

CORONAVIRUS – FORCE MAJEURE AND HARDSHIP UNDER FRENCH CONTRACT LAW

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As companies around the world assess and try to mitigate the impact of Coronavirus (Covid-19) on their contractual relationships, this summary looks at some specific questions regarding force majeure and hardship related issues under French law.

French law contains various specific regimes with respect to the performance of contracts, which apply in the silence of the contract and possibly also to supplement its terms. These include specific legal regimes on "force majeure"¹ and on "hardship". The outbreak of Covid-19, and developments since then, have given rise to important questions concerning these regimes and the impact of Covid-19 on the performance of contracts. Below are pointers on some key considerations concerning these issues.

This note is high-level and covers the relevant issues in general terms. However, these are complex and highly fact-dependent questions, requiring a case-by-case analysis.

A COULD CORONAVIRUS QUALIFY AS A FORCE MAJEURE EVENT?

An essential question here is whether the contract contains specific force majeure provisions or not.

1. The force majeure regime in the silence of the contract

Can Covid-19 be deemed to qualify as force majeure within the meaning of the French law?

1.1. **Criteria** – This requires establishing that² :

¹ Initially mainly developed by French case law, this has been codified following a reform of French contract law (the "**Contract Law Reform**") and is now a statutory regime applicable to contracts concluded from 1 October 2016. The new statutory provisions define force majeure, and they explain its effects in a more comprehensive and precise fashion. For contracts concluded before 1 October 2016, technically the situation continues to be assessed based on the previous case law regime.

² Mainly based on the criteria now listed in article 1218 of the French Civil Code following the Contract Law Reform applicable to contracts concluded from 1 October 2016, as mentioned above. However, the criteria were largely the same under French case law.

Key issues

- [Could Covid-19 qualify as a force majeure event?](#)
- [Alternatively, could Covid-19 qualify as a situation of "hardship"?](#)
- [Other important considerations](#)

- i) Covid-19 was outside the relevant party's control; and
- ii) Covid-19 could not reasonably be foreseen. This is assessed at the time of conclusion of the contract, and by reference to a prudent and diligent person taking account of the circumstances. The party claiming force majeure needs to prove it could not (reasonably) foresee that it would be prevented from performing the contract. Below are some past illustrations under French case law:

<p>Nancy Court of Appeal 22 November 2010 (n° 09/00003)</p>	<p>To be released from its obligations and solicit the termination of the contract, a party was arguing that the Dengue fever epidemic affecting Martinique presented the characteristics of force majeure. To reject this qualification, the Court of Appeal held that this epidemic in Martinique was recurrent and hence foreseeable: <i>"the parties have produced very comprehensive documentation on the Dengue fever, from which it appears that this widespread viral illness referred to as "tropical flu" was described for the first time in 1779 and has been a regular occurrence since the beginning of the 1980s (...). This epidemic phenomenon is recurrent notably in the French Antilles (...)"</i>.</p>
<p>Besançon Court of Appeal 8 January 2014 (n° 12/02291)</p>	<p>The Court of Appeal rejected the application of force majeure in connection with a contract entered into in January 2009, on the grounds that the H1N1 virus was not unforeseeable for the parties at the time of conclusion of the contract to the extent it had been widely announced: <i>"It is worth reiterating that, at law, a case of force majeure refers to an event that is unforeseeable, unavoidable ("irrésistible") and that cannot be overcome ("insurmontable") that renders performance of the obligation impossible. This is not the case of the H1N1 flu epidemic, which has been widely announced and planned, even before the implementation of the sanitary regulations SARL ATN 25 is attempting to hide behind."</i></p>

- iii) The effects of Covid-19 could not be avoided through "appropriate measures", and they make it impossible for the relevant party to perform its obligation(s) under the contract.

As a result for instance, and absent specific contractual provisions, it is difficult for Covid-19 to qualify as an event of force majeure with respect to a financial obligation in so far as the relevant party owns sufficient assets³.

1.2. Causation and effect – To qualify, Covid-19 would indeed need to prevent performance of the relevant obligation. In this respect, and as mentioned above, it must render performance impossible, not merely more difficult or costly (such as where the relevant party can continue performing its obligations by changing supplier or manufacturing site).

