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**The Consequences of the Covid-19 Pandemia on the Performance of Contracts:  
Short Comparison between China, French and Romanian Civil Law**

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**Abstract:** The purpose of this article is to present the way in which the COVID-19 pandemic influences the execution of civil contracts and which is the legal framework that regulates this exceptional situation. The study wants a comparative analysis between Chinese Civil Law, French Civil Law and Romanian Civil Law all from the point of view of the applicable norms and the jurisprudence.

**Keywords:** civil law; force majeure; unpredictable performance of the contract; civil liability; COVID-19; Chinese Civil Law; French Civil Law and Romanian Civil Law

## **1. Introduction**

The present material aims to present, in a general way, the effects of the exceptional normative acts that have as their object the limitation and combating of the COVID-19 virus (or SARS-CoV-2) on the execution of the contracts in the following positive rights: Chinese Law, French Law and Romanian Law.

Starting with the end of December 2019, humanity is facing an extremely difficult situation caused by the COVID-19 virus.

On January 30, 2020, the Directorate General of the World Health Organization (WHO) announces that the COVID-19 virus “*constitutes an international public health emergency*”<sup>2</sup>, and on March 12, 2020, Dr. Hans Henri P. Kluge, Director WHO regional for Europe, declares that the COVID-19 outbreak is a pandemic and Europe is the center of this pandemic<sup>3</sup>.

In this international context of major importance, on March 16, 2020, the President of Romania, Klaus Iohannis, signs the decree establishing the state of emergency throughout the Romanian national territory<sup>4</sup>.

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<sup>2</sup> <https://www.who.int/news-room/detail/27-02-2020-a-joint-statement-on-tourism-and-covid-19---unwto-and-who-call-for-responsibility-and-coordination>.

<sup>3</sup> <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>.

<sup>4</sup> <https://www.presidency.ro/ro/media/decret-semnat-de-presedintele-romaniei-domnul-klaus-iohannis-privind-instituirea-starii-de-urgenta-pe-teritoriul-romaniei>.

On March 23, 2020, France promulgates the law on establishing the state of health emergency for a period of two months in order to cope with the COVID-19 pandemic<sup>1</sup>.

In addition to the health consequences, the exceptional measures provided by the aforementioned normative acts also have effects on the transnational commercial relations between companies, implicitly on the execution of the contracts concluded between them.

Taking into account that the second trading partner of the European Union<sup>2</sup> is China, the country in which the virus was triggered, we will continue to present, in a comparative way, the consequences of the pandemic measures on the legal contractual reports between the subjects of Romanian Law, French Law and Chinese Law.

## **2. General Frameworks on Force Majeure in Domestic Law**

### **2.1. Force Majeure in Chinese Civil Law**

The Chinese Civil Code stipulates in Article 180 that civil liability cannot be engaged when the force majeure prevents the execution of the civil obligations assumed in the agreement of the parties.

The Chinese legislator has defined as **the force majeure** the objective situation that is characterized as unpredictable, inevitable and insurmountable.

In contractual matters, the Chinese Civil Code stipulates in Article 117 that the debtor's liability may be totally or partially removed when he cannot fulfill the obligations stipulated in the contract due to force majeure, except in cases provided by law.

In the event that the force majeure appears after the moment when the contractual obligation had to be executed, the employment of the civil liability cannot be prevented.

In order for the force majeure to be a cause for exemption from civil liability, the Chinese law provides for the fulfillment of objective conditions, respectively the force majeure must be inevitable and insurmountable.

Therefore, the legal characteristics by which the Chinese civil law concept of force majeure are *unpredictability, inevitability and insurmountably* (Chen & Weber, 2020).

Regarding the elements that define the force majeure, cause of exoneration of the civil liability, the Chinese positive law understands:

- by *unforeseeable situation*, the event that the current technologies do not have the capacity to predict;
- by *inevitable and insurmountable situation*, the event which, despite the efforts of the parties and the measures taken to prevent it, produces adverse consequences.

At the same time, Article 118 of the Chinese Civil Code requires the debtor prevented by the force majeure to execute the obligation to inform the creditor immediately in order to reduce the damage suffered by the latter.

