



•ALERT•

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## The health emergency: an unforeseeable event that brings to the possibility not only to terminate contracts that have become excessively onerous, but also to renegotiate contractual provisions

The health emergency that Italy, and a large part of the Western world is experiencing in these weeks, is a moot case for the extraordinary and unpredictable event category.

As regards contracts of duration, this event, according to the Italian legal framework, allows the termination of the contract due to excessive onerousness, when the value of a service is no longer fair compared to the value of the counter-service provided for in the contract.

In this case, according to article 1467 of the Italian Civil Code, the counterpart, who is subject to the request for termination, may offer to restore the contract to fairness: in other words, it may offer to modify the service that has become excessively onerous in order to restore the contractual balance.

Our legal system, on the other hand, does not provide that the party affected by the event can directly request to restore the contract to fairness, thus forcing the party to request termination, even when the party has an interest in maintaining in force the contract (albeit at fair conditions).

In our view, however, there is a way to fill this gap.

**A correct interpretation and application of the principle of good faith, indeed, makes it possible to consider that parties have a legal obligation to renegotiate.**



Obligation which, if breached, may give rise not only to a claim for termination of the contract for breach of contract and compensation for damage, but also to a claim for a court order that leads the contract (back) to fairness.

It is certainly true that the institution of contract renegotiation - as an instrument offered to the parties to bring an unbalanced contract back to fairness - is provided for in our legal system only for a series of standard cases and that, outside of these specific cases law attributes importance to contingencies only if the requirements of Article 1467 of the Italian Civil Code are met.

The absence of a general clause in these terms, however, does not imply that the Italian legal framework does not provide any protection in this respect.

**It is relevant, in fact, the principle of good faith, which binds the parties to renegotiate clauses that have become excessively onerous, regardless of the express provision of a renegotiation clause, so-called hardship clause.**

Good faith, as a primary source of integration in the contractual relation, is relevant by establishing collateral protection obligations, which, in relation to the concrete evolution of the negotiation process, also lead so far as to impose a proper renegotiation obligation.



In other words, **good faith becomes an obligation of solidarity** which requires each party to behave in a manner which, regardless of specific contractual obligations, is appropriate to preserve the interests of the other party, by making closer contractual rules and the actual situation which has evolved in the meantime.

In short, the obligation to renegotiate, entails the **duty**, if prerequisites are met, **to accept positively the invitation to renegotiate by accepting the proposed modifications or by proposing solutions which**, in compliance with the economy of the contract and taking into account its economic convenience, **make it possible to rebalance the contract**.

It should also be considered that attention to the issue of contingencies and the risk of inequality has been paid since a long time also at the international and european level. Unidroit Principles (Principles of International Commercial Contracts) indeed, expressly provide that circumstances that lead to a substantial alteration in the balance of the contract (so-called hardship) give the disadvantaged party the right to ask the other party to renegotiate terms, in order to adapt them to the circumstances that have arisen, restoring the initial equilibrium.

Along the same lines even the cc.dd. PECL (Principles of European Contract Law), which, in addition to regulating the parties obligation to renegotiate the unequal contract in the same terms and conditions provided for by the Unidroit Principles, also expressly provide for the possibility for the judge to order the party who refuses renegotiation or behaves in a manner contrary to good faith and fairness to pay damages.

So, what are the consequences of breaching the renegotiation obligation?

Once the duty to renegotiate can be considered as part of the more general obligation to behave fairly and in good faith in the performance of the contract, it can only be concluded that the breach of such an obligation allows the non-performing party to act for the **termination of the contract for breach of the other party**.

In addition, the performing party may also act to obtain compensation for any damage suffered in the course of the delay period of the proceeding.

In addition to the protection for damages, it can be reasonably presumed that there is the possibility for the Judge to intervene directly in the contract: once conditions are met, **the Judge can directly modify the contractual terms** that have become unfair, so as to restore them to fairness.

#### CONTACTS

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