

NEWSLETTER

COVID-19 and the notion of force majeure

March 2020

As a result of the COVID-19 spread, the companies worry about the impact the epidemic may have on the execution of pending commercial contracts, in particular, if it may be considered as an event of force majeure, hence permitting a contract's temporary suspension or termination.

The French Minister for Economic Affairs, Bruno Lemaire, pointed out on 28 February 2020 that COVID-19 will be considered as an event of force majeure for public procurements which thus allows companies to disengage from their contracts.

The same might not be as certain and applicable to contracts of the private sector, grounded on two cumulative criteria qualifying the event of force majeure and such qualification as force majeure will always be subject to the sovereign appreciation of the French judges who, in the past, refused to qualify as event of force majeure the epidemics of the H1N1 influenza in 2009 (*Appeal Court Besançon, 12 November 2013, n°12/02291*), the dengue virus (*Appeal Court Nancy, 22 November 2010, n°09/00003*) or the Chikungunya virus (*Appeal Court Basse-Terre, 17 December 2018, n° 17/00739*).

Force majeure is defined by article 1218 of the Civil code as « *the occurrence of an event which is beyond the control of the debtor, which could not have been reasonably foreseen at the time the contract was entered into and the effects of which cannot be avoided by appropriate measures preventing performance of its obligation by the debtor* ».

First, the event must be unpredictable at the time the contract was entered into. Consequently, force majeure cannot apply if the epidemic pre-existed the contract. Such condition is met by former contracts concluded before 2020. However, for contracts signed in 2020, the difficulty resides in determining as of which moment the COVID-19 might be considered as being known and the impact on the daily and economic life might have been anticipated by the contracting parties: as of the moment when the epidemic started in China? Or the moment it arrived in Europe or in France? It might be possible to refer to the date of 30 January 2020. In fact, on this date, the WHO pointed out that « the conditions for a potential public-health emergency of international concern are met » emphasizing that the epidemic constitutes an « exceptional event ». As a result, it may be difficult to bring forward the event of force majeure for contracts signed after 30 January 2020 due to the failing unpredictability criterion.

Further, the event must be irresistible. It is necessary to demonstrate that the COVID-19 justifies a total incapacity to perform the contractual obligations. The irresistibility aspect may be due to sickness as such (hospitalized person) or due to measures taken to contain it, for example closure of schools, circulating restrictions or confinement. However, in the presence of sick employees or suppliers unable to deliver their proper products, the possibility must be taken into account to rely on replacements or on alternative circuits: it is most unlikely that case law admits a total and unrestricted event of force majeure if the effects may be « avoided by appropriate measures », as provided for by article 1218.

Nevertheless, it is necessary to refer to the contract. In fact, even if French law provides for a definition of the force majeure notion, the contracting parties are free to adapt and modify such definition by including examples, exhaustive or not, and even to renounce from invoking the force majeure, as the article 1351 of the French Civil code allows to do so. Hence, it is very important to check the contract's clauses before invoking the event of force majeure.

If the qualification as force majeure is retained, it releases the debtor of his obligation (delivery of the product, payment) without the creditor of said obligation being able to obtain damages for non-performance of the contract, if the impediment is definitive. However, if the impediment is temporary, as it will be the case in the COVID-19 epidemic, the performance of the contract is postponed, unless such postponement means the performance becomes purposeless which terminates the contract. The contract being terminated, the question is who bears the financial consequences of such liberation. In the absence of a provision in the contract, the principle holds that in case of non-delivery of the product or the service, no payment is due. As a result, if any advance payment has been made, it must be refunded to the seller or the service provider.

The activation of the force majeure event depends on the contractual clauses. If the contract provides for activation rules, they must be complied to. If the contract is silent on this matter, in compliance with the good faith obligation, the contracting partner should be informed swiftly by clearly stipulating on which grounds the contract is affected by force majeure and the impact of the COVID-19 on the contract execution.

If the force majeure may not be retained, it is possible to consider the existence of a grounds of hardship.

In fact, in case of changing economic conditions of the contract resulting in a considerable decrease in its economic performance for one of the parties, the victim party may request to renegotiate the contract's terms to rebalance it. And in case the negotiation fails, the contract may be terminated in compliance with article 1195 of the French Civil code which provides :



« if an unpredictable change of circumstances impacts the contract execution rendering its performance excessively onerous by a party which had not accepted to bear the risk involved, this party may request the other party to the contract to renegotiate. The party continues to fulfil the obligations during the renegotiation. In case of refusal or failure of the renegotiation, the parties may agree to terminate the contract on the date and under the conditions they determine or request by mutual consent a judge to revise it. Failing an agreement within a reasonable deadline, the judge, upon request of one of the parties, may revise or terminate the contract on the date and under the conditions he defines ».

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Naturally, we remain at your disposal to analyse and propose tailor-made solutions to be implemented in your specific case.

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