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<sup>1</sup> <https://www.vie-publique.fr/loi/273942-loi-durgence-pour-faire-face-lepidemie-de-covid-19>.

<sup>2</sup> <https://www.touteleurope.eu/actualite/le-commerce-exterieur-de-l-union-europeenne.html>.

## 2.2. Force Majeure in French Civil Law

The French Civil Code defines in Article 1218 the *force majeure* in the contractual matter as the event that could not be foreseen in a reasonable manner at the time of the conclusion of the contract and is beyond the control of the debtor.

Obviously, this event must prevent the fulfillment of the obligation stipulated in the contract and its effects cannot be avoided by applying appropriate measures.

Consequently, the French positive law considers that an obstacle that impedes the execution of the contract can be considered as a force majeure event when it is *unpredictable, unavoidable and beyond the control of the debtor* (Landivauz, 2020).

It should be mentioned that the jurisprudence of the French Court of Cassation, applying the provisions of the old Article 1148 of the French Civil Code regulating the force majeure, characterized it by the combination of three elements, respectively: *unpredictability, irresistibility and exteriority*.

However, by the decision of April 14, 2006 of the Plenary Assembly, the Court of Cassation replaces the character of exteriority with an event that “*is beyond the control of the debtor*”<sup>1</sup>.

It is noted that the definitions of force majeure retained in Chinese Law and French Law are similar and in both rights the application of this cause of exemption from civil liability is not subject to the stipulation in the contract.

However, the existence of the force majeure case is subject to the interpretation of the substantive court.

## 2.3. Force Majeure in Romanian Civil Law

The Romanian Civil Code is in line with the French and Chinese civil codes.

Thus, Article 1351 of the Code provides that civil liability is waived when the damage is caused by force majeure or by accident, unless the law provides otherwise or the parties, by mutual agreement, do not agree otherwise.

The same article in the Romanian Civil Code defines the force majeure as “*any external event, unpredictable, absolutely invincible and inevitable*”.

Therefore, it can be observed that in order to be an exonerative cause of civil liability, as in the other two laws already presented, the force majeure must cumulatively fulfill the following conditions.

The first condition is the *externality* of the event of the legal report. In light of this condition, the force majeure must be foreign, extrinsic and totally independent of the will or the action of the debtor.

The second condition imposed by the legislator is the *unpredictability* of the event characterized by force majeure.

The Romanian positive Law considers that the unpredictability of the event should be evaluated in particular by referring to the objective and characteristic information of each individual case (Pop, Popa, & Vidu, 2015, p. 349).

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<sup>1</sup> C.cass.fr., ass.plen., 14 aprilie 2006, no. 02-11168, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007051847>.

In a concrete way, the reference moment of the assessment of the unpredictability is, in case of exemption from the contractual liability, the moment of the conclusion of the contract, and in the case of the extra contractual liability, it coincides with the moment of the prejudice.

Then, the Romanian Civil Code imposes two other conditions, namely the event achieved to be *invincible* and *absolutely inevitable*.

These last two conditions set out in Article 1351 of the Civil Code are closely correlated with the hypotheses in which the event is totally irresistible and insurmountable even if its effects could have been anticipated and the debtor has taken the necessary measures.

Thus, one wonders if the situation created by the COVID-19 virus, which appeared in China at the end of December 2019 and with effects in Europe as early as January 2020, can be legally qualified as a force majeure.

### **3. The Effects of the COVID-19 Pandemic on Contract Execution**

In France, on February 28, 2020, the Minister of Economy and Finance, Bruno Le Maire declared that COVID-19 will be considered “*as a case of force majeure for companies*”, and on March 12, 2020, by decision no. 20/0198, the Court of Appeal of Colmar qualified as a force majeure the COVID-19 pandemic.

In China, the Council for the Promotion of International Trade<sup>1</sup> declared that the situation created by the Coronavirus in December 2019, is a characteristic of the force majeure.

In this context, by the beginning of March 2020 more than 4,800 force majeure certificates were issued to Chinese companies for the purpose of protecting them against civil penalties as a result of non-performance of contractual obligations.

On March 21, 2020, the Government Emergency Ordinance no. 29/2020 (“*GEO*”) has been issued regarding some economic and fiscal-budgetary measures.