<p>Some examples</p>	
<p>Nancy Court of Appeal 22 November 2010 (n° 09/00003)</p>	<p>The unavoidable ("irrésistible") nature of the Dengue fever in Martinique was also not established, to the extent that there were <i>"individual protective measures to be complied with, such as the use of mosquito nets and repellents as well as wearing long clothes"</i> and that <i>"the symptoms of this illness consisted in a strong fever accompanied by headaches, muscle pain and asthenia that can last several weeks and that in most cases it did not give rise to complications"</i>.</p>
<p>Paris Court of Appeal 17 March 2016 (n° 15/04263)</p>	<p>Whilst the EBOLA virus can in the abstract constitute a case of force majeure, the relevant party cannot exonerate itself from its obligations without demonstrating to what extent the impossibility to perform the contract was caused by that event: <i>"considering however that the established nature ("caractère avéré") of the epidemic that affected West Africa from the month of December 2013, even were it to be considered as a case of force majeure, is insufficient to demonstrate ipso facto that the decrease or absence of cash invoked by the claimant was attributable to it"</i>.</p>
<p>Basse-Terre Court of Appeal 17 December 2018 (n° 17/00739)</p>	<p>The Court of Appeal rejected the qualification of force majeure for the Chikungunya epidemic, as it was not unavoidable ("irrésistible"): <i>"this epidemic cannot be considered unforeseeable and even less so unavoidable ("irrésistible") as in any event this illness, that can be relieved ("soulagée") by taking analgesics, can generally</i></p>

³ Under previous French case law, see Cour de Cassation, 16 September 2014, no. 13-20306: *"(...) the defaulting debtor of a monetary obligation in contract may not avoid liability by putting forward a case of force majeure"*.

be overcome ("*généralement surmontable*") (the respondents have not raised any particular medical weakness)".

1.3. Consequences – In the event of force majeure, the party that is prevented from performing its obligation is in principle released from liability for non-performance. At law⁴, if a party is prevented from performing on a temporary basis, performance is suspended (unless the resulting delay would justify termination). If this is permanent, the contract is terminated.

Also, this may in turn cause the other party to seek to suspend performance of its own obligation. For instance, there may be difficulties applying force majeure to payment obligations as mentioned above. On the other hand, where performance of a party's obligation is suspended on the grounds of force majeure, the other party's related payment obligation may also be suspended whilst the force majeure event lasts.

1.4. Other considerations re: force majeure:

i) A fast-evolving situation

The situation changes over time. For instance, what constitutes force majeure at a given point in time may no longer qualify as the situation evolves, e.g. because a party is then able to avoid the effects through measures that were not previously available or because an event stops being unforeseeable.

Thus, for contracts concluded after the outbreak of Covid-19 – and putting aside the case of contracts comprising specific clauses – it is highly unlikely that a party will be able to argue that Covid-19 itself, and related measures, were unforeseeable at the time of conclusion of the contract.

ii) "*Fait du prince*" as force majeure

The position may also change as a result of a competent authority taking lawful and legally binding measures that themselves prevent a party from performing its obligations ("*fait du prince*"). This could be the case for instance of a ban on the import or export of certain goods, or of confinement and other related measures such as those adopted in France, which themselves could qualify as force majeure to the extent they satisfy the criteria and conditions described above. In such a case, it is no longer Covid-19 in itself that is argued to constitute a case of force majeure, but those measures. Whilst the adoption of these types of measures could make the demonstration of force majeure easier in certain cases, it will still be necessary to show that the relevant measures render performance impossible for the relevant party, and not just more difficult or onerous.

In any event, it is important to keep up-to-date with respect to all developments on Covid-19, including new measures and laws, as they may impact the performance of the contract and the parties' rights and obligations.

iii) The nature of the contract

The developments in this note are based on general principle of French civil law, and there may be specificities depending on the nature of the contract, e.g. in the presence of employment contracts or of public law contracts. In this respect, the French State and local authorities have already announced that Covid-19 is a case of force majeure for their public contracts ("*marchés publics*").

iv) Please also see [Section C "Other considerations"](#) below.

2. Force majeure in the face of specific contractual provisions

The contract may address one or more aspects, for instance by defining force majeure for that contract, by setting out specific requirements that need to be satisfied to be able to invoke force majeure and/or by describing the consequences of force majeure. Where the provisions do not (adequately) address all important aspects, the legal regime would supplement them. Below are some of the questions to be considered.

⁴ Article 1218 of the French Civil Code.

