and Conditions of RAI, the Italian State National Broadcaster). It is worth noting that, in Italy, case law would not consider this avoidance of liability as automatic, as along with the alleged force majeure concurrent circumstances have to occur, such as (i) no alternative solution did exist to comply with the obligation impacted by force majeure, (ii) the party affected by force majeure complied with all other obligations of the contract, and (iii) the party affected by force majeure promptly warned the other party and adopted reasonable measures to mitigate any impact

In any event, should the contract be entered into during the emergency period, force majeure cannot be relied upon.

Finally, it should be noted that, pursuant to article 1256 of the Italian Civil Code, the obligation is deemed in any case exhausted when, for reasons not attributable to the debtor, performance becomes “*impossible*”; if this impossibility is only temporary, the debtor is not responsible for the delay in performance.

Besides contractual provisions, it has to be borne in mind that in these very days Italy enacted special legislation (D.L. 18/2020, so-called "*Cura Italia*") providing, *inter alia*, that compliance with measures imposed by the Government to contain the Covid-19 pandemic will always have to be evaluated in Court to balance alleged defaults and related consequences (forfeitures, belated/missed payments, etc). With particular reference to the Entertainment Industry, the Decree suspended events, shows and performances of any kind, held in any place, both public and private, as well as the opening of museums and other cultural institutions and venues from 8 March 2020 to 13 April 2020 (deadline subject to further extensions).

The following provisions of the above mentioned Decree "*Cura Italia*", address specifically and directly the operators of the entertainment industry:

- a) Article 38 provides for the recognition of an indemnity to workers in the entertainment industry for the month of March equal to Euro 600.
- b) Article 88 provides for the reimbursement of tickets for shows and museums and therefore affects both companies operating in the sector and consumers. Reimbursement may be requested in relation to tickets for performances of any kind, including cinema and theatre tickets, and entrance tickets to museums and other places of culture.
- c) Article 89 establishes a specific emergency fund ("*Fondo Emergenze Spettacolo*"). This provision shall in any case be subsequently implemented pursuant to further measures to be adopted.
- d) Article 90 provides for further facilitations in the field of copyright, i.e. it provides for the allocation, in support of authors and artists, of 10% of all private copying fees collected in 2019.

Turning to the US, also in this legal system there is no general law concept of force majeure. Force majeure is treated as a "creature" of consent, and – as such – will apply only when a force majeure clause is included in a contract. Therefore, if a contract does not contain a force majeure clause, you need to rely on one of two defenses that are implied by law. The first one is the doctrine of "impracticability": many US Courts (*inter alia*, California Courts) will excuse a breach of contract if an unforeseeable event makes performance impracticable, by causing a very high level of difficulty or extra expense for the breaching party if it were to perform under the contract. This rule applies only if (i) the event is beyond the control of the breaching party and (ii) such party has not expressly taken the risk of the occurrence of such event. In our case, by applying this rule, on one side, a breach may be excused if the contract was entered into before the spread of Covid-19 (an event that *per se* should be considered unforeseeable at least before the beginning of this year); on the other side, the fact that contractual performance becomes impracticable, should be evaluated on a case by case basis. For example, an actor refusing to perform or shoot in Milan (Italy) in February might be excused, while the simple fear to perform during the same period (and therefore before the pandemic emergency was declared) in LA might not be excused. By the same token, also failure of a production company to deliver or of a studio to release a film due to the fact that actors have not shown up, should be excused and this regardless if the actor did not show up for shooting in Milano or in LA.

The second defense is the doctrine of "frustration of purpose", which might be invoked within the entertainment industry contractual universe. In addition to the other requirements described above with regard to the doctrine of impracticability, such doctrine also requires that (i) the unforeseeable event destroys the purpose of the contract and that (ii) the other party was aware of that purpose at the time when the contract was entered into. For example, if a Studio has committed to substantial marketing efforts in strict connection with a film release and the same film is delayed due to Covid-19, if the Studio breaches the contract, it can use the "frustration of purpose" as a possible defense for non-payment, as long as the marketing campaign was cancelled and the Studio did not expressly assume the risk of delay.

Conversely, when a contract includes a force majeure clause, the most important consequence is that two above doctrines could be overridden.

In particular, the “impracticability” and “frustration of purpose” could be no longer be relied upon to excuse un performance and therefore extreme caution should be used before invoking as a possible defense a force majeure clause included in a contract. This might be particularly risky in an industry like entertainment, where often poor attention was devoted (at least in the past) in drafting force majeure clauses or where such clauses frequently reproduce standard terms pertaining to entertainment industry specifics, as drawn from past experience. In other words, the risk is that should any of the events listed in the clause not be similar to the Covid-19 outbreak, the clause might be interpreted by the Courts as not excusing a breach due to coronavirus, and this even if such outbreak event was clearly unforeseeable.

Note to the reader: As you can imagine these represent just some, very general, considerations likely to come into play, but it will be necessary to double check them against the actual circumstances of the case at hand. We remain at the disposal of clients and interested parties if need be.

2 April 2020

I nostri contributi di informazione e aggiornamento sulla crisi del Covid-19 e sulle sue implicazioni sono uno sforzo collettivo dello Studio ed una iniziativa di servizio. Per sottolinearlo, gli autori hanno rinunciato ad indicare il proprio nome in calce ai singoli lavori. Il presente articolo ha esclusivamente finalità informative e non costituisce parere legale.

*Our contributions of information and update on the Covid-19 crisis and its implications constitute a collective effort of the Firm and an initiative of service. For such reason, the authors decided not to sign individually their works and articles.  
This article is exclusively for information purposes, and should not be considered as legal advice.*

#### MILANO

Via San Paolo, 7 · 20121 Milano, Italia  
T. +39 02 72554.1 · F. +39 02 72554.400  
milan@dejalex.com

#### ROMA

Via Vincenzo Bellini, 24 · 00198 Roma, Italia  
T. +39 06 809154.1 · F. +39 06 809154.44  
rome@dejalex.com

#### BRUXELLES

Chaussée de La Hulpe 187 · 1170 Bruxelles, Belgique  
T. +32 (0)26455670 · F. +32 (0)27420138  
brussels@dejalex.com

#### MOSCOW

Ulitsa Bolshaya Ordynka 37/4 · 119017, Moscow, Russia  
T. +7 495 792 54 92 · F. +7 495 792 54 93  
moscow@dejalex.com