With particular title, GEO No. 29/2020 stipulates in Article X, paragraph 3 the following:

*“it is presumed to constitute a case of force majeure, within the meaning of this emergency ordinance, the unforeseeable, absolutely invincible and inevitable circumstances referred to in art. 1351 paragraph (2) of the Civil Code, which results from an action of the authorities in application of the measures imposed by the prevention and control of the pandemic caused by the infection with the COVID-19 coronavirus, which affected the activity of the small and medium-sized enterprises, an impact attested by the emergency situation certificate. The presumption may be overturned by the interested party by any means of evidence. The unpredictable character is related to the moment of the birth of the affected legal report. The measures taken by the authorities in accordance with the normative act establishing the state of emergency will not be unpredictable”.*

The new legislative measures regarding the qualification as a force majeure of the COVID-19 pandemic have raised different questions, such as:

*–Is the COVID-19 pandemic a case of force majeure by default? Or must certain formalities be fulfilled in order for it to be recognized as a cause for exemption from liability?*

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<sup>1</sup> <http://en.ccpit.org/info/index.html>.

–In the case of COVID-19, do the specific rules of the contingency have an impact? Or can they co-exist with those related to force majeure?

Trying to answer these questions, in the following we will try to create a legal picture of the consequences of the state of emergency on the employment of civil liability.

### 3.1. Legal Classification of COVID-19 in Chinese Positive Law

Until the end of March 2020, the Supreme Court of China has not yet ruled on the status of the COVID-19 virus as a case of force majeure.

However, China went through a similar situation in 2003 when the SARS epidemic broke out.

At that time, the Chinese Supreme Court published a circular on the activity of the courts during the period of prevention and control of atypical pneumonia<sup>1</sup>.

The circular stipulated in articles 2 and 3 that if the execution of the contract was prevented by the SARS epidemic and the contractual responsibility had a significant impact on the party at fault, the litigation will be judged in the light of the principle of fairness and on a case-by-case basis.

On February 10, 2020, the Supreme Court of Zhejiang Province<sup>2</sup> published the circulars for the implementation of special judicial procedures in the various civil jurisdictions following the epidemic with COVID-19.

In the second section, Article 1 of these circulars stipulates that as long as the contract can be executed, the parties must execute it, otherwise they may undertake their contractual responsibility.

In other words, the epidemic does not automatically trigger the case of force majeure.

From the point of view of the case law of the Chinese courts, the doctrine identified three situations in which the debtor may or may not be exempted from contractual liability, respectively (Chen & Weber, 2020):

**a.** A first category consists of the decisions of the courts which have held that force majeure is not unpredictable when the conclusion of the contract is post-pandemic.

In this case<sup>3</sup>, the SARS epidemic spread throughout the first half of 2003 throughout China. In May of the same year, a loan agreement was signed between Wang Ting and the Chinese Agricultural Bank.

Through this contract, Wang Ting applied to the Agricultural Bank for a loan of money, committing to repay them by a monthly installment.

Wang Ting did not execute the monthly payment on the pretext that the SARS epidemic made the contract impossible.

The court ruled that the SARS epidemic had already begun at the time of signing the contract and, therefore, was not an unforeseeable event in this case. As a result, the claim of the guilty contracting

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<sup>1</sup> The circular has been published on June 11, 2003 and repealed on April 8, 2013, Chen, J. & Morrel Weber (2020), S. M., *loc.cit.*, nota 1.

<sup>2</sup> There are four levels of jurisdiction in the Chinese judicial system, namely: the Basic Court, the Intermediate Court, the High Court and the Supreme Court.

<sup>3</sup> Guangzhou Intermediate Court, Sui Zhong Fa Min Er Zhong ZI, Civil Decision No. 1150/2005, *Wang Ting vs. Agricultural Bank in China*.

party for being exempted from the payment of the debt does not comply with Article 117 of the Chinese Contract Law and cannot be released from contractual liability.

**b.** A second situation concerns the cases where, due to the force majeure, the non-performance of the contractual obligation is only temporary. In this case, the contract is suspended until the case is terminated which impedes its execution<sup>1</sup>.

Specifically, on November 10, 2002, Yin Wenmin signed a sale-purchase agreement for a house with Changyuan as a real estate developer. The building is located on an island in southern China.