2.1. Definition:

- i) Do the force majeure provisions expressly list events that are equivalent to Covid-19 (e.g. viruses, diseases, epidemics, public health risks or public health emergencies?), and do these events automatically qualify as force majeure events under the contract? Or does the contract list examples of events that may qualify, subject to satisfying criteria described in the contract (e.g. being outside the relevant party's reasonable control, etc.)?
- ii) If the contract includes a generic definition of "*force majeure*" events, could Covid-19 be argued to qualify on the basis of the criteria set out in the contract?
- iii) Are there specific exclusions?

2.2. Specific requirements or conditions:

- i) Freedom of contract means that parties to a contract can also address, in their contractual provisions, various practical issues with respect to force majeure that are not necessarily clearly addressed in the statutory regime (e.g. as regards its scope, conditions or implementation).

By way of example, there may be notification requirements that condition the ability to then rely on the force majeure provisions. The manner in which the notification is to be provided may also be framed, and it will be important to comply with the applicable process. Other examples may include such things as requirements to mitigate the effects of the force majeure event, to keep the other party regularly apprised and/or to resume performance as soon as possible.

- ii) Also, can both parties rely on the force majeure provisions or one of the parties only (and if so, does this depend on whether that party is the "affected" party)?

2.3. Consequences – Does the contract describe the consequences of the occurrence of a force majeure event? This may go from the suspension of the obligation(s) whose performance is prevented, through to the termination of the contract by one and/or the other party(ies).

2.4. Interaction with the statutory regime – For all topics that are not expressly addressed by the contract, reference should be made to the statutory provisions. Beyond, there may be questions regarding the exact interaction between the contractual provisions and the statutory regime.

B ALTERNATIVELY, COULD COVID-19 QUALIFY AS A SITUATION OF "HARDSHIP"?

French law contains a specific hardship regime ("*imprévision*"), that applies in the silence of the contract depending on when the contract was concluded and subject to specific contractual provisions.

1. **Criteria** – This requires establishing that:
 - 1.1. There has been a change of circumstances, that was unforeseeable at the time of conclusion of the contract.
 - 1.2. The change of circumstances renders performance of the contract "excessively onerous" for a party (the "**Affected Party**").
 - 1.3. The Affected Party had not accepted to bear the risk.
2. **Consequences** – Where such an event occurs:
 - 2.1. The Affected Party can ask the other party for a contract renegotiation. Performance continues during the renegotiation.
 - 2.2. If the renegotiation is refused or if it fails, the parties can mutually agree to terminate the contract or ask the judge to adapt it.
 - 2.3. Failing agreement within a reasonable timeframe, the judge can, upon request by one of the parties, revise the contract or terminate it.

The threshold is less high than for the statutory force majeure regime, as it requires a situation rendering performance excessively onerous – but not impossible. This regime would apply only for those contracts concluded (or, possibly, amended or renewed) after 1 October 2016. Before that time, there was no specific hardship regime under French civil law⁵, although parties at times invoked other grounds (e.g. good faith or questions of consideration) to try to obtain a contract renegotiation.

In our experience, many contracts concluded since the entry into force of the Contract Law Reform actually expressly exclude (or at least adapt) the legal hardship regime.

C OTHER CONSIDERATIONS

There are various other issues that may need to be taken into account when considering the impact of Covid-19 on the performance of a contract, and how to respond. These include:

1. **Mitigation of loss** – There is no express, legal duty for a party to mitigate its loss (but the introduction of such a duty has been under consideration for some time). This being said, the principle of good faith could be invoked.
2. **Other legal instruments** – There are other legal instruments that may need to be analysed depending on the circumstances. One example is the ability of a party, in certain cases, to refuse to perform or to suspend performance of its own obligations where the other party does not perform its obligations, or it is manifest that it will not perform on time ("*exception d'inexécution*"). There are conditions to be satisfied, including in terms of materiality of the non-performance or its consequences.
3. **Good faith and beyond** – Good faith, in the negotiation, conclusion and performance of contracts (and also in their termination), is a fundamental principle of French contract law. Parties should consider this when defining their behaviour towards their counterparties, and when assessing their counterparties' behaviour towards them.

Without jeopardising the key principle according to which the contract is the law of the parties, this may take on a particular meaning in the context of Covid-19, a major global issue, and calls for solidarity and restraint between businesses.

Claims linked to whether or not Covid-19 and related developments constitute force majeure or hardship could in turn give rise to questions and challenges concerning the implementation of the contractual provisions.

⁵ There was a different situation under French public law.

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