According to the terms stipulated in the contract, Changyuan had to deliver an apartment before June 30, 2003.

The SARS epidemic occurred in the first half of 2003 and the local government issued a decree prohibiting the employment of workers from outside the island.

Due to the fact that the workers on the Changyuan Corporation site were mainly from outside the island, the construction work was completed around December 30, 2003, causing a delay in delivery.

The court found that the outbreak of the epidemic was unpredictable, inevitable and insurmountable in the medical conditions of the time, which prompted the local government to take the necessary administrative measures to prevent the spread of the epidemic, including publishing the decree prohibiting the employment of workers from outside the island.

The contract in question was signed before the government issued this decree. The construction workers involved in this case came mainly from outside the island. This government action has objectively led to construction delays for various construction companies.

Therefore, the SARS epidemic was a case of force majeure regarding the planned date for the construction in question. However, Changyuan was only released from its obligations during the period when the force majeure prevented it from carrying out its construction work.

**c.** A final situation encountered in the practice of the Chinese courts has as reference the decision of the Supreme Court of Liaoning Province<sup>2</sup>, where it was decided that force majeure is not a cause of exoneration of civil liability when the measures taken by the public authorities affect only a part of the activities of a debtor.

On October 25, 2002, Zhengdian placed an order to Pengcheng Holiday for two services, namely: restaurant and hotel accommodation.

Following the SARS epidemic of May 12, 2003, the local government of Dalian issued a decree suspending all purchases of wild animals.

As the outstanding activities of Zhengdian society were also related to wild animals, the latter was affected by the epidemic and the local government decree. Thus, Zhengdian requested judicial termination of the contract and, consequently, to be released from contractual liability in accordance with section 117 of China's contract law.

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<sup>1</sup> Sanya Intermediate Court, Sanya Minyi Zhong Zi, Civil Decision, No. 79/2005, *Yin Wenmin vs. Sanya CHangyuan Property Development Co., Ltd.*

<sup>2</sup> Liaoning Province Superior Court, Liaoshi Ermin Kangzi, Civil Decision No. 14/2013, *Dalian Pengcheng Holiday Damu Co., Ltd. vs. Dalian Zhengdian Watch Industry Co., Ltd.*

Bearing in mind that the decree only aims to stop the exploitation of wild animals, the High Court held that only part of Zhengdian Company is impacted by the decree, namely the preparation of wild animals. In addition, the activity of hotel accommodation can be carried out normally.

Therefore, the Court ruled that the SARS epidemic and the decree affected only certain activities of Zhengdian and were not sufficient to prevent the performance of the lease between it and Pengcheng. Therefore, the SARS epidemic cannot have the characteristics of a major force in this case.

### 3.2. Legal Classification of COVID-19 in French Law

Like Chinese Civil case law, the French courts have developed a practice that can be grouped into three categories according to the time of the force majeure (Guiomard, 2020).

**a.** In a first phase, the court established that there was no force majeure when the pandemic already existed at the time of the conclusion of the contract<sup>1</sup>.

In March 2002, the Union representatives from Troyes Habitat signed a contract with the tourism agent SARL Alara.

The purpose of this contract was to organize a trip to Thailand in April 2003.

In early April 2003, due to the SARS epidemic, Troyes Habitat employees canceled their trip, asking the Court of Appeal of Paris to reimburse the amounts paid based on the existence of a force majeure case.

The Court held that, on the date scheduled for the stay (April 15-26, 2003), there was no health risk in Thailand that would have forced the travel agent to cancel the trip.

On April 1, 2003, the Directorate General of Health announced that only travel to Hong Kong and China is not recommended. At the same time, until April 10, 2003, no cases of local transmission of SARS in Thailand were observed.

In these circumstances, the Court held that the health risks were not a case of force majeure that would make it impossible to execute the travel contract.

**b.** A second solution retained by the French jurisprudence refers to the debtor's obligation to prove that the event produced made the contract impossible to execute<sup>2</sup>.

On December 19, 2014, SA Holding Savana filed an objection to the competent court for the trial of social security cases in Paris, against a constraint notified on December 8, 2014 in the amount of € 4,254, corresponding to contributions due for the third quarter of 2014, requesting the extension of time limits of payment caused by force majeure, namely the Ebola virus epidemic.

The court found that the proven nature of the epidemic that struck West Africa in December 2013, even considering it a case of force majeure, was not sufficient to establish that this epidemic had led to the reduction or absence of cash in SA Holding Savana.

The court considered that the guilty contracting party had to bear the burden of proof and therefore did not prove that the non-payment of contributions was the result of force majeure.

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<sup>1</sup> C.A Paris, 8e ch., sect. A, June 29, 2006, No 04/09052.

<sup>2</sup> CA Paris, pôle 6, ch. 12, 17 March 17, 2016, No 15/04263.

c. A third conclusion that can be drawn as a result of studying the practice of the French courts concerns the characteristics of the force majeure.

Thus, in a case judged by the Court of Appeal of Montpellier in 2018, it was emphasized that in order to be an exonerative cause of civil liability, the force majeure must be: *unpredictable, inevitable and out of the control of the debtor*<sup>1</sup>.

The company Pro signed a fixed subscription contract with the Orange provider.

According to the clauses stipulated in the contract, Pro company benefits from a special service to restore the telephone connection within 4 hours in case of interruption.

On November 28, 2014, Pro notifies its telephone provider, Orange, of discontinuing its telephone lines. This line was not restored until February 5, 2015.

It is worth noting that the city of Béziers, the headquarters of the Pro company, was classified as a state of natural disaster by the Ministerial Decision from November 27, 2014 and until November 30, 2014.

In these circumstances, the court considered that, given the proliferation of disaster areas, the restoration of the lines was necessarily long-term. The geographical size of the disasters, their magnitude and their classification as natural disasters made it possible to preserve the irresistible character of the floods that have occurred and to characterize the force majeure.

### **3.3. Legal Classification of COVID-19 in Romanian Law**

On March 21, 2020, in Romania, the GEO No. 29/2020 regarding some economic and fiscal-budgetary measures entered into force.

In Article X, point 3 of this Ordinance is defined as a case of force majeure any *unforeseeable, absolutely invincible and inevitable circumstance* provided by Article 1351, paragraph 2 of the Civil Code, which results from an action of the public authorities in the application of measures of prevention and control of the COVID-19 pandemic and affecting the activity of small and medium-sized enterprises.

At the same time, the same rule also provides that this situation must be attested by an Emergency Certificate.

Therefore, we can deduce that for COVID-19 to be a cause of force majeure for civil liability, the debtor must prove that the following conditions are met:

- a. the event must be *unpredictable, absolutely invincible and inevitable*;
- b. it must result from an action of the public authorities in the implementation of measures to prevent and control the COVID-19 pandemic;
- c. Obtaining an Emergency Certificate.

Without resuming the presentation of the force majeure conditions made above, we will only confine ourselves to making some clarifications regarding the Emergency Certificate.

The certificate, according to Law No. 335/2007 of article 4, letter j) and Article 28, paragraph 2, point i), are issued by the Chamber of Commerce and Industry of Romania.

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<sup>1</sup> CA Montpellier, 2e ch., December 18, 2018, No 16/04959.



According to the general rules for approving the existence of a case of force majeure<sup>1</sup>, the Certificate of emergency situations is issued:

- exclusively at the request of legal entities in Romania;
- by filling in a standard Application for approval of the existence of the force case;
- by filing a copy of the contract affected by the force majeure event, including the force majeure clause;
- following the certifications from the authorized bodies, authorities and institutions, on a case-by-case basis (other than the Chamber of Commerce and Industry of Romania), regarding the existence and the effects of the event invoked, its location, the moment of beginning and ending the event;
- following the notifications addressed to the contractual partner regarding the occurrence of the event invoked and its effects on the conduct of the contractual operations;
- last but not least, after the payment of a fee<sup>2</sup> by the applicant.

It should be mentioned that the force majeure certificate is not an absolute proof. Therefore, the court is the only one able to decide whether the conditions related to the force majeure are met to exempt the debtor from liability.

Regarding the application of the legal rules specific to the force majeure to the event created by the COVID-19 virus, the Romanian positive law does not depart from the French and the Chinese law.

In a general way, in the Romanian doctrine there is a difference in the application of the effects of the force majeure depending on the moment of the conclusion of the contract (Patrascu & Baltescu, 2020).

Regarding the contracts concluded before the outbreak of the pandemic, and taking into account the unpredictable nature, the consequences of the force majeure case also have an impact on the liability of the guilty debtor.

On the other hand, when the contract was concluded after the occurrence of the situation caused by COVID-19, we can say that the debtor is not exempted from liability if he knew and could be aware of this event, the situation had not become irresistible and he had the possibility to prevent the damage created to the other party by not fulfilling its obligation.

It is without lack of denial that March 21, 2020, the date on which the Ordinance no. 29/2020 was issued, is the time when the event caused by the COVID-19 virus can be considered as a major force on the territory of the Romanian State.

#### 4. The Theory of Unforeseeability as an Alternative to Force Majeure

Last but not least, in addition to the application of the rules of law relating to force majeure, practitioners have asked themselves whether the *unforeseen clause*, also called *hardship*, can be applied in this situation<sup>3</sup>.

<sup>1</sup> Romanian Chamber of Commerce and Industries, General rules for approving the existence of force majeure case, <https://ccir.ro/servicii/avizare-existentei-cazului-de-forta-majora>.

<sup>2</sup> In March 2020, the Tax was 500 EUR payable in lei, at the NBR exchange rate on the day of payment, plus VAT.

<sup>3</sup> Micu, C. (Attorney at Law, *Zamfirescu Racoji Vasile & Partners*, Bucharest), *Coronavirus (COVID-19), Imposibilitatea obiectivă de executare a contractelor/Coronavirus (COVID-19), Objective impossibility to perform contracts*, March 11, 2020, <https://www.juridice.ro/675555/coronavirus-covid-19-imposibilitatea-obiectiva-de-executare-a-contractelor.html>; Berg-Moussa, M., (Attorney at Law at *August Debuzy*, Paris), *Le Coronavirus est-il un cas de force majeure et/ou une cause d'imprévision?/ Is Coronavirus a case of force majeure and / or a cause of unpredictability?*, March 4, 2020, <https://www.august-debouzy.com/fr/blog/1415-le-coronavirus-est-il-un-cas-de-force-majeure-etou-une-cause-dimprevision>; Pascal, J. (Attorney at Law at *Fidal*, Paris), *Coronavirus, si l'imprevision etait preferable a la force majeure ?*, March 12, 2020, <https://www.fidal.com/fr/actualites/coronavirus-si-limprevision-etait-preferable-la-force-majeure>.

Both the French Civil Code in Article 1195 and the Romanian Civil Code in Article 1271 provide that when the performance of the contract has become excessively more burdensome for one party due to the unforeseeable changes of the circumstances existing at the time of the conclusion of the contract, the latter may request the other party renegotiation of the terms of the contract.

As we mentioned above, depending on when the contract is concluded, the force majeure may or may not exempt the debtor from his liability.

However, when the unforeseeable nature of the force majeure is not an absolute, intrinsic one, which prevents the execution of the contractual obligations, but only one that breaks down on the circumstances existing at the date of the conclusion of the contract, the parties have the possibility to continue the execution of the contract, but re-framing their report legal.

Thus, for the contracts whose performance was influenced by the measures taken against the COVID-19 virus, the condition of unpredictability may not be retained. We consider that in this case, it is appropriate for the parties to redefine their initial agreement on the basis of the provisions provided for in Article 1271 of the Civil Code, first, and to submit all due diligence to achieve the object of the contract concluded between them.

**In conclusion**, it can be said that in order to protect the parts of a contract from the effects of the COVID-19 pandemic, the legislator provided a legal framework framed by two pillars, namely: the *force majeure* and the renegotiation of the contract based on the *unforeseen clause*.

The first pillar, namely the force majeure, has the effect of extinguishing the legal report and exempting the debtor from liability, while, the second support point, the contingency, gives the possibility to continue the realization of the object defined in the contractual report, but adapting the way of execution by renegotiation to the new circumstances.

We consider that choosing one of these two variants has to be made according to the invincible character of the newly defended event, namely the pandemic caused by the COVID-19 virus.

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